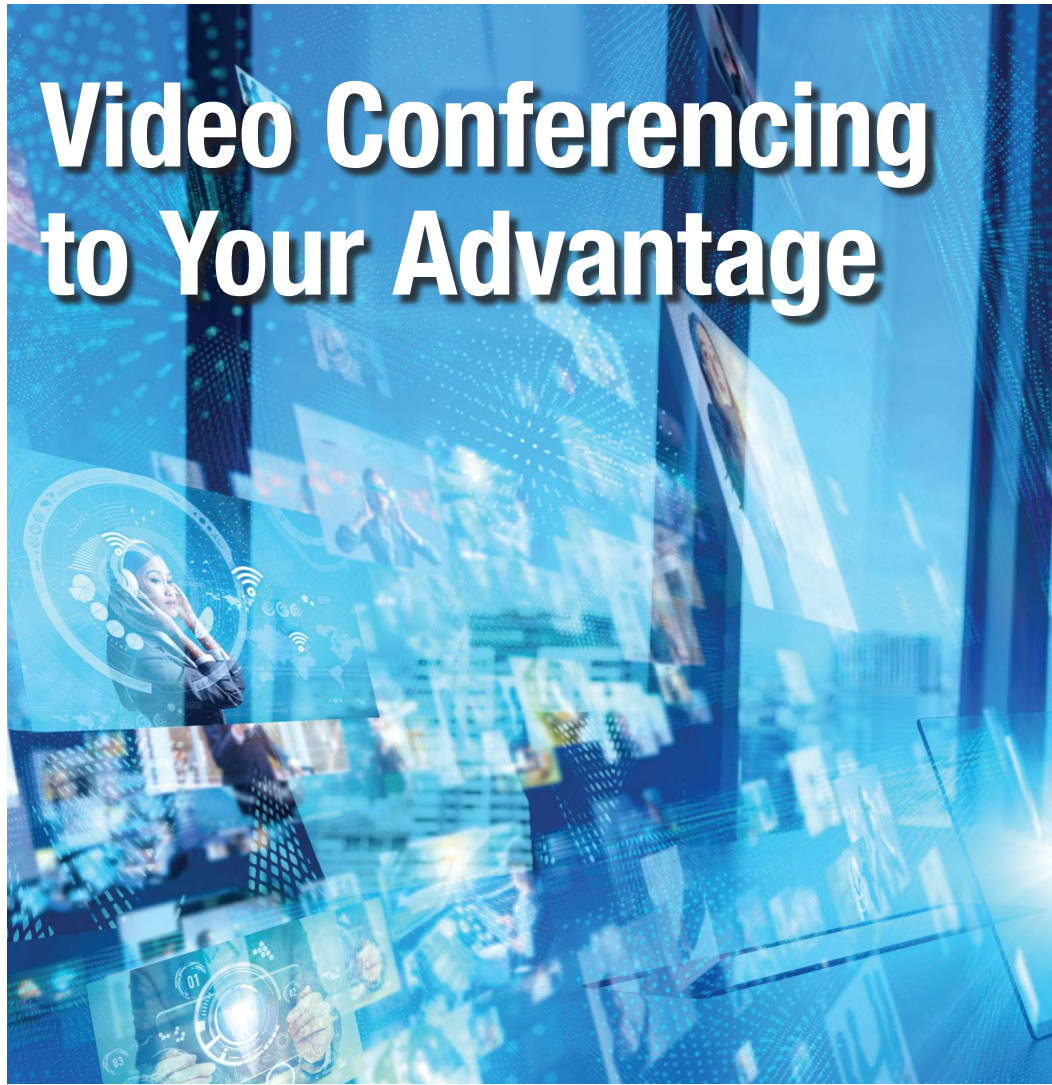




Witness Preparation in a Pandemic

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Laying the proper groundwork allows for the seamless transition of witness preparation to the virtual world.



Video Conferencing to Your Advantage

Social distancing policies are requiring attorneys to practice law remotely. Attorneys are learning to adapt to this new environment, along with their clients, as the courts require cases to move forward with discovery.

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Taking and defending depositions—the most important events in discovery—present some significant challenges. Among them is remotely preparing your client to testify. While many attorneys have some experience taking depositions by video, remote preparation of a client requires some additional knowledge and skill. Learning how to be more effective at remotely preparing your client can transform your client into a more effective witness.

Before COVID-19, preparing your client to testify meant being in the same room and appreciating the subtle nuances of in-person communication. You could make important assessments about the client even after just a few minutes of personal interaction. Did your client seem anxious or was he or she at ease? What did the body language of the client communicate to you—fear or confidence? Unhindered

by the lag time of over-the-internet communication, how good was your client at waiting and listening before responding to questions? Conducting the preparation remotely may in and of itself compound the uneasiness of being involved in litigation. So, how do we meet this challenge and adjust our practice to provide our clients with the best possible representation?

Fortunately, witness preparation can be seamlessly transitioned to video conference with proper preparation and provided that everyone involved in the preparation is keyed in to the practical and ethical peculiarities of virtual legal practice. There are several areas to take into consideration when preparing your witness to testify remotely. First, what are your goals for the preparation? Second, what are the advantages of a remote deposition and remote preparation? Next, what prac-

ticalities should be considered in advance of the virtual sessions, including privacy and security issues. Finally, we will discuss what the meetings should focus on in order to optimize your client's testimony.

What is the Goal of the Preparation?

The primary goal of the preparation is to teach the client how to listen actively to the questions and think strategically to create a thoughtful and complete response. This will give your client the best chance to control the deposition and advocate the truth in a convincing way. More often than not, attorneys are disappointed when the client can't remember the answers discussed during the preparation sessions. This disappointment stems from an inherent flaw in the preparation. While the client may have a wealth of knowledge and understand the defense themes, you can never predict exactly how the opposing lawyer will frame his or her questions. This is why trying to lecture the client to give scripted answers often fails. With one word the opposing lawyer can change the question leaving the client to try to remember "the right answer" to a different question. If, however, the client is listening carefully and taking time to think about the question and the answer, the client can then create a thoughtful and complete response to each question. As discussed in more detail below, preparing the client remotely forces the client—and the attorney—to listen more carefully.

The Advantages of Remote Depositions and Remote Preparation

There are advantages both to remote client depositions and remote preparation of the client. The advantages of your client getting deposed remotely are significant. Foremost among these is no in-person intimidation by opposing counsel. The lack of intimidation makes it more difficult for opposing counsel to control the testimony. Moreover, there is a short, but natural, lag time that gives the client a chance to think before responding. This is aligned with the goal of taking time and listening carefully before answering the question. The result is that it's now more difficult for opposing counsel to obtain "soundbites" from your client.

As attorneys exclusively dedicated to witness preparation, we have prepared

witnesses by video conference for over two years. We have experienced the challenges of remote preparation, learned how to overcome them, and even turned them to the client's advantage. With more and more depositions being videotaped, preparing for that experience is essential. With video conference preparation, clients are afforded the opportunity to gain real experience in front of a camera. The experience alone may help reduce anxiety and build confidence. As the attorney, you get

to see first-hand what your client will look like on camera, and you can address any issues with the client's presentation as they happen. Moreover, preparation over video forces the client to listen better. The client is forced to look at the attorney on the screen and pay close attention to what is said. This is particularly true because of the lag and the lack of synchronous audio and video transmission.

With remote preparation, more eyes can evaluate the client. Claims representa-

tives and other involved parties can have the freedom to attend when scheduling or expense would normally preclude it. Everyone with an interest in the client's performance can make their own assessment of his or her performance. Video conference preparation also offers greater flexibility in scheduling and eliminates travel expenses. As more depositions are being conducted by video conference, remote preparation gives both the client and the attorney a robust experience in that environment.

Even some of the complicating factors associated with video conferencing can be advantageous to the ultimate preparation of the client. In face-to-face communication, we are accustomed to interpreting both verbal and non-verbal cues to know when it is our turn to talk. Clients often miss those cues, or ignore them, and interrupt the questioner. This can be much worse via video conference, where verbal and non-verbal cues are more difficult to observe. The result is constant interruptions between participants. This presents an excellent opportunity to teach the client how interruptions negatively impact their testimony. With constant and proper guidance, the client will learn how to take his or her time, listen carefully, and wait before answering each question. The client will then gain confidence over the course of the preparation and will ultimately answer questions in a clear, logical, and convincing way.

The Goal: Teach Client How to Listen and Think Strategically

Focus on Listening

Take Time to Think

Create a Thoughtful Full
Complete Response



Consider the Advantages to Remote Client Depositions

- No In-Person Counsel Intimidation
- Technical Improvement
- Counsel Has Difficulty Controlling Testimony
- Natural Time Lag Provides Opportunity to Think Before Response
- Tougher to get "Soundbites"
- Greater Emotional Detachment



Keeping the Preparation Private and Preserving the Attorney-Client Privilege

Video conferencing has transitioned the work environment out of the office and into our homes. As a result, extra care must be taken to preserve the attorney-client privilege and keep the meeting private. The attorney-client privilege has long been the hallmark of the trusted relationship between the client and his or her lawyer. Model Rules of Pro. Conduct r. 1.6 cmt. (Am. Bar Ass'n 2020). This trust is especially important to foster at the beginning of a case and when the client is being prepared to offer testimony. The attorney-client privilege allows for the attorney to encourage the client to communicate fully and frankly, even when the content of the conversation could be embarrassing or

potentially harmful to the defense of the case. *Id.* In the virtual setting, new privacy and privilege issues must be considered because the attorney and the client are not in the same location. When attending preparation sessions at home or anywhere outside of the attorney's office, the client may be much more inclined to allow a family member, friend, or co-worker to listen in or even offer input. We must be cognizant that the general rule is the presence of any third-party defeats privilege. Similarly, if the attorney is working from home, having family members walking back and forth in the background may not only create a privilege issue, but it also creates a sense of informality that may discourage the client from speaking candidly. Care must be taken to ensure that the only people in "attendance" during the preparation session are attorneys, law firm personnel, and the client. Preferably, all involved should be alone in a room behind a closed door. Not only will this protect privilege, but it will also help minimize distractions and encourage candor.

Security of virtual meetings has been fodder for media headlines ever since COVID-19 sent us to the internet to stay connected with the rest of the world. The ABA Model Rules of Professional Conduct require that the attorney "make reasonable effort to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Model Rules of Pro. Conduct r. 1.6 cmt (2020). This puts the onus on the attorney to ensure that he or she can secure the virtual meeting. The process starts by purchasing the correct video conference plan. For example, if the preparation involves the utilization of protected health information, most of the popular video conferencing companies, including Zoom, GoToMeeting, Microsoft Teams, and Skype, are all HIPAA compliant in connection with the execution of a Business Associate Agreement.

Planning for the Remote Preparation

Your remote witness preparation sessions will run more smoothly with adequate planning. In the most isolative circumstances, all parties will be attending the preparation sessions separately. While it may seem obvious, all participants should

have a computer or tablet that can transmit and receive audio and video. Older model desktop computers may have cameras with poor video quality or may not even have a camera. Some computer audio systems create a looped audio signal that creates unwanted feedback (a constant ringing or screeching) when multiple people are speaking. Another common issue is poor connectivity. You will need to ensure that everyone has a reliable internet connection with sufficient upload and download speeds.

The next step is to verify that all attendees have installed the appropriate video conferencing software. You should consider hosting a test run to verify that the software will run smoothly. Clients may find a test run helpful to familiarize themselves with the basic functionality of the software, including how documents will be exchanged and reviewed. As always, the client should be provided with all pertinent documents, either in print or electronically, well in advance of the preparation session in order to review them and be prepared to use them in response to questioning. If your client will be deposed by video conference, a test run will help reduce some of the anxiety that the client may have about the preparation and the deposition.

Even with the proper software installed, the attorney will still need to schedule the meeting with security and manually

adjust certain settings. In addition to having a separate meeting ID and password for each meeting, the attorney should serve as the sole host of the meeting. By serving as the only host, the attorney can exclusively control (1) the admission and expulsion of attendees; (2) screen sharing; (3) document sharing; (4) whiteboard access; and (5) recording capability. Many of these settings can be configured in advance or adjusted during the meeting. These measures will greatly minimize the chances that any unauthorized persons join the meeting and that any unwanted disclosure of information will occur.

Here are some additional steps you should consider when you prepare your client remotely. First, both the attorney and the client need to dress professionally and be groomed (the client should know in advance that the preparation is not an informal chat, but rather an important meeting that should be treated just like the actual deposition). Second, the attorney should send a letter explaining the process, and the expectations should be sent to the client well in advance of the video conferences so he or she can prepare for the actual session. Third, the attorney should practice and be comfortable using the remote access software and be capable of using the whiteboard and other screen sharing tools. Fourth, there should be a written agenda or outline to make

Keep Private

- Only Client and Attorneys Should Attend
- Keep Outside "Consultants" Out
- Client Door and Your Door Closed
- Prevent Interruptions
- Cell Phones Off to Prevent Third-Party Communications



What You Can Do

- Be prepared and organized to achieve goals
- Promote authentic expressions of emotion
- Discipline the witness to look at the camera
- Do not multi-task as it creates distraction
- Be mindful of where you are looking – Are you looking more at yourself?



the session efficient and focused because it is more difficult for the client to stay engaged and concentrate while looking at a computer screen. Finally, in medical malpractice cases, the law firm needs to have signed, in advance of the session, a HIPAA Business Associate Agreement with the video conferencing company. Both Zoom and Go-To-Meeting have these agreements and your account will automatically be configured for HIPAA requirements. The failure to have the agreement in place may jeopardize the patient privacy protections required by HIPAA.

Preparing the Client Remotely

Optimizing the client's testimony requires the attorney to guide the client skillfully through both the emotional and factual nuances of the matter at issue. Care should be taken to start with the emotional impact to help clients recognize and navigate those emotions that ultimately affect their ability to speak their truth clearly. Extra consideration should be given to the fact that many clients in the midst of this COVID-19 world are already emotionally fatigued. Emotional responses to litigation are many and varied, and the client should be encouraged to share how he or she feels. Moreover, the physical separation between you and the client may make it difficult to sense what the client is feeling, so it is important for the attorney to be direct and persistent

in addressing the emotions the client feels about the litigation and the deposition.

Once the client has shared how he or she feels, the attorney can then start to help the client identify the source of the emotion. As an example, an employee may express fear that is based on an erroneous belief that his or her employment is in jeopardy if his or her testimony is not perfect. The attorney can now lead the client through questions designed to help the client resolve his or her emotional crisis. Weaving through this process is a discussion of clearly seeing the pertinent facts of the case and leading the client to understanding the difference between responding emotionally and responding rationally. Ultimately, the goal of the preparation is to teach the client how to focus on listening, take the time to think about the question and the answer, and develop a thoughtful and complete response delivered in a confident way.

During this process, the attorney must pay close attention to the way the client is answering questions. Is the client answering directly? Is the client rambling in response to a simple question? Is the client interrupting you? Does the client express doubt or lack confidence? If you see any problems in the way the client is responding to your questions, address it immediately and don't wait until you practice cross-examination; start instilling the dis-

cipline from the very beginning of the video conference. Doing this will help the client become an active listener and answer more appropriately.

Most of us grew up learning with visual aids. Using these aids during the video conference presents some challenges but is effective when done the right way. A large Post-It Pad on an easel (or sticking the Post-It pages on the wall behind you) is a good tool to use. You can board questions and break them down, list critical issues, or create a timeline. If you go this route, make sure the Post-It Pad is close enough to the camera and that you write in a dark, bold, thick marker so the witness can see it clearly. Alternatively, most video conference software has a screen sharing feature that includes the use of a virtual whiteboard that can be used during the preparation and saved for later use.

When you get to the stage of practicing cross-examination, you have an opportunity to see how your client will answer difficult questions on video. There is plenty to observe carefully, as it is equally important to pay attention to how the client looks on video as it is to evaluate the quality of the answer. To the extent possible, you will want to practice the same type of tactics the opposing attorney will use in the deposition—not just in the way the attorney will ask questions, but also how documents will be presented, what to do if there is an interruption during an answer, and any other techniques you expect opposing counsel to use. Practicing even the small details will help reduce the client's anxiety and give him or her the confidence to testify.

Closing Thoughts

Meeting with our clients to counsel them about testifying had historically been one of the most personal meetings during the entire course of a lawsuit. COVID-19 has challenged us all, both personally and professionally, to pivot our normal practices in a way that allows us to remain connected personally while we stay physically apart. Attorneys who are willing to integrate remote witness preparation into their practice will benefit from less interruption to their normal workflow, the opportunity to stay connected to their clients, and a confident client at deposition.

