TECHNOLOGY

The Zoom Video Deposition

By Cory Morris

Now that we are well into the pandemic, we need to work and remain socially distant. Once technically challenged, some defense attorneys who lacked a computer with a video recording device were forced to evolve from flip-phone to a computer savvy multimedia-maven within hours by doing video depositions.

Lawyers must remain technically competent in times of crisis and change. Comment 8 to New York Rules of Professional Conduct ("RPC") 1.1 states: "To maintain the requisite knowledge and skill, a lawyer should… (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information." The RPC will no doubt require attorneys to become familiar with platforms like Zoom, Skype for Business and Microsoft Teams.

Many are professing that depositions via Zoom are the new normal.[1] After conducting over 20 hours of video deposition since Gov. Andrew Cuomo's Executive Order, here are some takeaways to continue to work towards resolving open litigation.

Getting started

It bears repeating that you should read the manual. For Zoom, access the tutorial at https://support.zoom.us/hc/en-us/articles/206618765-Zoom-Video-Tutorials. Most depositions are conducted with Zoom and court reporters are more than capable of conducting lengthy or consecutive depositions on this platform.

Cory Morris

Hardware concerns, lighting, grooming, together with a strong and stable internet connection provides a decent start but a hardwired connection, audio headsets, and speaking clearly with proper enunciation are of paramount importance. To avoid problems like Zoom-bombing,[2] attorneys must generate random meeting identifications, utilize waiting room features, enable or disable certain features, and sometimes designate hosts depending on the Zoom meeting.

Location and jurisdiction matters

Notice and the administration of the oath is important. Generally speaking, under New York Civil Practice Law and Rules ("CPLR"), Section 3107, "The notice shall be in writing, stating the time and place for taking the deposition, the name and address of each person to be examined, if known, and, if any name is not known, a general description sufficient to identify him or the particular class or group to which he belongs." Rule 30 of the Federal Rules of Civil Procedure ("FRCP") requires "reasonable written notice to every other party, stat[ing] the time and place of the deposition and, if known, the deponent's name and address." The court reporter who is administering the oath, should obtain photo identification consistent with the jurisdiction. When possible, parties should stipulate as to, among other things, admissibility of the deposition.

Both the CPLR and FRCP allow for video recording, which can easily be utilized in a Zoom video deposition. Again, absent a stipulation, one should comply with the jurisdictional requirements of notice. FRCP 30(b)(3)(B) allows, "[w]ith prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice." In New York, 22 CRR-NY § 202.15 provides that "Depositions authorized under the [CPLR] law may be taken, as permitted by section 3113(b) of the Civil Practice Law and Rules, by means of simultaneous audio and visual electronic recording, provided such recording is made in conformity with this section."

Best practices should include not only these statutory requirements but notice that the deposition will be taken via electronic means, Zoom, and the requirements upon the deponent. Further, should it be necessary, one can arrange to have the deponent arrive at a location where the court reporting service will make all video, audio and social distancing arrangements.

Internet issues

Good internet bandwidth is essential. Every participant should be using a dedicated stable high speed internet connection during the deposition. If your internet connection is being shared with Ring doorbells, Amazon Firesticks, streaming Netflix and VOIP while the children are participating in online classes, you will likely have poor internet band-

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REAL PROPERTY

The Constitutionality of Retroactive Legislation and Covid-19 Business Interruption Insurance

By Dennis C. Valet

Business owners looking to their commercial policies for business interruption and loss of income coverage due to Covid-19 have likely run into a giant roadblock — an exclusion of loss caused by virus or bacteria.

Virus exclusions have led practitioners scratching their heads for novel legal theories to find coverage for Covid-19 business interruption where coverage is expressly denied. The New York State Assembly took notice of these exclusions, and the resulting lack of coverage and drafted Assembly Bill A10226A. The bill construes all policies insuring against loss of use and occupancy and business interruption "to include among the covered perils under that policy, coverage for business interruption during a period of a declared state emergency due to the coronavirus disease 2019 (Covid-19) pandemic." It also declares all virus exclusions null and void, and extends this special coverage for the duration of New York's declared state emergency.

Most importantly, the bill is retroactive — deemed effective March 7, 2020 and applying to policies in effect on that date.

Alarm bells are ringing in general counsel offices. Is this even constitutional? After all, the bill will create, in insurers' minds, an unfunded liability that was not bargained for when they set insurance premiums for policies in effect on March 7, 2020.

Article 1 of the United States Constitution provides that "No State shall…pass any… Law impairing the Obligation of Contracts" and the Fifth and Fourteenth Amendments to the United States Constitution prohibit the taking of property without due process of law. In the past insurers have turned to both arguments when objecting to legislation that retroactively imposed new obligations. Long story short, the United States Supreme Court has held that the Constitution permits contractual interference pursuant to a balancing test that evaluates the following factors, to wit: (1) the extent of the interference, (2) the historic regulation of the industry affected by the law, (3) the legitimate public purpose for the law, and (4) whether the law is appropriate given the stated public purpose, with special deference given to laws addressing emergencies.[1] Litigation is inevitable and it appears that the Assembly has specifically drafted this bill with previous case law in mind.

Dennis C. Valet

The New York State Court of Appeals has addressed retroactive insurance coverage legislation in two important decisions.

In *Health Insurance Association of America v. Harnett*[2], the Court of Appeals struck down legislation that required retroactive coverage for maternity care in health insurance policies, doing so on the narrow ground that those policies were forced renewals, where the insurer could not unilaterally cancel or refuse to renew a policy after its period expired, and therefore they did not consent to the change in the substance of the policy. The Court of Appeals did recognize that the legislation could work in other circumstances, stating "while there was a genuine, identifiable public purpose to be served by the enactment of [the law], the predicament which spawned the legislation had not risen to the magnitude of a crisis which warranted overriding the terms of the agreements entered into by the parties." Contrasting the holding in *Harnett*, commercial policies affected by this bill are not automatically renewable and can be cancelled by the insurer. Further, the Assembly bill specifically references the fact that Covid-19 is a state emergency.

In *American Economy Insurance Co. v. State of New York*,[3] the Court of Appeals upheld legislation that insurers argued retroactively imposed unfunded workers' compensation liability. The legislation did away with a special fund that was used to pay for workers' compensation claims that were closed but unexpectedly reopened many years later. This holding was on the narrow ground that the legislation did not change the actual legal enforceability of the contract between insurer and insured, only how the liability was paid for (i.e., passing the cost of the claim from the fund directly to the insurers). Here, the Assembly bill creates a type of fund (although it seems more like a surcharge) that pays for the coverage imposed by retroactive changes, a provision that presumably is intended to bring the bill closer to, rather than further away from, what is permitted by *American Economy Insurance Co.* and *Health Insurance Association of America v. Harnett*, which caution against the rewriting of contractual obligations between insurer and insured.

Other state courts have attempted similar legislation. In *Harleysville Mutual Insurance Co. v. State of South Carolina*[4], the South Carolina Supreme Court struck down a law that retroactively changed the definition of an "occurrence" on the ground that it altered the contractual relationship between insurer and insured without addressing a pressing emergency. In *Vesta Fire Insurance Corp. v. State of Florida*, legislation was permitted that limited property insurance cancellations in the wake of Hurricane Andrew. Likewise, in *State of Louisiana v. All Property & Casualty Insurance Carries Authorized and Licensed to Do Business in State*, the Louisiana Supreme Court upheld legislation that extended the filing deadlines for claims, and the statute of limitations for insurers suing their insurers, in the wake of Hurricanes Katrina and Rita.

So, is the proposed legislation constitutional? There are good arguments for both sides. On one hand, Covid-19 is undoubtedly an emergency and the proposed legislation serves a legitimate and pressing public purpose. The bill even attempts to fund the surprise liability imposed. On the other hand, the bill substantially changes the rights and obligations bargained for when the insurer issued policies in effect on March 7, 2020. It takes a specific and purposeful exclusion and renders it null and void. This ham-fisted approach may prove too much, with particular consideration given to whether there are less invasive solutions available to the legislature.

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1. *Home Building & Loan Association v. Blaisdell*, 290 US 398 (1934) and *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 US 400 (1983).
2. 44 NY2d 302 (1978).
3. 401 S.C. 15 (2012).
4. 937 So2d 313 (La. 2006).

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John Venditto: On July 19, 2019, the respondent pled guilty to the crime of corrupt use of position or authority, a class E felony, and the Grievance Committee moved for his disbarment, based on his felony conviction. The court granted the motion, finding that the respondent was automatically disbarred from the practice of law in the State of New York based upon his conviction of a felony.

Mark Weissmann: By order of the Supreme Court of New Jersey, the respondent disbarred, on consent, based upon, inter alia, his failure to maintain trust account and records in compliance with court rules. In view thereof, the court issued an order directing the respondent to show cause why discipline should not be imposed. The respondent requested that he be suspended, rather than have a reciprocal discipline of disbarment be imposed. The court denied the respondent's request, found that reciprocal discipline was warranted and disbarred the respondent from the practice of law in the State of New York.

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lawyers from carelessly presenting unsubstantiated factual information and unsupported arguments to the court.

All bankruptcy attorneys are routinely confronted with situations in which some clients would be greatly helped by misrepresenting certain facts. However, as members of a noble profession, we are held to the highest standards of ethical behavior and honesty.

An attorney who files schedules and statements on a debtor's behalf is under an affirmative duty to undertake an inquiry into the facts set forth in the schedules and statements before filing them, and to ensure that the representations in the schedules and statements are factually and legally justified based on the information obtained in that inquiry. Under this standard, counsel is not a guarantor of the accuracy of the information contained in the schedules and statements. Instead, an attorney is under a duty to perform an objectively reasonable investigation under the circumstances and to act upon any information revealed in that investigation.

The judge also determined that a subsequent hearing would be held to address sanctioning the attorney for "this shortcoming." The trustee was seeking disgorgement of fees, an award of the trustee's costs, and other sanctions. The judge also found that, prior to filing, the client likely did not disclose to the attorney the contract to sell the property, so the attorney was off the hook on that charge. In addition, the judge was "untroubled" by the attorney arranging to have successor counsel cover the meeting of creditors as the attorney disclosed his suspension to the client, the client agreed to that arrangement, and the client was not responsible for paying successor counsel.

Practical pointer: All bankruptcy attorneys are routinely confronted with situations in which some clients would be greatly helped by misrepresenting certain facts. However, as members of a noble profession, we are held to the highest standards of ethical behavior and honesty. We must demonstrate integrity with our profession, even if that means not helping a client, by unethical behavior, to obtain a more favorable result. Failure to do so can result in serious consequences.

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width. Check your internet speed on sites such as SpeedTest.net.

Before the deposition begins, test your ability to obtain a full picture (hands on the table shoulders and head in the image) video of the deponent and whether you have a solid internet connection with all the required programs running.

Conducting the deposition

Depositions should start promptly. A confirmation and oath will be taken of the deponent by the court reporter who will have recorded the deponent's picture identification.

Counsel will identify themselves to the satisfaction of the court reporter and all the parties. Each counsel should note his or her appearance on the record, the court reporter or "host" should identify everyone else present and confirm that the Zoom deposition is password protected. Where confidentiality is necessary, the actual physical location of each party should be identified and each participant asked whether there any other individuals in a position to observe or listen to the deposition. If so they should be identified on the record.

The deponent actively participating in the deposition should be "pinned." The pin video feature allows you to disable active speaker view and only view a specific speaker. It will also only record the pinned video if you are recording locally (to your computer). Pinning another participant's video will only impact your local view and local recordings, not the view of other if he or she is recorded.

Experienced court reporters will, of course, only be able to take down the one party speaking so it is especially important for preparation purposes that the deponent understand that the he or she must allow the question to finish and expect an objection before answering. Bathroom and coffee breaks still occur, albeit not in your office.

Zoom will be utilized from everything from schooling to HIPPA compliant sessions. Lawyers must get used to the novelty and convenience of technology. Defense counsel may wish to identify themselves if there are multiple parties objecting. It is also useful, together with deponents, if multiple defense counsel designate one location or one person defending the deposition. While foreign to even of some of the most fierce and hardened litigators, the novelty of some of these issues can be resolved by stipulation or application to the judge should the parties be unable to agree.

Advanced settings

The enormous changes in the world today will no doubt change lawyering. Zoom depositions allow what would be otherwise non-recorded depositions to obtain the full audio and video of a deponent in their "natural" environment, typically the deponent's home or office. An attorney will usually not be in the same room as the deponent. During the breaks, the time should be noted and the video and audio settings muted as you do not want your adversary to hear you talk to your client or yell at the dog.

Screen-sharing allows you to access open documents and programs on your computer. In the case of a document, perhaps your premarked exhibit or a google map on your computer screen, the person on the other end can see what you are showing her. In the case of audio, you may wish to play that 911 phone call. For video, you can display the dashboard camera footage showing moments before the accident. With screen-sharing, a lawyer can freeze frame and get the deponent to give you a play-by-play of the prerecorded video all while creating video of the deposition.

More advanced settings will allow for integration of multiple applications, second screens, iPads or tablets for deponents to manipulate, in real-time, exhibits and create new exhibits. Court reporters are quickly adapting and courts will no doubt accept the video depositions, as they have previously, in motion practice and, eventually, trial.

The RPC also requires competence and security. Lawyers should contract with reputable court reporters and create technology stipulations to avoid problems.

Socially distancing and non-essential does not mean the end of the legal system. We are essential. While we are not colonizing the moon, we will have more comfortable depositions in the post coronavirus world.

Note: Named a SuperLawyer, Cory Morris is admitted to practice in NY, EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CASAC-T. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

1. Planet Depos, LLC, *Top Tips for a Zoom Remote Deposition*, JD Supra (Mar. 25, 2020), https://bit.ly/3eXkiWO.
2. Rae Hodge, *Zoom security settings to change now to prevent Zoombombing*, Cnet (April 21, 2020), https://cnet.co/3eSVNd0.