

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Remote Depositions: The New Normal

Since the start of the COVID-19 pandemic, parties have had to adjust their approach to litigation—including by conducting remote depositions—to account for the new normal. In some instances, however, parties have resisted remote depositions, claiming that the complex nature of certain litigation is ill-suited for remote depositions, including because the depositions would be document-laden and involve large numbers of exhibits. Southern District Magistrate Judge Stewart D. Aaron recently addressed an objection to remote depositions in *Rouviere v. DePuy Orthopaedics*, 2020 WL 3967665 (S.D.N.Y. July 11, 2020). In *Rouviere*, the plaintiffs sought an order compelling a defendant to have its corporate representatives appear in person for deposition, or, in the alternative, to extend the fact discovery deadline until an in-person deposition of the corporate representative could be conducted. Aaron denied



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the request, concluding that, under the circumstances, the deposition of the corporate representative could be conducted effectively by videoconference, and it would be “unworkable” to

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delay the deposition indefinitely until it could be conducted safely in person.

‘Rouviere v. Depuy Orthopaedics’

Rouviere is a medical device product liability case that was commenced in May 2018. The case arises out of

injuries that one of the plaintiffs allegedly sustained after receiving a purportedly defective hip implant that contained components manufactured by defendants DePuy Orthopaedics, Inc. and Howmedica Osteonics Corp. (Howmedica). By the beginning of June 2020, the court already had granted the parties three extensions of the discovery deadlines, including a 90-day extension on March 23, 2020, due to the coronavirus pandemic. On June 16, plaintiffs moved for a fourth extension of the discovery deadlines, which the court granted in part and denied in part in an order dated June 22 (the June 22 Order). In relevant part, the June 22 Order required that all fact depositions be completed by Aug. 21, 2020, and provided that “all depositions in this action may be taken via telephone, videoconference, or other remote means.”

Shortly thereafter, on July 7, 2020, the plaintiffs moved the court to compel corporate representatives of Howmedica to appear in person for a deposition, pursuant to Federal Rule of Civil Procedure 30(b)(6), or, in the alternative, to extend the discovery deadlines until an in-person deposition of Howmedica’s corporate representative could be conducted. The plaintiffs, who live in Florida, stated

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that they were prepared to drive from Florida to New Jersey in order to take the deposition in person. Howmedica opposed the motion, arguing that its witness and counsel would “place their health at risk by attending an in-person deposition with the Florida plaintiffs,” and advocated instead for depositions by videoconference.

Remote Litigation Is the New Normal

Before addressing the merits of plaintiffs’ motion, Aaron noted that “[c]onducting court proceedings remotely in the Southern District of New York has become the ‘new normal’ since the ... spread of the coronavirus and COVID-19.” *Rouviere*, 2020 WL 3967665, at *3. Aaron pointed out that Southern District Chief Judge Colleen McMahon was in the middle of “conducting a bench trial via Zoom in a patent case in our court.” Aaron then observed that “conducting depositions remotely [also] is becoming the ‘new normal[,]” and that “[t]he more recent court decisions [permitting remote depositions during the pandemic] build on pre-pandemic case law that liberally allowed for and encouraged remote depositions as technology for taking depositions in that way has improved significantly over time.”

Requiring a Remote Deposition

Against this backdrop, Aaron addressed plaintiffs’ motion, considering “the hardship imposed upon Howmedica if its Rule 30(b)(6) deposition were held in person and the potential prejudice to Plaintiffs if the deposition

were held by videoconference.” Aaron found the hardship to Howmedica to be “obvious” and significant, noting that “social distancing does not guarantee a safe deposition environment” and “holding a deposition in a room with a witness, counsel and a stenographer present would place everyone in the room at risk.”

On the other hand, Aaron found the prejudice to plaintiffs if the Howmedica Rule 30(b)(6) deposition were held by videoconference to be nonexistent. Aaron concluded that “[t]he only prejudice plaintiffs articulate[d] in their submissions”—namely, “that the deposition will be ‘document intensive’ and ‘document laden’”—“is not an obstacle to a successful remote videoconference deposition[,]” because “exhibits can be managed in remote depositions by sending Bates-stamped exhibits to deponents prior to the depositions or using modern videoconference technology to share documents and images quickly and conveniently.” To account for “any prejudice” caused by “delays during the deposition in the handling of exhibits by the witness and counsel[,]” Aaron granted plaintiffs an extra hour to conduct the deposition, extending its duration from seven hours to eight hours.

Aaron observed that “[t]he only other potential prejudice to the plaintiffs proceeding remotely is that the examiner will not be physically present to interact with, and observe the demeanor of, the deponent.” Aaron rejected this as a disqualifying prejudice, however, because Rule 30(b)(4) expressly allows for remote depositions and

thus “[i]f the lack of being physically present with the witness were enough prejudice to defeat the holding of a remote deposition, then Rule 30(b)(4) would be rendered meaningless.” In addition, Aaron observed that “in the unique circumstances presented by the COVID-19 pandemic, holding a deposition by videoconference actually would provide a better opportunity for the plaintiffs’ counsel to observe the demeanor of the witness.” Aaron reasoned that in an in-person deposition, the witness would be wearing a mask, which would “eliminate[] many of the advantages of observing the witness at an in-person deposition,” whereas if the witness were deposed remotely, “the witness would not need to wear a mask, giving the plaintiffs’ counsel the opportunity to observe the full face of the witness.”

Refusal to Delay The Deposition

After weighing the significant hardship that would be imposed upon Howmedica by an in-person deposition against the relative lack of prejudice to plaintiffs in holding a remote deposition by videoconference, Aaron ordered that the Howmedica deposition proceed by videoconference. He denied plaintiffs’ alternative request to adjourn the deadline for the completion of fact discovery until the Howmedica deposition could be taken in person as “unworkable.” After observing that “no basis [exists] to believe that the current conditions that require a remote deposition to be taken will not continue for the

foreseeable future,” Aaron refused to “indefinitely delay the completion of discovery in th[e] case.”

Additional Considerations for Remote Depositions

Although not addressed in *Rouviere*, other considerations for remote depositions include how to ensure that the deponent is not coached during questioning, whether the attorney taking the deposition can avoid giving the deponent early access to the deposition exhibits, and how to address problems with the videoconferencing technology that might arise during a deposition. Courts have addressed each of these issues. To avoid the potential of coaching, courts have ordered that “no individual may be physically present in the same room as the witness, except for the witness’s attorneys, while the witness is giving deposition testimony on the record”; “[i]f the witness’s attorneys are physically present with the witness, the witness and the witness’s attorneys shall [at all times] be visible on screen”; and “[n]o individual shall communicate with the witness via outside means, including, but not limited to, electronic message, text message, or voice call, while the witness is giving deposition testimony on the record regardless of whether or not a question is then pending before the witness.” See *Dennis v. JPMorgan Chase*, 2020 WL 5658624, at *2 (S.D.N.Y. Sept. 23, 2020); see *In re 3 M Combat Arms Earplug Products Liability Litigation*, Case No. 3:19-md-2885 (MCR) (GRJ), Dkt. No. 1125 at 9 (N.D. Fla. May 13, 2020).

To avoid the deponent receiving early access to the deposition exhibits, courts have required that “[i]f physical copies of exhibits are sent in advance, the witness and receiving [p]articipants shall open the exhibits’ sealed envelope on screen at the instruction of the deposing attorney and shall not open or review any such exhibits until instructed to do so by the deposing attorney after the deposition has commenced”; “[i]f the exhibits are sent via electronic means,

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the deposing attorney may withhold a password to access the exhibits until immediately prior to the deposition’s start time”; “[a] witness or [p]articipant in receipt of exhibits in advance of the deposition’s start time shall not review any exhibit until the deposing attorney offers the exhibit to the witness”; and “[c]ounsel for the witness shall advise the witness of this obligation.” *Dennis*, 2020 WL 5658624, at *3; see Sample Protocol for Remote Depositions issued by Southern District of New York Magistrate Judge Robert Lehrburger on May 11, 2020, available at: https://nysd.uscourts.gov/sites/default/files/practice_documents/RWL%20Lehrburger%20Sample%20Remote%20Deposition%20Protocol.pdf.

Finally, to address potential technological issues, courts have ordered that “[s]hould technological issues arise during the course of the remote

deposition that prevent the witness, the court reporter, the deposing attorney, and the defending attorney from participating in the deposition, and such technological issues cannot be resolved in less than an hour, the deposition will be adjourned, and the parties shall meet and confer regarding continuing and completing the remote deposition”; “[f]or other technological issues that may arise during the deposition, the Parties will meet and confer in good faith to determine whether adjournment of the deposition is necessary”; and “[a]ny time lost to technological issues will not count against the deposing party’s allotted time of seven hours.” *Dennis*, 2020 WL 5658624, at *4; see *Al Otro Lado v. Wolf*, 2020 U.S. Dist. LEXIS 64352, at *11-12 (S.D. Cal. Apr. 13, 2020).

Conclusion

Remote videoconference depositions are the new normal and most likely will continue for some time. Although challenges can arise in connection with remote depositions, courts have been receptive to—and have ordered—various procedural mechanisms that lawyers can use to ensure that remote depositions run smoothly and do not interfere with the lawyers’ deposition strategy.