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# THE “NEW NORMAL” DEPOSITION

ADDING REMOTE DEPOSITIONS TO YOUR SKILL SET DURING (AND AFTER) COVID-19

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**A LexMundi Member**

# THE “NEW NORMAL” DEPOSITION

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1. The argument—or imperative—for remote depositions
2. Courts and rules on remote depositions
3. How do I remotely take or defend a deposition?

# THE “NEW NORMAL” DEPOSITION

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# ONGOING RESTRICTIONS ON MEETING AND TRAVEL

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- Colorado currently in Level 2 "safer-at-home" order
  - Denver and surrounding counties transitioning to "safer at home"
- Court closures and restrictions
- Surrounding states
- Corporate policies and individual preferences

# DISCOVERY MUST GO ON

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- Court restrictions slowly lifting
- Parties eager to continue
- Courts will want to get back to business, even if that looks much different than it did in early March
- Chief Justice Directive 08-05: Goal of trial within one year of filing
  - Judges are mindful of this

# REMOTE DEPOSITIONS HAVE ARRIVED—AND ARE LIKELY HERE TO STAY

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- Part of the discovery toolkit until COVID-19 is truly under control, whenever that is
- Economic pressures will further encourage remote depositions
- Clients and attorneys will grow more comfortable, especially with less important witnesses

# COUNTING THE COSTS

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In Person	Remote
Court reporter	Court reporter
Attorney time during deposition	Attorney time during deposition
Witness fee	Witness fee
Witness mileage (and possibly other travel costs)	Remote deposition software platform
Attorney travel time (if billable)	
Attorney travel costs (flight, hotel, meals, mileage)	

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# ETHICAL OBLIGATION TO STAY CURRENT WITH NEW TECHNOLOGY

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## Competence, Rule 1.1

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and changes in communications and other relevant technologies, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject. See Comments [18] and [19] to Rule 1.6.

## Confidentiality Rule 1.6

- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

# RULES OF CIVIL PROCEDURE ON REMOTE DEPOSITIONS

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## Colorado Rules

The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means.

CRCP 30(b)(7)

## Federal Rules

The parties may stipulate, or court may on motion order, that a deposition be taken by telephone or other remote means.

FRCP 30(b)(4)

- FRCP 30(b)(5)(A) and CRCP 30(b)(4): Unless parties stipulate otherwise, they must conduct depositions "before an officer appointed or designated"
- With stipulation, parties can agree that court reporter participates remotely

- Colorado Executive Order March 27, 2020
  - Authorizes use of remote notarizations
    - Notary must be currently commissioned in Colorado
    - Both notary and signer must be physically located in Colorado
    - Process must be recorded and stored for 10 years
    - Notary's certificate must specify audio-visual technology

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# PRACTICAL CONSIDERATIONS: CHOOSING A REMOTE DEPOSITION

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- Importance of the witness
- Role of documents during the deposition
- Witness adversity
- Risk of witness evasion
- Location (including COVID-19 restrictions)
- Other public health issues
- Cost
- Opposing counsel
- Scheduling

## PRACTICAL CONSIDERATIONS: MEET AND CONFER—OR SEEK LEAVE OF COURT

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- You or your client prefer a remote deposition
- Discuss it with opposing counsel as soon as possible
  - Generally a good topic for the Rule 26(f) conference if you anticipate a high volume of depositions
- Need a stipulation or a court order
- Be prepared to convince them

# PRACTICAL CONSIDERATIONS: CONTENTS OF A NOTICE FOR REMOTE DEPOSITIONS

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## Specify audio-visual technology in the deposition notice

1. The deposition will be conducted remotely, using audio-visual conference technology;
2. The court reporter will report the deposition from a location separate from the witness;
3. Counsel for the parties and their clients will be participating from various, separate locations;
4. The court reporter will administer the oath to the witness remotely;
5. The witness will be required to provide government-issued identification satisfactory to the court reporter, and this identification must be legible on camera;
6. Each participating attorney may be visible to all other participants, and their statements will be audible to all participants;
7. All exhibits will be provided simultaneously and electronically to the witness and all participants;
8. Counsel for all parties will be required to stipulate on the record:
  - a. Their consent to this manner of deposition; and,
  - b. Their waiver of any objection to this manner of deposition, including any objection to the admissibility at trial of this testimony based on this manner of deposition.



# PRACTICAL CONSIDERATIONS: CONTENTS OF A SUBPOENA TO ATTEND REMOTE DEPOSITION

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The deposition will be conducted remotely, using audio-visual conference technology. The court reporter will report the deposition from a location separate from You. Counsel for the parties and their clients will be participating from various, separate locations. The court reporter will administer the oath to You remotely. You will be required to provide government-issued identification satisfactory to the court reporter, and this identification must be legible on camera. Each participating attorney may be visible to all other participants, and their statements will be audible to all participants. All exhibits will be provided simultaneously and electronically to You and all participants. Counsel for all parties will be required to stipulate on the record: (a) their consent to this manner of deposition; and, (b) their waiver of any objection to this manner of deposition, including any objection to the admissibility at trial of this testimony based on this manner of deposition.

- Choosing your court reporter
  - Determine reporter's training and experience with remote depositions
- Some local firms with this capability
  - Hunter & Geist (now U.S. Legal)
  - Stevens Koenig (now Veritext)

- Significant advancements here
- Used to mail or email documents to the court reporter before the deposition, and pre-mark exhibits
- But how do you know whether the reporter is handing over the right document, and when?
- Is the adverse witness looking ahead at future exhibits?

# PRACTICAL CONSIDERATIONS: PLATFORMS

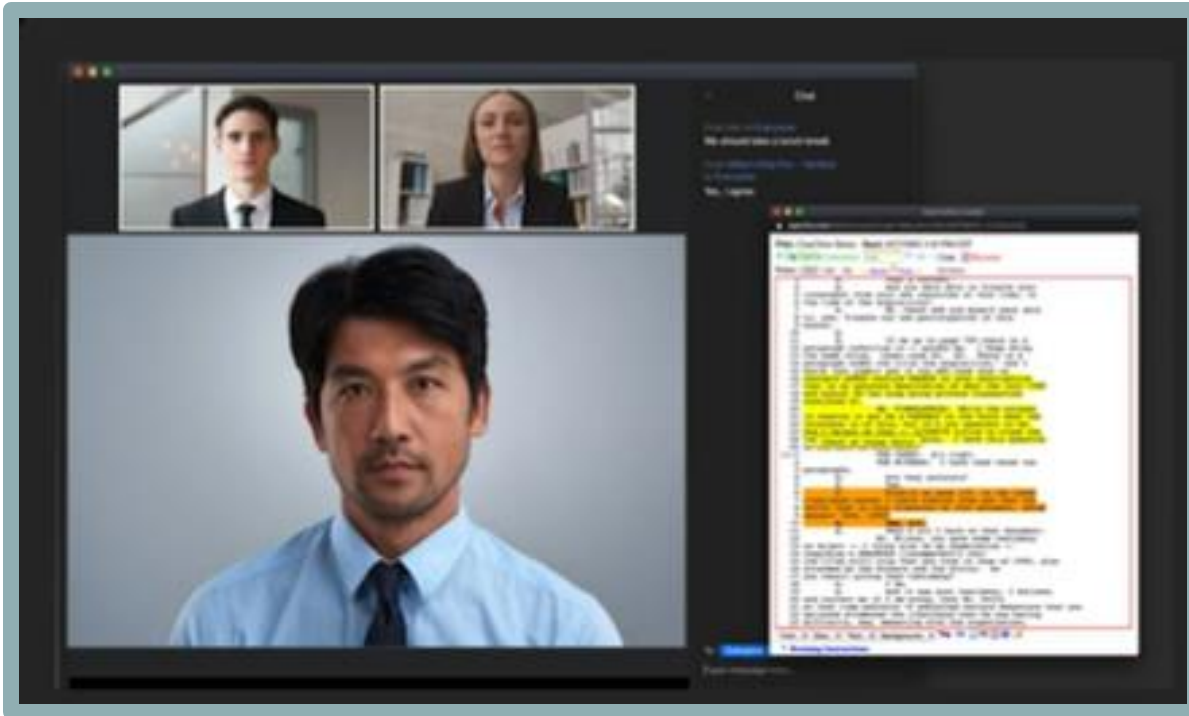
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# PRACTICAL CONSIDERATIONS: PLATFORMS

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# PRACTICAL CONSIDERATIONS: PLATFORMS

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Veritext Calendar - Corporate Services invited you to a meeting Friday, March 27th at 12:00 PM EDT

Internal Ref #: 1234567

**Case Name: Plaintiff v Defendant**

Starts 03/27/2020 at 12:00 PM EDT

Ends 03/27/2020 at 11:45 PM EDT

**Message**

Sample Message

**Join Meeting**

PC, Mac, iOS or Android

<https://veritext.remotecounsel.com/zoom/meeting/MzYxODg=>

Phone

[646-568-7788](tel:646-568-7788)

Meeting ID: 943-0410-485

# EXHIBIT SHARING IN VERITEXT

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The screenshot displays the VeritextVault web interface. The left sidebar shows a navigation tree with 'VeritextVault' at the top, followed by 'Recent', 'Bookmarks', and 'Files'. Under 'Files', there is a 'Shared' section with 'Exhibit Share' containing folders for 'McCann vs Gadget Corp', 'Test vs Test', and 'Widget Inc vs Gadget Co'. The 'Depositions' folder is expanded, showing several deposition folders, with 'Deposition of William Szilagyi 4-1-20' selected. Under this folder, 'ABC Firm - Private' is highlighted. The main content area shows a file list with columns for 'ITEM NAME', 'SIZE', 'DATE MODIFIED', and 'UPDATER'. The file 'Sweeney Letter.pdf' is selected, and a context menu is open over it, listing actions such as 'Open In...', 'Download', 'Preview', 'Comments (0)', 'Tasks', 'Versions', 'Details', 'Move/Copy', 'Rename', 'Lock', 'Delete', and 'Introduce Exhibit'. A blue banner at the bottom right of the interface reads 'QUESTIONING ATTORNEY VIEW'.

ITEM NAME	SIZE	DATE MODIFIED	UPDATER
Expert Reports	-	Mar 25, 2020 3:26PM	-
inside.png	328 KB	Aug 20, 2015 10:50AM	Bob A
imac-2011-teardown.jpg	30 KB	Aug 20, 2015 10:50AM	Bob A
MSJ Jones Matter.DOC	44 KB	Aug 3, 2015 10:37AM	Bob A
Employee Roster.xlsx	196 KB	Mar 25, 2020 3:24PM	Bob A
Stock Option Plan.pdf	2.5 MB	Mar 17, 2020 8:31AM	Bob A
Patent 6370566.pdf	5.2 MB	Mar 17, 2020 8:31AM	Bob A
Sweeney Letter.pdf	1.6 MB	Mar 17, 2020 8:31AM	Bob A
Operation File 348453.pdf	815 KB	Mar 17, 2020 8:32AM	Bob A

# PRACTICAL CONSIDERATIONS: PLATFORMS

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The screenshot displays the vTestify web interface for a deposition titled "McCallister v. Alliance Systems, Inc.". The interface is divided into several sections:

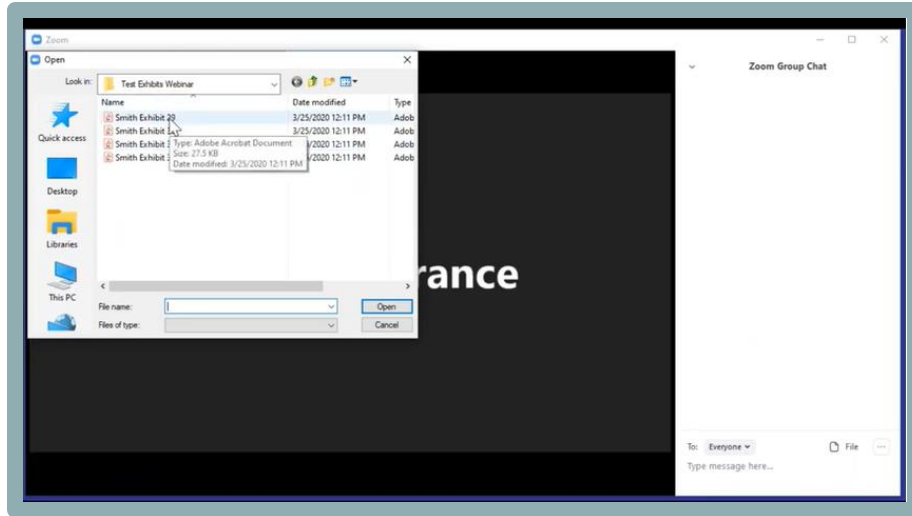
- Top Header:** The vTestify logo is on the left, and "Need Help? Call 866-845-1181" and "Logout" are on the right.
- Video Feed:** On the left, a large video window shows Ryan Campbell. Below it is a "STOP RECORDING" button. At the bottom left, there are smaller video thumbnails for participants: Harrison Mott, Mendel Hardsworth, and Jane Bradley.
- Document Viewer:** The central area shows a document titled "AFFIDAVIT OF OATH". The document text includes a sworn statement by Ryan Campbell, dated 11 November 2017, affirming the accuracy of the deposition transcript. The document is signed by Ryan Campbell and has a notary seal for James Tate, Notary Public, State of North Carolina, County of Wake.
- Exhibit List:** Below the document, there is a table with columns for "FILE NAME", "EXHIBIT #", and "TIME STAMP". Two exhibits are listed, both named "file\_attachment\_1.pdf".
- Chat Window:** On the right, a chat window titled "Mendel Hardsworth" shows a conversation. The chat history includes messages from Mendel Hardsworth, Jane Bradley, Ryan Campbell, and Andrew Wortley.



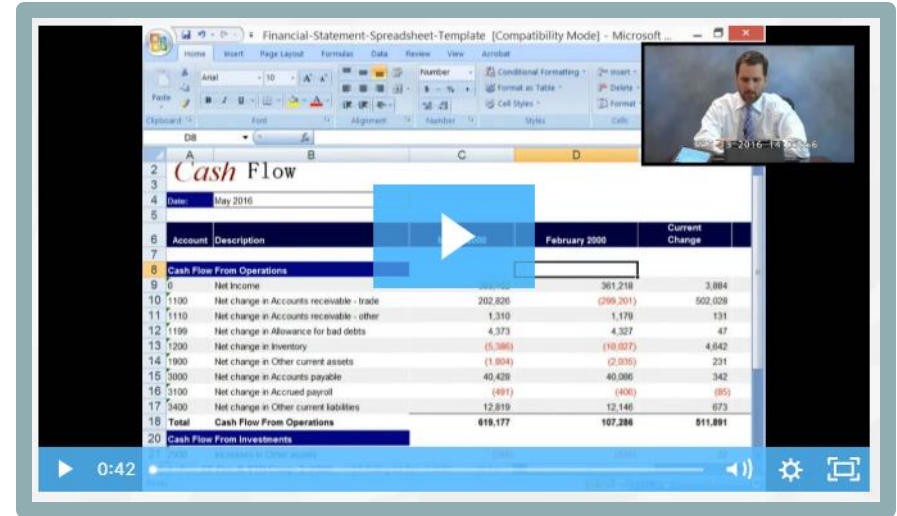
# PRACTICAL CONSIDERATIONS: PLATFORMS

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## U.S. Legal



## Veritext



# PRACTICAL CONSIDERATIONS: MEET AND CONFER ON LOGISTICS

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- Opposing counsel agrees to a remote deposition, or the court orders it
- Coordinate logistics to avoid problems or disputes:
  - Court reporter
  - Video/document platform, and possible cost sharing
  - Back-up plans, such as other video platforms, email addresses for sending documents and cell phone numbers to reach each other at the last minute

# PRACTICAL CONSIDERATIONS: PREPARING FOR THE REMOTE DEPOSITION

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- Request a training of the platform—or perhaps do a mock deposition with a colleague (and your witness, if defending)
- Basic WFH videoconference preparation
  - Your equipment and Internet connection
  - Backup plans for everything that can go wrong
  - Dress code

- Video conferencing etiquette
  - Mute when not speaking
  - Be mindful of rustling papers when you are speaking, and try to prepare only electronic outlines and exhibits
  - Slow down even more than usual
  - Be especially careful about interruptions and speaking over each other

- Preventing improper coaching
  - Confirm whether anyone else is in the room
  - Watch for the witness reading from papers, computer, or phone when a question is pending
  - Note any apparent reading on the record
  - If necessary, ask the witness about any chat windows that are open, or ask the witness to sit farther away from the computer

# QUESTIONS?

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