

DOOM, ZOOM, AND TRANSFORMATION IN THE YEAR OF COVID:

Reflections on the Durability, Practicality, and Efficacy of Remote Depositions

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“Out of crisis springs opportunity.”

Inspired by the words of a fortune cookie

It was one year ago (March 13, 2020) that Nature flipped the switch and unleashed the COVID virus, instantly changing life and the practice of law as I had known it. Within days I was visiting a website called “Zoom” and taking tutorials on how to conduct “remote” conferences and depositions. It was revelatory and life altering. Within a month, I was taking Zoom depositions and participated in both a hearing and mediation by Zoom. Zoom depositions, hearings, conferences, and mediations have now become the new norm – at least in my practice.

The purpose of this paper is not to instruct anyone on how to conduct effective remote depositions, but instead to share my experiences and insights in the hope that they may help inform your practice and inspire even more innovation and effectiveness than you no doubt have already experienced in conducting depositions remotely.

Disclaimer: Throughout this paper I will make reference to “Zoom.” I am not getting any promotional fee and am not promoting Zoom. There are other providers who offer videoconferencing including Web-Ex and Microsoft. I do not reference or offer any observations about these other platforms only because I have not used them extensively. While I use Zoom specifically, I mean it more as a generic reference to video-conferencing platforms in general.

Ironically, it was over thirty years ago that I first wrote a paper for the State Bar of Texas on taking and using video depositions at trial entitled “*Youtubephoria*.”¹ At the time, the practice of videotaping depositions was somewhat novel in Texas and virtually unheard of in other states. That experience has helped inform how I have approached scheduling and conducting remote depositions. I view remote depositions as merely a stage in the evolution of non-stenographic depositions: telephone, video, satellite, and now video-conferencing.

¹ This and other papers I have written on deposition practice are downloadable from my firm’s website, www.cuttingedgejustice.com/papers

While COVID has fundamentally altered my approach to taking depositions, I actually conducted my first “remote” deposition over thirty years ago. There was a company in Houston with a facility that provided equipment and screens for uplinking and downlinking by satellite. We had a deposition scheduled for a key expert witness who resided outside of Boston. There was a terrible snowstorm, and he could not travel. He, however, could walk to a Federal Express store down the street which he agreed to do. From there, he “uplinked” to the satellite and we downlinked the transmission to the screens before us. Incredibly, the reception was quite good. We had the witness on one screen and exhibits on the other. All the attorneys were in the same facility and the deposition proceeded seamlessly and successfully. Nonetheless, it was a one and done experience. The company went out of business, and I did not attempt anything similar until April 2020.

If you want to know the truth, my first pandemic-induced Zoom deposition was more memorable for its clumsiness than its effectiveness. It was like trying to learn ballroom dancing (which I have never been able to master). But I think a lot can be, and in this case was, learned from missteps.

My first impression on seeing the various video boxes pop up on my computer screen was oddly of “Hollywood Squares,” and the introduction to the “Brady Bunch.” Everyone was looking out from their screens with the same expressions that one would expect of people just getting ready to shave or put on makeup. The initial interaction was both awkward and hilarious. I could not help myself; my mind raised back to the Who rock opera, “Tommy.” “Can you hear me?” “Can you see me?”

I think, however, I am getting ahead of myself. Before anything popped up on the screen, we had to figure out how to invite everyone to the party. What should the notice say, and how do we get connected? Thank goodness for my incredible paralegal and tech savant, Kelly, and our excellent court reporter. Between them, we figured it out and slogged forward.

THE NOTICE

199.2(b)(3)

(3) Alternative Means of Conducting and Recording. The notice must state whether the deposition is to be taken by telephone or other remote electronic means and identify the means. If the deposition is to be recorded by nonstenographic means, the notice may include the notice required by Rule 199.1 (c).

199.1 (b) and (c)

(b) *Depositions by Telephone or Other Remote Electronic Means.* A party may take an oral deposition by telephone or other remote electronic means

if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction.

(c) *Nonstenographic Recording.* Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recording. The party requesting the nonstenographic recording will be responsible for obtaining a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworthy. At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of nonstenographic recording to be used and whether the deposition will also be recorded stenographically. Any other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise.

The Place of Deposition

Through a lot of trial and error, I have developed a notice of deposition template that I feel addresses many of the questions that might arise in scheduling a remote deposition. A copy of the current template is attached as **Appendix A**.

I knew from the outset of the pandemic that if we were going to continue taking depositions that the process was going to be different, and the customary notice of oral deposition would probably have to be altered. The main difference in the notice deals with the place of deposition. Where is the deposition going to take place especially when all the participants are going to be in different places?

We concluded first that we needed to inform all the parties and the witness that this was going to be a remote deposition. At the beginning, there was no choice. A series of Texas Supreme Court Orders made clear that it was going to be virtually impossible to do a live deposition. We are not going to talk here about remote depositions under Court ordered restrictions. Instead, we are going to look at remote depositions prospectively as an accepted way of conducting a deposition regardless of whether we are in a pandemic with governmental directives or not.

If the witness is a party or company representative, generally there is not much controversy about whether the witness appears at the attorney's office or some other

place of the witness's choosing. The party witness needs access to a computer, a phone line, and the internet. Due to the inconsistency of the Internet in some places, a deposition that was intended to be done by Zoom can easily simply turn into a telephonic deposition, in which you hear the witness but do not see them. In that case, the rules regarding telephone depositions obviously apply. However, these rules also apply to remote Zoom depositions. The witness can be at their home, in their attorney's office, or anywhere else that the witness wants to be so long as the witness participates in the deposition. The parties merely agree that the court reporter (or another individual authorized to administer oaths) may swear in the witness. Nonetheless, if you want or need to take a videotape deposition and there are transmission problems, it can result in a lot of aggravation and wasted time. Be prepared to adjourn the deposition, alter the setup, and push restart. Sometimes, the deposition simply has to be rescheduled.

A key to efficiently scheduling and getting the deposition started is a clear email from the court reporter with an embedded hyperlink that will allow each participant to easily connect with the session. The link concept is very similar to connecting to a conference call, which in a large sense is what you are doing except with video. It helps to have a Zoom account (there is greater capacity and control); however, one is not necessary for the witness and the attorneys to participate. At the outset there were concerns about security and "zoombombing" (for those of a certain age imagine a party line). However, a lot of security has now been layered into the system to provide peace of mind. In recent months, it seems as though the concerns about video conference security have subsided, at least on the surface.

If the witness is a non-party, things can get more complicated, and if the witness does not have an attorney, the whole process can become a mess. At least when you are dealing with a party witness or a witness who has an attorney, you can communicate, and hopefully coordinate, with that attorney to assure that the witness is presented with the necessary accommodations to participate in a productive remote deposition. If you are dealing with a non-party fact witness who does not have an attorney, every aspect of the process is a potential landmine.

At the outset, you need to communicate to the non-party witness through the notice that the deposition is going to be taken remotely and what that means. Importantly, the witness must understand that he/she does not necessarily need to travel anywhere to give the deposition, but that the witness must have necessary tools with which to participate in the deposition. What happens if the witness does not have a computer or access to Zoom or even access to the Internet? Can a witness be held in contempt for not complying with the notice and subpoena if the witness does not have access to the technologies with which to participate? I doubt it. So, you need to provide the witness as much guidance, including technical support as ethically possible. You need to tell the witness in the notice what the witness will need to participate and to let the attorneys

know if the witness does not have the necessary devices or cannot for whatever reason connect to the Internet.

The notice should set out that the witness is expected to appear at a place that has access to the Internet (the stronger the signal the better), and that the witness must have access to equipment that will allow the witness to appear visually on Zoom for the deposition. The court reporter service that our firm uses offers technical support and tutorials for individuals who are not familiar with video conferencing. The notice can indicate that the witness is free to contact the court reporting firm to answer any questions about what equipment can or should be used and how to log onto the deposition and participate. Or there can be an offer that the witness or the witness's attorney can contact the noticing party if there are any questions or equipment needs. The important thing is not to assume that merely because you issue a notice that the witness is going to show up with state-of-the-art technology to participate in the deposition. To the contrary, prepare for the worst and attempt to mitigate potential calamity.

The subpoena to the non-party witness is very important because it is through the subpoena that you are going to provide the witness the link to connect to the Zoom deposition. This needs to be explained in the notice and in the subpoena. This part requires strategy and coordination with the court reporter since the link may not be ready when the notice is served. The notice may need to state that the link will be provided in the subpoena. You also cannot assume that the witness will understand the hyperlink concept, so that process of connecting to the deposition session should be explained. The more explanation that is given, the less mystery and suspense there will be about whether the non-party witness is going to appear. A copy of one of our subpoenas is attached as **Appendix B**.

The concept of jurisdiction took us a little while to come to terms with regarding a remote non-party witness deposition. A Texas district court may issue a notice to anyone within the state, but the witness cannot be compelled to appear more than 150 miles from the witness's place of residence. Tex. R. Civ. P. 176a. Since we are informing the non-party witness that he/she does not have to travel anywhere to participate in the deposition, the jurisdiction issue should not be an impediment. However, the witness still has the right to object to or move to quash the deposition and the witness is free to obtain this relief from a court in the county in which the witness resides. During the pandemic when there were gathering and travel restrictions, it could be anticipated that wherever the hearing took place that it would be done remotely. As time goes by and those restrictions are lifted, it could be required that the attorney seeking to compel the deposition might have to travel to the county of the witness's residence or seek leave to have the matter decided by the Court overseeing the underlying action.

We have had some party Zoom depositions in which the witness appears from their home and their counsel appears from counsel's home or their office. In other

depositions, however, the witness appeared at their attorney's office and they either shared a computer, or the attorney has one computer, and the witness uses another. During COVID, this latter situation was difficult to accomplish because a lot of offices were closed and there was the added issue of social distancing. Also, at the beginning of the pandemic there was the issue of mask wearing. Let me go on record as saying that a witness wearing a mask starts off with some credibility issues. We as a species form a lot of our initial impressions from facial recognition. A mask is a distraction, not only visually but audibly. You need to agree and confirm in advance that the witness will be produced in a setting in which the witness does not need to wear a mask. (I also have no issue with opposing counsel wearing a mask for the same reasons stated above for not wanting the witness to wear one). As these restrictions have diminished or have been lifted, there is greater flexibility especially with the witness and their attorney being in the same room.

I have heard some attorneys complain about the witness and the attorney being in the same room because of the fear that the attorney will coach the witness. Frankly, this to me is not a significant concern. Nor is it a problem that is unique to Zoom depositions. I have been practicing now for nearly 45 years. During that time, I have seen all manner of attorney coaching that goes on during depositions, some subtle and some unabashedly overt. My impression is that there is always coaching. Some attorneys meticulously "woodshed" the witness before the deposition, while others who are not so diligent or with as much time, choose to do it on the fly during the deposition. The result is about the same ("I am not a potted plant!"). I do not think that this is an issue that should cause a great deal of concern or waste a lot of judicial energy and resources addressing.

The important take away is to give serious consideration to where the witness is going to be and what equipment the witness is going to need or use to participate in the remote deposition. We had one deposition in which the witness was driving his truck to a job site, occasionally looking down at his iPhone that he was using to connect to the deposition. We told him that he needed to pull over onto the shoulder and stop. We ultimately persuaded him to call us back when he arrived at work and was no longer driving. Another witness was on an iPhone in his home. The arrangement was not optimum, but he wound up appearing relaxed, comfortable, and accessible. The point is to make sure you attempt to know and manage the setting. Do not simply leave it to chance. That said, one of the downsides of a remote deposition is that the party noticing the deposition does not have a lot of control over the setting in which the witness is presented. You can try to control it, but more often than not you are having to adapt to the conditions you are dealt.

Documents

Other than getting a non-party witness to show up and meaningfully participate in a remote deposition, obtaining and using documents in a deposition is one of the more

challenging aspects of taking a remote deposition. It becomes quite cumbersome if, in response to a request for production or subpoena duces tecum, the witness shows up with documents for the first time at the deposition. There is the problem of distributing the documents to the participants and marking them as exhibits. We have found that trying to reach an agreement that all documents in response to a request for production or subpoena issued in conjunction with the deposition will be delivered to the opposing attorneys no later than 72 hours before the deposition begins is very effective. This gives the parties time to review the documents, mark them as exhibits, and load them onto the computer so that they may be used during the deposition by way of “sharing the screen.”

The technique of sharing the screen is actually quite convenient and effective when everything goes right. It allows a party to upload from his/her computer a particular document that will appear on the screen so everyone can see it. The witness screen can be reduced to a screen within a screen (or picture within a picture). The document can be highlighted, cropped, or written on depending on the Adobe tools available to the attorneys.

Agreements and Conduct of the Deposition

In our remote deposition notices, we like to set out proposed agreements that can be incorporated into the deposition. They are common-sense, but mainly serve as reminders so that the matters are addressed at the beginning of the deposition and agreed to. The main agreement is merely a recognition of the rule requiring that the deposition will be taken the same as if the testimony were being given in a courtroom at trial. Tex. R. Civ. P. 199.5(d). This means that there will be no coaching of any type, which addresses the concern discussed above. It also means no “chatting” during the deposition. This is a term of art. Zoom provides a feature by which participants can text each other during a session. Of course, just as it is improper for an attorney to verbally coach a witness through a deposition, it is improper to use text messaging to communicate the same information. A sample of the agreements we propose appear in **Appendix A**.

OPERATIONAL CONSIDERATIONS

The issue of whether you can DIY a remote deposition or whether there needs to be a certified court reporter, notary, and certified videographer is less than crystal clear. Honestly, it is murky at best.

Many attorneys who are handling small cases and are trying to minimize expense probably want to conduct the remote deposition themselves using the Zoom features and a notary to swear in the witness. This likely could work in many instances, however, there is the potential for the opposing attorney to request a transcript or the Court could request

a transcript *sua sponte*, or if there is an appeal a transcript will be required. The transcript must be derived from the original recording.

There is a nettlesome Attorney General Opinion, (Op.Atty.Gen. 1995, No. DM-339) that holds that a deposition can only be recorded by a certified court reporter and that although the Government Code allows a notary to take a deposition, this authority only applies to depositions on written questions and not oral depositions. It has been found that a notary is not authorized to conduct a deposition by videotape without a certified stenographic recording. I am not sure what the present state of the law is on this matter, but Tx Civ. Prac. & Rem. Code §20.001 (which pertains to whom may take a deposition) was amended in 1993 to eliminate the reference to only certified court reporters being authorized to take an oral deposition. Tex. R. Civ. P. 199.1(c) arguably changes this situation:

The party requesting the nonstenographic recording will be responsible for obtaining a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworthy.

I have not found any appellate authority holding that a videotape deposition recorded by a notary public was invalid or inadmissible for not having been taken by a certified court reporter.

My own preference is not to put myself in the role of maintaining the security and integrity of the videotape, even though if recorded by Zoom it will reside in the Cloud. A copy of the cloud transmission could be made, but then the attorney would be put in the position of having to certify the integrity of the copy.

A recent federal case illustrates the potential for technical landmines. ***Alcorn v. City of Chicago***, --- F.R.D. ---, 2020 WL 4904567 (N.D. Ill. 2020). In this case, the Plaintiff proposed to take the deposition with a certified court reporter and to “record” the deposition via Zoom without a certified videographer. The federal judge found this untenable and in violation of Fed. R. Civ. P. 30. The Court found that it was not adequate to have a certified transcript but an uncertified video record. The Court ruled that the Zoom recordation could be made but could not be offered into evidence. Fortunately, for those practice in Texas state court, Tex. R. Civ. P. 199.1(c) does not require the degree of certification imposed by Fed. R. Civ. P. 30.

The customary video operator is a somewhat enigmatic participant in the remote deposition exercise. Is he/she really videotaping? How is this being done? Zoom records the video deposition. However, someone has to oversee and be accountable for the video. That is where the videographer comes in. The videographer more often than not is somewhere separate and apart from the attorneys, the court reporter, and even the witness. The videographer is not actually videotaping as we have come to expect but is managing the videotaping. The videographer is not videotaping but rather capturing what

is being recorded by the video conferencing platform, which stores the video data in the cloud.

The individual who schedules the deposition is the controller of the deposition literally. The controller is also the one who controls access to the deposition and to the deposition transcript. It is the controller who lets the proper people participate and keeps out uninvited intruders. A court reporter is not required, but I have found that I do not have the facility to engage in DIY deposition production. I prefer to focus on obtaining the testimony and not split my focus by having to concern myself with the mechanics of how the deposition is being recorded. If you do have that ability, good for you. It is cost-saving at least at the front end. So long as you conform to the rules for taking and preserving a remote deposition, you are within your rights to conduct the deposition yourself without a court reporter and even without a transcript (subject to Tex. R. Civ. P. 203.6).

I prefer to eliminate as much uncertainty and as many potential landmines as I can on my way to trial. I hire a court reporting firm that has developed strict and appropriate protocols for taking and preserving the video transmission and the stenographic transcription. Even then, the situation is not always black and white.

My experience has been that the court reporting service I hire associates a certified videographer who is responsible for seeing that the video is properly transmitted to the cloud via the Zoom platform. The videographer is not actually videotaping the deposition, however. The videographer is merely capturing what is recorded by Zoom and transmits it to the Cloud. The court reporting service maintains access to and control of the video data. I have talked with videographers about this process and have not received a totally satisfactory response to how the videographer can assure that the recording “is” intelligible, accurate, and trustworthy, particularly since few if any of them actually review the videotape once it is transmitted to the cloud. What they can and do is certify that they are monitoring the record to assure in real time that it is intelligible, accurate, and trustworthy. In this regard, I have had the experience in which a videographer recognized that transmission had been lost. He notified the participants, and a new connection was established. I believe that what will probably happen in the future is that the videographer will certify that she has properly captured the recording and has not modified or manipulated it. The court reporter who maintains control of the video will certify that what is delivered to the parties is what was captured by the videographer.

If you are going to use a court reporter, vet the reporter regarding his/her knowledge and experience doing remote depositions and do some drills with the reporter to make sure you and the reporter literally and figuratively are on the same page. Talk with the reporter about what you plan to do during the deposition so that reporter can be prepared and so that the reporter can be of assistance. This is particularly true with using documents, which we will discuss in more detail below. The judge in the *Alcorn* case discussed above was also very concerned about what information was shown on the

computer screen and recorded particularly when sharing the screen for documents. The court found the gallery view distracting and the potential for revealing privileged information on attorney's computers very troubling.

The videographers we use do not use the gallery view but instead keep the focus solely on the witness, except when documents are used and the screen sharing function is activated. In that event, the focus is on the document and the only other cell on the computer screen is the small window depicting the witness. This is a good practice; however, the attorney needs to be conscious that as long as the document is the focus and the image of the witness is not.

Consider getting the documents you intend to use at the deposition to the court reporter in advance of the deposition so he/she can mark the exhibits in advance. If you do not provide the documents to the court reporter, it can potentially result in delay, confusion and a cluttered or inadequate record.

QUALITY CONTROL CONSIDERATIONS

So, if Zoom is recording the video deposition, you are probably asking how do the participants manage the quality of the visual presentation and the sound? This I believe is probably one of the most important considerations in taking a Zoom deposition. Garbage in, garbage out. It requires advance strategy and planning. The first consideration is making sure that the witness has good equipment.

It helps considerably to use a computer that has the camera at the top of the screen rather than at the bottom. Most newer computer models have made this adjustment. Early on, when the computers had the camera at the bottom of the screen, everyone looked like they had their nose up in the air. It was not a pretty picture. If you still have one of these type of configurations, go to your law book library and grab one of those old Martindale Hubbell volumes B. They are the right thickness. Put the book under your computer and it should adequately raise the camera to provide you a direct view. For a small investment, you can purchase a separate camera that sits on the top of the computer screen and plugs into your computer via a USB connection. These devices are good because they provide added controls that allow you to adjust the focus and depth of field. They also provide image enhancements which allow you to get rid of blemishes that might be distracting. However, the camera on most newer laptops and tablets are very good and sufficient.

I have found that the speakers on most computers are less than ideal. As a Baby Boomer who spent a fortune in college purchasing the most technologically advanced speakers with which to fully appreciate the riffs of Jimi Hendrix, I can tell you that it is even more important to have good sound volume during a deposition. It is one thing to ask the perfect question, it is another to miss the perfect answer because of bad speakers.

Invest in a pair of Bluetooth earphones or earbuds. Yes, it looks a little geeky, but wireless earbuds are now ubiquitous so it will probably not be a distraction. And even if it is, the tradeoff for good sound quality is worth it.

A separate microphone is also a very good investment, and a good one may be purchased for a relatively nominal amount. However, I have heard and read that using a phone line rather than a microphone enhances the sound the best and most reliably.

Another important consideration is lighting. My father was a professional photographer. I learned from him the incredible importance of light in creating an effective visual. The witness should either be near a window or, for another small investment (under \$50.00), you can purchase a ring light that also sits on your computer screen and provides proper lighting so that your witness does not appear sinister.

Now that we are all equipped for our deposition and we have secured the attendance of everyone, including the witness, are we ready to begin? Not yet.

For reasons that I have not quite yet figured out, participants in Zoom depositions pay little attention to what they are wearing and even less to the background or setting in which the deposition is being recorded. Both attire and background are critically important to making the right impression. Yes, the last year has been a drag. We are sick of our confines and none of us feel like dressing up. That, however, is no reason to conduct the Zoom deposition from your bedroom in a pair of pajamas. I am not exaggerating. This has happened.

If you are presenting the witness, give serious consideration to the background. You want the background to make a statement, but you do not want it to be the statement. You do not want it to be distracting. Zoom allows you to preview and practice. Take advantage of this feature. Experiment with settings until you are happy that the one you choose conveys the right tone and mood. You also might want to consider purchasing a portable background like what court reporters often have and set up in back of witnesses giving a video deposition. This provides a clean and appealing background and is reliable.

As I have mentioned already and will discuss more later, many times we are not presenting the witness and therefore do not have control over the background. The party producing the witness may have little interest in making the video appealing. Indeed, the party may be happy to have as much distraction from the witness as possible. There is not a sure or easy answer to this problem. However, if it is an important witness and you wish to make the video as clear and persuasive as possible, attempt to confer and reach an agreement about the setting in which the witness will be presented. I know what you are thinking. Who has time for that? It is a valid point, which is why I say that more often than not, you are going to need to improvise and adapt on the fly. Just make sure that

you do not take the setting for granted and fail to consider its effect on the quality of what you are trying to do.

Attire should be given the same consideration as the setting. Remember that the video is going to be shown to the judge and the jury. If you are presenting the witness, make sure that the witness is properly attired, the same as if the witness were appearing in the courtroom. The witness should avoid bright or flashy colors, leave jewelry at home, and make sure there are no potentially offensive logos or messages on their clothing. This may sound obvious, but it is surprising how attorneys tend to let down their guard in the context of remote depositions. Indeed, attorneys are getting more and more casual in their own attire, especially during depositions. And what is with all the males trying to look like Ted Cruz? I think casualness can be fine but be sure to give it some thought and think about your audience.

There is a cool feature on Zoom called “virtual background.” (Pretty soon I bet there is an avatar feature that will allow witnesses or attorneys to appear as other beings or creatures like dogs or cats). The virtual background allows you to project yourself against any background you can download. It allows you to be in your bedroom but give the impression that you are actually in a conference room. Do not use it, at least as it is presently engineered, unless absolutely necessary. It works well if you do not move around, but if you move your appendages, such as hands and arms, they tend to disappear. This can be very disturbing and distracting.

LEGAL CONSIDERATIONS

Administration of Oath

One of the points I have tried to stress in this paper is that remote depositions are not too much different from the devices we have used in the past. They are a combination of telephonic and videotaped depositions. Remote depositions are merely another form of non-stenographic recording in one sense. Accordingly, I will review the Texas case law that has developed regarding non-stenographic depositions, particularly telephonic depositions, and videotape depositions. I also, have tried to collect cases from around the country dealing with remote depositions during the pandemic.

It is noteworthy that the predecessor to Rule 201 required that the parties either stipulate to a deposition being taken by telephone or that an order be obtained. TEX. R. CIV. P. 202(2). The present rule does not require either.

A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so. Tex. R. Civ. P. 201 (b).

Another provision in Tex. R. Civ. P. 201(b) allows for the court reporter to be at the place where the attorney noticing the deposition is located, provided a person is present with the witness and authorized to administer an oath to the witness in that jurisdiction.

The Dallas Court of Appeals ruled in 1991, under the prior Rule 202, that it is not necessary for the court reporter be in the room with the deponent, either for the swearing in or for the recording. The reporter can take the witness' oath and record the testimony over the telephone. ***Clone Component Distributors, Inc. v. State***, 819 S.W.2d 593, 598 (Tex. App.--Dallas 1991, no pet.). This opinion has not been expressly overruled; however, it arguably has been overruled by the enactment of Tex. R. Civ. P. 201.

In ***Clone***, the court was dealing with a deposition taken in a foreign jurisdiction. At that time Rule 188 required that a witness giving a deposition taken in a foreign jurisdiction be sworn in before a person authorized to administer oaths in that jurisdiction. The Dallas Court did not interpret "before" as requiring that the person be physically present with the witness. It is notable that Rule 201 requires that the person administering the oath be present with the witness.

The requirement that the person authorized to administer oaths be present with the witness is both curious and nettlesome. There is no authority or comment that I have been able to find that provides insight into why the person swearing in the witness must be present with the witness, especially if the witness is not in a foreign jurisdiction. This requirement ostensibly if not expressly by Texas Supreme Court orders has been dispensed with during the COVID pandemic, which raises the question whether 1) it is an absolute requirement, 2) whether the parties may stipulate to allow the court reporter taking the deposition to administer the oath, or 3) the trial court has the discretion to override the requirement. If video conferencing or Zoom depositions are to continue to be used after the COVID pandemic, which I hope they are, it will be important to revisiting this requirement and either eliminate it or add qualifications to it.

Exhibits

The Dallas Court of Appeals, in ***Clone***, also suggested how to deal with the objection that the attorneys, the witness, and the court reporter will be unsure of which exhibits have been identified and whether the deponent at one end of the telephone has copies of the same exhibits as the attorneys at the other end of the call. One solution, according to the Court, is to send the witness marked copies of the exhibits ahead of time and to have the witness identify the exhibits in his possession during the deposition. "The witness should then be instructed to examine the exhibits in the deposition when he receives it for his signature and to note any discrepancies on the deposition before signing it." ***Clone Component Distributors, Inc. v. State***, *supra* at 599-600. Another solution suggested by the Court is to send a copy of the exhibits to the witness during the deposition by fax.

Motions for Protection

As we have learned through this pandemic, we are a society that values personal liberty and freedom. These values bleed into our trial practice. Predictably, there will be a tension between those who wish to take depositions remotely and those who will insist that depositions be taken in person. I believe these competing interests can be reconciled and that there should not be much need to waste judicial resources trying to resolve the disagreements.

If a party wishes to notice an oral deposition to be conducted remotely in the future, he/she should be able to do so freely by following techniques such as I have outlined above. If an opposing party for whatever reason objects to taking the deposition remotely, should the party be able to object? Similarly, what if a party in a lawsuit wishes to take the deposition of the other party in person and the party deponent objects that he or she wishes to participate remotely?

I believe that we should start with the premise that a party seeking the deposition should be able in the first instance choose the manner in which the deposition should be obtained, i.e., in person or by alternate means such as telephone or videoconferencing, subject to a motion for protection. The person objecting to the manner of discovery should be obligated to demonstrate an articulated harm from the proposed manner of discovery. The Court should have the discretion to determine the methods of discovery, considering evidence of the benefit versus the harm or demonstrated burden. Tex. R. Civ. P. 192.4.

A party objecting to a notice to take a deposition, whether in person or remotely, should have to demonstrate that there is a harm that likely will result from taking the deposition remotely. The objecting party would have to file a motion for protection or motion to quash and put on evidence of a likely harm. ***Garcia v. Peebles***, 734 S.W.2d 343, 345 (Tex. 1987). (footnotes omitted, emphasis added):

While Texas courts have not written on the proof necessary to obtain a Rule 166b–4 [now Rule 166b(5)] protective order, federal courts have dealt with the issue pursuant to Fed. R. Civ. P. 26 (c). In ***United States v. Garrett***, 571 F.2d 1323 (5th cir. 1978), the court noted that a movant must show “a particular and specific demonstration of fact as distinguished from stereotyped conclusory statements.” 571 F.2d 1323, 1326 n. 3. (citations omitted). Sweeping predictions of injury and “[b]road allegations of harm, unsubstantiated by specific examples of articulated reasoning,” do not justify a protective order. ***Cipollone v. Liggett Group, Inc.***, 785 F.2d 1108, 1121 (3rd Cir. 1986). Though the Texas and federal rules are not identical, *these requirements of a particular, articulated and demonstrable injury, as opposed to conclusory allegations, apply to motions for protective orders under Rule 166b–4.*

While Rule 166b(5) has been replaced with Tex. R. Civ. P. 192.6 the **Garcia** mandate remains unchanged.

Masinga v. Whittington, 792 S.W.2d 940 (Tex. 1990) which dealt with an objection by a witness to giving a videotaped deposition, provides guidance. The Texas Supreme Court held that the witness was required to demonstrate an articulated harm, which the witness had not done. The motion for protection was denied. I have given a lot of thought to such a scenario and am at a loss on what the harm could be. Thousands of depositions have now been taken remotely without any cases of harm being reported, at least that I have been able to find through my research to date.

There has been one unreported opinion handed down in Texas since the onset of the COVID pandemic dealing with the issues of whether an in-person deposition can be noticed and whether a party may alter the method of deposition notice (i.e., in person) by motion for protection, and during the COVID pandemic, what considerations must be taken into account by the trial court. **In re Landstar Ranger, Inc.** 2020 WL 5521136 (Tex. App. – Texarkana 2020 orig. proceeding).

In **Landstar**, RPI demanded that corporate representatives be presented for in person depositions in Dallas. When the COVID pandemic was declared and the Governor of Texas and Texas Supreme Court issued emergency orders, Landstar requested that the depositions of the representatives be taken remotely. RPI refused. One of the corporate representatives presented an affidavit explaining why it would be unduly burdensome for him to participate in a deposition in person. He represented that he was taking care of his mother and if he were forced to travel to and attend an in-person deposition, he would have to quarantine for 14 days which would deprive his mother of care. The other representative presented no evidence of harm. The trial court ordered the deposition of the representative who produced the affidavit to go forward in person in the county of his residence. The other representative was ordered to travel to Dallas and give his deposition in person. The Court ordered that masks be worn, and social distancing practiced but imposed no other safety guidelines. The Court of Appeals held that the court was within its discretion to order the depositions in person as noticed. The Court further observed that the one representative had produced evidence in support of his motion for protection, but that the other had not. The motion for protection that was unsupported by evidence was summarily denied. The appellate court however granted the petition for mandamus because the trial court did not require adequate safety precautions to be practiced during the deposition. This echoes the holding of the Texas Supreme Court in **In re David Weekly Homes**, in which it held that a party's hard drive could be ordered produced under certain circumstances, but the trial court must always take steps to protect the privacy of the producing party, particularly regarding matters that are irrelevant to the claims and defenses in issue. 295 S.W.3d 309, 322 (Tex. 2009).

While the **Landstar** case is unreported, it does help inform our course going forward, after the pandemic is brought under control and we are no longer under

emergency orders. The takeaway is that there is not an absolute right to a remote deposition or for that matter any chosen method of taking a deposition, and there is not an absolute right to require a deposition being taken remotely. The trial court has discretion to determine the means and methods of the taking the deposition, but the court must heed evidence in support of requests for protection and must take steps to protect the safety, health, welfare, and privacy of the participants.

No doubt, some attorneys will file a motion to automatically quash under Tex. R. Civ. P. 199.4 claiming that the remote method of the deposition is inconvenient. Just as I predict some attorney will make this argument, I predict the courts will summarily reject it as it is misapplication of the rule.

There is nothing inherently inconvenient about a remote deposition, but there could be logistical issues, particularly regarding non-party witnesses and expert witnesses. By logistical I mean the issue of where the deposition is to take place. We know it is taking place remotely, but precisely where is the witness going to be? What if a party notices a non-party's deposition to take place remotely, the non-party chooses to participate from her home and the opposing party wishes to attend in person? Is there a requirement that the non-party announce where she is going to be when she is participating in the deposition? Right now, there is nothing in the rules that requires such a notification nor is there any case law providing guidance. But let us assume the witness were to inform everyone that she is going to participate in the deposition from her home and the opposing party's attorney announces that he intends to attend in person (or does not even give notice and shows up at the witness's home). What if the witness does not want the opposing party's attorney in her home? What motion must be filed and who has the burden?

Years before the present pandemic, the Eastland Court of Appeals, dealt with an attorney's argument that he preferred to do an oral deposition in person rather than by telephone or videoconferencing, citing concerns about not being able to observe the witness or observe the witness adequately, and regarding the use of documents. The appellate court's observations are as relevant today as they were back in 2008, when the opinion was handed down in *In re Turner*, 243 S.W.3d 843, 847(Tex. App. Eastland 2008, orig. proceeding):

The trial court specifically inquired of counsel why the deposition could not be taken telephonically. Baker Hughes's counsel responded that he had taken telephone depositions before and that they were "just not the same thing." We realize that telephone or video depositions are different from traditional oral depositions and that, when documents are involved, practical problems are presented. But we note that bankruptcy courts in the Western District of Texas routinely conduct trials—many of which involve numerous documents and parties—by video conference. An attorney's preference for an oral deposition is not synonymous with an actual need for one. ***Cf Int'l***

Awards, Inc. v. Medina, 900 S.W.2d 934, 936 (Tex. App. – Amarillo, 1995, orig. proceeding). (trial court may weigh counsel’s preference for a face-to-face deposition against the particular circumstances of the case).

It is noteworthy that the witness in **Turner** was a party witness who was being requested to come to the forum from Hong Kong to give a deposition. The fact that international travel was involved was significant factor in the appellate court’s decision. Nonetheless, in coming years, given the concern of courts for the spiraling cost of litigation, which mainly results from traveling to depositions and expert witness expense, the courts may consider the **Turner** court’s reasoning applicable when considering the competing arguments in whether a deposition should be conducted in person or remotely.

Another informative case on court discretion in determining the manner of taking and conducting an oral deposition is **International Awards, Inc. v. Medina**, 900 S.W.2d 934 (Tex. App. – Am. 1995) (orig. proceeding). Again, an attorney was complaining that the Court’s order requiring that a deposition be taken telephonically rather than in person would impair the party’s ability to preserve effective testimony. The appellate court held that the trial judge had not abused his discretion:

Next, and more importantly, only a *clear* abuse of discretion warrants relief. **Walker v. Packer**, 827 S.W. 2d at 839-40. In determining whether such circumstance exists at bar, this court must consider various rules of procedure. The first, Rule 202(2), grants a trial judge authority to order telephonic depositions. Tex. R. Civ. P. 202(2). The second, Rule 166b (2) and (5), empowers him to limit or modify the avenues of discovery normally available to litigants. Tex. R. Civ. P. 166b (2) & 5(a) and (b). And, the third, Rule 166b (5), enables him to undertake the first two to avoid undue burdens and expense. Tex. R. Civ. P. 166b(5). Together they allow, if not compel, the court to strike a balance between the needs of the case and parties, the amounts in dispute and the costs inherent in conducting discovery and preparing for trial.

I believe as time goes on, we will reach a point where non-parties are subpoenaed to go to a certain location within the county of their residence to participate in a remote deposition, but I also believe there may need to be more discussion and agreement about logistics than there has been historically. These, however, should not be difficult issues to resolve.

If a party’s deposition is being noticed remotely, there should be little change in how the deposition is scheduled. Customarily, the party’s deposition is taken at the office of her attorney. If the deposition is noticed to be conducted remotely this merely means that the party noticing the deposition does not intend to be in person at the place of the deposition. It does not mean that the party’s attorney cannot be present with the attorney, or that other party’s attorneys in the case also may not appear in person. The witness

would merely give her deposition in person but by way of a computer conference call such as Zoom. The same considerations that I have outlined above would pertain to this form of deposition regarding the conduct of the deposition and the production and use of exhibits.

Proportionality may play an increasingly important role in the decision-making. How important is the witness? What is the expense and burden? What is the benefit of an in-person deposition versus the expense? Will an in-person deposition add to the resolution of the case more so than a remote deposition? The following passage from *International Awards*, *supra* at 936-937 is informative:

Thus, in perspective, International was demanding the right to conduct a video deposition _____? mile from the site of trial to prove a claim it valued at no more than \$700. Common sense would suggest that the cost of travelling to Austin and capturing the deposition on video tape would equal, if not exceed, the total amount of damages International intended to recover at trial. Faced with this scenario, the trial judge's hands were not enchained against ameliorating the situation. In selecting the means to redress the problem, that is, in ordering a deposition by telephone, it implicitly struck a balance between the resources of at least one party and the demands of the case. Such did not begin to approach the standard, a *clear* abuse of discretion, warranting mandamus. [citations omitted]

PROS AND CONS

I believe the pros of remote depositions will prove to outweigh the cons. The largest benefit is the reduction in expense. Scheduling depositions is much easier and efficient because participants do not have to coordinate travel calendars. Sometimes in the past, multiple days needed to be set aside to take a deposition in a distant place, a day to travel to the location, a day of deposition and then if there was not a nearby airport or an accommodating flight schedule a day back. Such travel not only involved air travel, but food and lodging as well. Additionally, there was the opportunity cost from being out of the office because of the traveling. This cost-saving is particularly notable regarding expert witnesses.

As mentioned earlier in the paper, I have been at the forefront of taking videotape depositions. I have found them to be particularly useful in preparing a case for settlement and as evidence and impeachment at trial. I have not seen any degradation in the quality of videotaping from using video-conferencing platforms.

If attorneys are successful in recording video conferenced depositions with only a notary, the cost savings to their clients could be substantial. This could make a significant difference in many smaller cases.

The cons include the concern that the attorney is not using all her senses to assess the witness. There is a type of detachment that is inherent in a remote deposition. Whether this is bad or significant is probably an individual perception. There are some depositions in which I think I might like to be in the same room with the witness to get a full impression of the witness's energy, but I think those instances will be few and far between.

Document production and use is the biggest hurdle that I have noted. Whereas in the past, witnesses have often simply shown up at the deposition with the documents responsive to a request or subpoena duces tecum, now there must be consideration to exchanging the documents in advance of the deposition so they may be shared on the screen during the deposition. We have not experienced any significant issues in this regard, but it does require added attention and to that extent it is an inconvenience.

As discussed above, there will be issues from time to time with remote witnesses who are not represented or who do not have access to a proper devices with which to connect to the remote deposition or adequate Internet coverage to provide a clear and consistent transmission. I think these situations however will tend to be rare and, if addressed early enough, should not be unsolvable problems.

The conduct of the deposition is not much different than an in person deposition and, for more pugnacious litigants, the social distancing may be a good thing. Talking over each other remains a problem, but that is a problem in a live deposition as well. There is the concern about off-screen coaching, but that can and should be solved by an agreement at the beginning of the deposition among the attorneys and the witness that inappropriate conduct such as this will not take place and the deposition will be conducted the same as if in a court room.

The most important factor in maximizing the benefits of remote depositions is conferencing. I am not referencing the actual video conferencing, but conferencing among the attorneys in advance of the deposition or better yet, in advance of scheduling depositions, to agree upon protocols.

GOING FORWARD

As I am writing this paper, Gov. Abbott has lifted the mask mandate, over one hundred million Americans have been vaccinated and President Biden has guardedly projected that families may be able to celebrate July 4, 2021, in small gatherings. Things are getting back to normal. Soon, no longer will we be forced by circumstances to engage in remote depositions but may resume in person depositions. So, what does the future look like in this regard? Will we be doing remote depositions in the future? I hope that we are and believe that we will. I believe that every crisis transforms us and our culture.

This pandemic will no doubt also transform our practice from the physical space in which we work to the way we get about and how we interact. Remote depositions are part of that evolution. Soon the novelty will fade, and the method will simply become commonplace like the computer and the Internet have insinuated themselves into our lives. Our challenge will be to embrace the innovation, refine it, and make it efficient and productive. If we do, I think the transformation will enhance the practice of law on many levels.

APPENDIX A

CAUSE NO. _____

PLAINTIFF

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IN THE DISTRICT COURT

vs.

_____ COUNTY, TEXAS

DEFENDANT

_____ JUDICIAL DISTRICT

**PLAINTIFF'S NOTICE OF INTENTION TO TAKE REMOTE /
ORAL / VIDEOTAPED DEPOSITION OF DEPONENT**

This notice is pursuant to Tex. R. Civ. P. 199, 176, and 205 of Plaintiff's intention to schedule the continuation of the oral/videotaped deposition of the individual specified below and to obtain production of documents and data from the witness:

1. SCHEDULE OF WITNESSES

A. Plaintiff intends to depose the following individual:

WITNESS	TIME	DATE	PLACE
Deponent	10:00 a.m.	mm/dd/yy	Via remote deposition, see Para 2 below

B. The above deposition(s) is/are to begin at the designated time(s) and will continue from day to day until completed. The deposition(s) will be taken for all purposes allowed by the Texas Rules of Civil Procedure and the Texas Rules of Civil Evidence and in accordance with the Texas Rules of Civil Procedure, subject to any agreements memorialized within the transcript of the deposition, on the record, or in accordance with Tex. R. Civ. P. 11. All or part of the videotaped deposition may be offered at trial pursuant to Tex. R. Civ. P. 203.6.

2. PLACE AND CONDUCT OF DEPOSITION:

A. Plaintiff reserves the right to take the deposition remotely or in person subject to the existing orders of the Governor of the State of Texas relevant to such a procedural exercise.

B. If the deposition is taken in person, it will be taken at a mutually convenient location in the county of in which the witness resides.

C. If the deposition proceeds remotely:

1. The place where the witness appears to participate in the deposition will be subject to the agreement of the parties. Subject to the agreement of the parties, unless otherwise specified in the notice, the witness does not have to appear at a specific place to participate in the deposition.

2. The witness will be required to appear at a place that has the proper facilities and equipment (computer with working video, audio, and microphone), internet connection and capacity (band width) for the witness to efficiently and effectively engage in the remote video deposition using the video platform described below. If the witness has any question, concerns or objections about this, the witness or his attorney should contact Plaintiff's counsel immediately so that an agreement regarding accommodations can be reached or an appropriate court order may be obtained.

3. The referenced court reporting service will be the "host" of the deposition and therefore will be in control of the deposition and the recordation of the deposition via the videoconference platform that is used. The deposition will be by invitation and password protected. The deposition will be locked to outside participants for security.

D. Regardless of whether this deposition is taken remotely or in person, the deposition will be conducted in accordance with Tex. R. Civ. P. 199.5.

3. PROPOSED AGREEMENTS:

If the deposition is taken remotely, Plaintiff proposes the following agreements. If the parties cannot reach an agreement on these proposals a reasonable time in advance of the deposition, Plaintiff reserves the right to seek and obtain a protective order compelling the proposed protocol:

A. The witness may be sworn in and the deposition stenographically taken by a certified court reporter remotely.

B. The witness may sign the deposition by declaration or before an online notary.

C. The deposition is being taken in conformance with Tex. R. Civ. P. 199.5. In this regard, there will be no “chatting” with the witness during examination of the witness.

D. If a subpoena duces tecum is served in conjunction with the notice, data, documents, and things in the witness’s possession responsive to the subpoena duces tecum shall be produced no later than seventy-two (72) hours prior to the date and time of the deposition. The documents shall be identified by unique, sequential numbers and produce to opposing counsel and the reporter via Dropbox or other electronic means.

4. COURT REPORTER

This deposition will be stenographically recorded by a certified court reporter affiliated with and/or associated by the firm of U.S. Legal Support, 16825 Northchase Dr., Suite 900, Houston, TX 77060, (713) 653-7100.

5. SUPPLEMENTAL NON-STENOGRAPHIC RECORDATION

A. Pursuant to Tex. R. Civ. P. 199.1(c), Plaintiff hereby gives notice of his present intention to record the above referenced depositions by videotape in addition to stenographic recordation. The videotaping of these depositions will be done by an operator affiliated with and/or associated by the firm of U.S. Legal Support, 16825 Northchase Dr., Suite 900, Houston, TX 77060, (713) 653-7100.

B. Due to the COVID-19 emergency Plaintiff reserves the right to conduct the deposition by remote electronic means. In such event, the witness will be presented at the above-referenced location and Plaintiff's attorneys will be in Houston and conduct the deposition by use of computers, telephone lines, and video/webcams. The videoconferencing provider will record the proceedings simultaneously as they are transmitted over the telephone lines and internet.

C. The non-stenographic recording and videoconferencing, if any, will be in addition to stenographic recordation described in paragraph 2, above. The remote electronic service provider will be U.S. Legal Support, 16825 Northchase Dr., Suite 900, Houston, TX 77060, (713) 653-7100 or a provider affiliated with and/or associated with this provider.

6. ELECTRONICALLY STORED DATA

The request for documents, data and things includes all such information and materials created and/or stored exclusively as electronic data, in its native format. See Definitions.

7. DEFINITIONS AND INSTRUCTIONS

The definitions and instructions attached as **Exhibit A** are applicable to all document requests pertinent to this notice.

Respectfully submitted,

AVERSANO & GOLD

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leighnerw@ckl-lawyers.com

One Riverwalk Place

700 N St Mary's St., Suite 1500

San Antonio, Texas 78205

(210) 588-2901 Telephone

(210) 588-2908 Facsimile

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

Pursuant to Tex. R. Civ. P. 21(a), the undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause via hand delivery, via commercial delivery service, via facsimile, via mail, via certified mail, return receipt requested, e-service, and/or via electronic mail, on the _____ day of _____ 2021.

DONNA M. AVERSANO

EXHIBIT A
DEFINITIONS AND INSTRUCTIONS

- A. **“WITNESS,” “DEPONENT” “YOU,”** “ _____,” refers to _____, his employer, employees, agents, and representatives.
- B. **“ _____” OR “ _____”** unless indicated otherwise, refers to _____ its predecessor and successor companies, if any, its parent, directors, officers, subsidiaries, affiliates, agents, employees, contractors, all divisions and departments, representatives, insurance carriers and attorneys. When conduct is attributed to _____, it is intended to include conduct by and through _____ employees, subcontractors, agents, and representatives.
- C. **“PLAINTIFF”** refers to _____.
- D. **“DATE IN QUESTION”** means on or about _____.
- E. **“INCIDENT IN QUESTION”** or **“OCCURRENCE IN QUESTION”** refers to the circumstances described in Plaintiff’s live pleading, under Statement of Facts. This includes the circumstances surrounding and leading up to the injury to _____ at the site in question, on the date in question.
- F. **“PERSON”** or **“PERSONS”**: include natural persons, firms, partnerships, associations, joint ventures, and corporations.
- G. **“IDENTIFY”**: In those instances where the word “identify,” is used in these requests for discovery, it should be interpreted as requiring with respect to **individuals**, the person’s complete name, last known residence address and telephone number. With respect to **documents or things**, it should be interpreted as requiring sufficient information regarding the item so that the party seeking discovery can locate and identify the object as readily as the party from whom it is being sought, including the title or subject matter of the document, the author and the recipients of the documents, and the date of generation and/or transmittal.
- H. **“DOCUMENTS”**: This term includes, but is not limited to, all paper material of any kind, whether written, typed, printed, punched, filmed, or marked in any way, including all non-identical copies; and all such items maintained exclusively as electronically stored data or information.
- I. **“ELECTRONICALLY STORED DATA”** and/or **“MAGNETIC DATA”** means all information in the responding individual’s or entity’s possession or control stored on mechanical, electrical, or chemical forms or media, including films, discs, transcriptions, graphic depictions, and other data compilations. Unless otherwise stated, a request for electronically stored data is a request for such data in the responding individual’s or entity’s possession or control in its original, native

format. It is preferred that the original, native format is searchable. When the request is for communications (including announcements and directives) that were created or stored as electronically stored data, the request also includes metadata. Unless specifically expressed, a request for electronically stored data is for the specific requested items and data responsive to the request that are reasonably available to the responding party in the ordinary course of business. The responding party or non-party is obligated to comply with Tex. R. Civ. P. 196. 4. Toward this end, the responding party or non-party need to inform Plaintiff(s) in what format the data is stored in the ordinary course of business so that a meaningful meet and confer may be conducted before the response deadline to determine the feasibility of compliance with Plaintiff's requests, and if compliance is demonstrated to be infeasible, to consider reasonable alternatives, if any, offered by the responding party or non-party. Plaintiff is amenable before the deadline for the responses to engage in a meet and confer to discuss the feasibility of compliance and if warranted and feasible to attempt to tailor such requests to the capabilities of the responding party's operating system(s) and usage, or to consider alternative manners of production. The responding party is encouraged to contact Plaintiff's counsel as soon as practicable to engage in a meaningful and timely meet and confer in these regards.

- J. DOCUMENTS and DATA:** In those instances in which the respondent or responding party chooses to answer a request for information by referring to a specific document, record, or data, it is requested that such specification be in such sufficient detail to permit the requesting party to locate and identify the records and/or documents from which the answer is to be ascertained, as readily as can the party served the request. It is further requested that if the respondent or responding party chooses to specially organize documents and data for production in this litigation rather than producing such documents and data as they are maintained in the ordinary course of the respondent's or responding party's business, the respondent or responding party specifically identify by name what discrete documents and things in its possession are responsive to the particular request by and that the respondent or responding party assign the responsive documents unique, serial bates numbers for referenced. See, Tex. R. Civ. P. 196.3. It is requested that all responses to requests for production comply with Tex. R. Civ. P. 196.2.

- K. DOCUMENT/DATA DESTRUCTION:** It is requested that all types and categories documents, electronic data and/or other data compilations and things that might be relevant to the claims and defenses pled in this litigation be preserved and that any ongoing process of document/data destruction involving such documents and/or data cease. In those instances where document destruction has already taken place, it is requested that the destroyed and/or purged documents and/or electronic data information that would have been relevant to the following discovery requests but for their destruction be “identified” (see definition of “identify,” above) as well as the date of destruction and the individual authorizing, ordering, and/or carrying out the destruction. This request similarly pertains to all relevant documents that come into your possession after this date this request is served.
- L. DESIGNATED TIME PERIOD:** As used in these requests, *unless otherwise specified*, refers to the time period thirty-six (36) months prior to and including the date in question, through the present.
- M. POSSESSION, CUSTODY, and CONTROL:** As used in these requests, means possession, custody and control, including *constructive possession*, such that the responding party need not have actual physical possession of the document or thing, as long as the responding party has a right (superior to that of the requesting party) to compel the production from a third party entity (including an agency, subsidiary, division, authority or representative) having physical possession of the item.
- N. SUBPARTS:** In those instances, in which a request is subdivided into subparts, it is requested that the responding party respond specifically and separately to each subpart.

APPENDIX B

CAUSE NO. _____

PLAINTIFF

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IN THE DISTRICT COURT

vs.

_____ COUNTY, TEXAS

DEFENDANT

_____ JUDICIAL DISTRICT

REMOTE DEPOSITION SUBPOENA

This subpoena is directed to: NAME OF DEPONENT

Date on which this subpoena was issued: DATE

Name: Name

Address: Street address
City, State Zip
Phone

or anywhere he may be found

On the date and time set out in the attached deposition notice and below, you are commanded to do the following at:

Date: _____

Time: _____ a.m. / p.m.

Location: The deposition shall be conducted remotely via Zoom and you are required to participate remotely. This means that you may attend the deposition via the internet from your residence or at any place within the county of your residence with internet capability sufficient to conduct a and participate in a remote deposition via Zoom. At that time and place, you are to use the link below to log on to the remote deposition.

Link: **Proceeding Details:**

- **Date:** _____
- **Start Time:** _____ am CDT
- **Meeting ID:** _____
- **Password:** _____

RemoteDepo Quick Guide can be found [here](#).

How to Join the Proceeding:

- Click the link below to join the proceeding from your PC, Mac, iOS or Android device.
<http://uslegalsupport.remotecounsel.com/meetings/xxxxxxxxx/join>
- Select "**Join as Participant**" on the far left of the web browser window.
- Connect your audio **AFTER** you have joined the virtual deposition room. We recommend using the "**Call Me**" option for best performance.

If you are joining the proceeding by phone ONLY:

- Dial-in: _____
- Meeting ID: _____

attend and give testimony at the following proceeding in the above styled and captioned case pending in the court set forth above:

DEPOSITION

HEARING

TRIAL

to produce and permit inspection and copying of documents or tangible things to be used as evidence in this case.

In the event that you have questions about the procedure, do not have the equipment necessary, or means to log on to the internet for a remote deposition, please contact the court reporter listed in the deposition notice or our office immediately upon receipt of this subpoena so that alternate arrangements can be made for you to comply with this subpoena.

This subpoena was issued at the instance of (party's name): _____ (*Plaintiff*), who are represented by the following attorneys of record:

Attorney: Paul N. Gold / Donna M. Aversano
Firm: Aversano & Gold
Address: 933 Studewood, 2nd Floor, Houston, TX 77008
Phone / Fax: (713) 426-5600 / (713) 426-5601
Email: pgold@agtriallaw.com / daversano@agtriallaw.com

Enforcement of Subpoena. Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the Court from which the subpoena is issued or a district Court in the county in which the subpoena is served, and may be punished by fine or confinement, or both. Signed by the person issuing this subpoena.

ATTACH \$10 WITNESS FEE TO SUBPOENA

Paul N. Gold / Donna M. Aversano
Attorneys for Plaintiff

In Texas, a subpoena may be issued by the clerk of the appropriate District County or Justice of the Peace Court, an attorney authorized to practice law in the State of Texas as an officer of the court, or by an officer authorized to take depositions in this State.

ACCEPTANCE OF SERVICE OF SUBPOENA BY WITNESS PER RULE 176 T.R.C.P.

I, the undersigned witness named in the Subpoena acknowledge receipt of a copy thereof, and hereby accept service of the attached Subpoena, and will appear on said date and time as directed in this subpoena.

Rule 176.8(a) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the Court from which the subpoena is issued or a district Court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

SIGNATURE OF WITNESS

DATE

Not executed as to the witness _____
for the following reasons: _____

CAUSE NO. _____

PLAINTIFF

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IN THE DISTRICT COURT

vs.

_____ COUNTY, TEXAS

DEFENDANT

_____ JUDICIAL DISTRICT

**SUBPOENA
RETURN**

Came to hand the _____ day of _____, 2021, at _____ o'clock __.m.
and executed the _____ day of _____, 2021 at _____ o'clock __.m.,
by delivering to the within named _____ in person at
_____ in _____ County, Texas, a true copy
of this Subpoena, and tendering said witness the sum of \$10.00.

By _____
Person who is not a party to the suit,
and is not less than 18 years of age.