

Avoiding Ethical Impropriety Concerns in Virtual Depositions

Protecting the integrity of witness testimony is critical to maintaining trust in the adversary justice system and to help provide fairness to the parties, according to Retired Judge David Brown of Sacramento County Superior Court.

By David I. Brown

A current concern regarding virtual depositions involves counsel and/or the party/witness trying to “game” the examination of a witness through covert coaching. Of course, an attorney has an obligation to prepare his or her client for deposition and may even prepare percipient witnesses (see, e.g., Section 116 of the Restatement of the Law Third, The Law Governing Lawyers). It is incumbent on the practitioner to be familiar with the California Rules of Professional Conduct. Rule 8.4 (based on the American Bar Association (ABA) Model Rules of Professional Conduct) makes clear that “[i]t is professional misconduct for a lawyer to,” among other things:

“(a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional



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misrepresentation (d) engage in conduct that is prejudicial to the administration of justice.”

The comments to the rule make plain that “[a] violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity,” and that “[a] lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections 6101 et seq., or if

the criminal act constitutes ‘other misconduct warranting discipline’ as defined by California Supreme Court case law. (See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].)” “A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption.”

Similarly, the Rule 1.2(d) of the ABA Model Rules makes plain that “[a] lawyer shall not counsel a cli-

ent to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent conduct, but a lawyer may discuss the legal consequences of any proposed course of conduct” and Rule 8.4, echoing the California Rule.

It has been debated whether law is a profession or a business. At the very least, it appears beyond debate that the legal profession refers to lawyers—their training, licensure, ethical responsibilities and client obligations as well as other practice-related matters. The profession is about the zealous, ethical representation of individual clients. Lawyers also enter a social compact to represent society by defending the rule of law. These are not abstract principles, but rather bedrock principles upon which the legal system functions.

As noted, in the virtual deposition context, one primary concern is the coaching of the witness by someone in the room with the witness or through covert electronic means. This is especially concerning where the reporter is also remote. To alleviate these concerns, the witness should be asked to state under oath whether there are other persons present and to identify any such person(s) (the exclusion of non-parties and nonessential persons should be addressed by counsel precedent to the deposition in a written stipulation or addressed to the court/arbitrator by motion). If the person so identified is permitted to attend (e.g., another party or support individual), that per-

son should be required to appear onscreen so that any improper conduct can be identified.

It would appear appropriate to require anyone seeking to participate, wherever they are, to appear on camera. Again, if coaching of the witness is a real concern, counsel may wish to demand in advance of the deposition that the witness appear alone or, in the absence of such an agreement, seek an order from the court to that effect.

The witness should also be required to swear under oath that he or she is not in possession of or utilizing any electronic device (earpiece, cell phone, iPad, etc.) during the deposition testimony. Additionally, questioning may be utilized to elicit possible unethical interference with the process. Where counsel perceives such a concern, questioning the witness is certainly appropriate:

- Is there anyone in the room with you?
- Is anyone other than those in this Zoom deposition able to hear your responses?
- Other than the computer you are using, are there any other electronic devices present in the room? Do you have any program open on your cell phone or laptop other than Zoom?
- Other than through this Zoom program, do you have the ability to communicate with anyone else right now?
- Can you rotate your camera to show us the entire space that you are in?

You might also inquire about notes and whiteboards in the room. Obviously, any materials that might be viewed by the witness may be marked as an exhibit to the deposition. For example, evidentiary rules permit the adverse party an opportunity to review such materials that the witness has used to refresh their recollection in order to cross-examine the witness.

Undoubtedly, a witness could lie in responding to these questions, but the risks of such prevarication can be high—perjury and other evidentiary sanctions, not to mention potential professional consequences for the lawyer whose client tried to game the system, with the lawyer’s participation. Protecting the integrity of witness testimony is critical to maintaining trust in the adversary justice system and to help provide fairness to the parties.

Hon. David I. Brown is an arbitrator, mediator and special master/referee at JAMS. He handles insurance, personal injury and torts, construction, construction defect, real property, professional liability, business and commercial, and employment disputes.

