Zoom Depositions—Practical Pointers

Presented By:

Pablo Mose, Attorney
Rebein Brothers PA

Zoom Depositions and Hearings

Tips & Tricks

Ellis County Bar Association -- 2021

Core Authority on Remote Discovery and Hearings

- Federal Rules of Civil Procedure & Comparable Kansas Statutes
  - Rule 26 (K.S.A. § 60-226) – Discovery Generally
    - Note difference in Disclosure requirements
  - Rule 30 (K.S.A. § 60-230) – Depositions

“Remote means”

- FRCP 30 provides:
  - (4) By Remote Means. The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.
- Notice still required:
  - “A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address.”

Local Rules and State Guidance

- 2020 Spec. Sess. House Bill 2016, § 24 & 2021 Senate Bill 14
  - Legislative grant of authority to Courts

- 2021-PR-009
  - Most recent Order from 1/26/2021 extending core administrative orders

Key parts of 2020-PR-123 that were extended into 2021:

- “To the extent possible, any hearing related to an essential function must be conducted by two-way telephonic or electronic audio-visual communication. No hearing related to a nonessential function may be conducted except by two-way telephonic or electronic audio-visual communication.”
- “Courts must continue to expand the use of remote hearings as much as possible to reduce any backlog and to dispose of new cases efficiently and safely. All remote hearings must comply with 2020-PR-056. Courts should consider all virtual courtroom standards and guidance posted on the Kansas judicial branch website and any updates that follow.”

Published Court Rulings

- No published court rulings from a March 2021 Westlaw search appear to reject requests for Zoom Depositions or evidentiary hearings. The rulings favoring requests for remote depositions and proceeds all appear to support the use of remote means.
- *Swenson v. GEICO Casualty Company*, 336 F.R.D. 206 (D. Nev. 2020)

  "Plaintiff urges that the depositions should move forward by remote means. . . Defendant argues that the depositions should be halted so that they can take place in person at some future time when the pandemic is no longer an impediment . . . Plaintiff has the better argument. . . courts have overwhelmingly endorsed depositions moving forward by remote means during the pandemic."

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“ . . . while the Court is sympathetic to Learning Resources' preference for an in-person deposition, that preference is outweighed by the risks posed by the COVID-19 pandemic and the hardship that the Walmart defendants will likely experience if their lead counsel is unable to be physically present during Ms. Latham's in-person deposition. Consequently, in its discretion, the Court orders that Ms. Latham's deposition take place via remote videoconference.”

Tips & Tricks from Participation in Zoom Proceedings and Depositions

- Working with a 3rd Party Reporter
  - Who?
  - How?
  - What?
  - Where?

Who all is needed?

- i. Reporter
- ii. Interpreter?
  - 1. Website portal in same language?
- iii. Witness
  - 1. Having cell phone contact number can be important

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

RADAMES MOLINA ALBELO, on behalf of himself and all other persons similarly situated, Plaintiffs, v. EPIC LANDSCAPE PRODUCTIONS, L.C., Defendant.	Case No. 4:17-cv-0454-DGK

SECOND AMENDED NOTICE TO
TAKE DEPOSITION OF OPT-IN PLAINTIFF ERIC LARA

PLEASE TAKE NOTICE that Counsel for Defendant Epic Landscape Productions, L.C., will take the Zoom deposition of Eric Lara on Tuesday, December 29, 2020 beginning at 1:00 p.m. Central Time. The Zoom deposition shall be taken by stenographic means by Veritext Court Reporting, and shall continue from day to day until complete. Interpreting services will be provided and coordinated through Veritext Court Reporting. Zoom information will be provided by The Hodgson Law Firm, LLC.

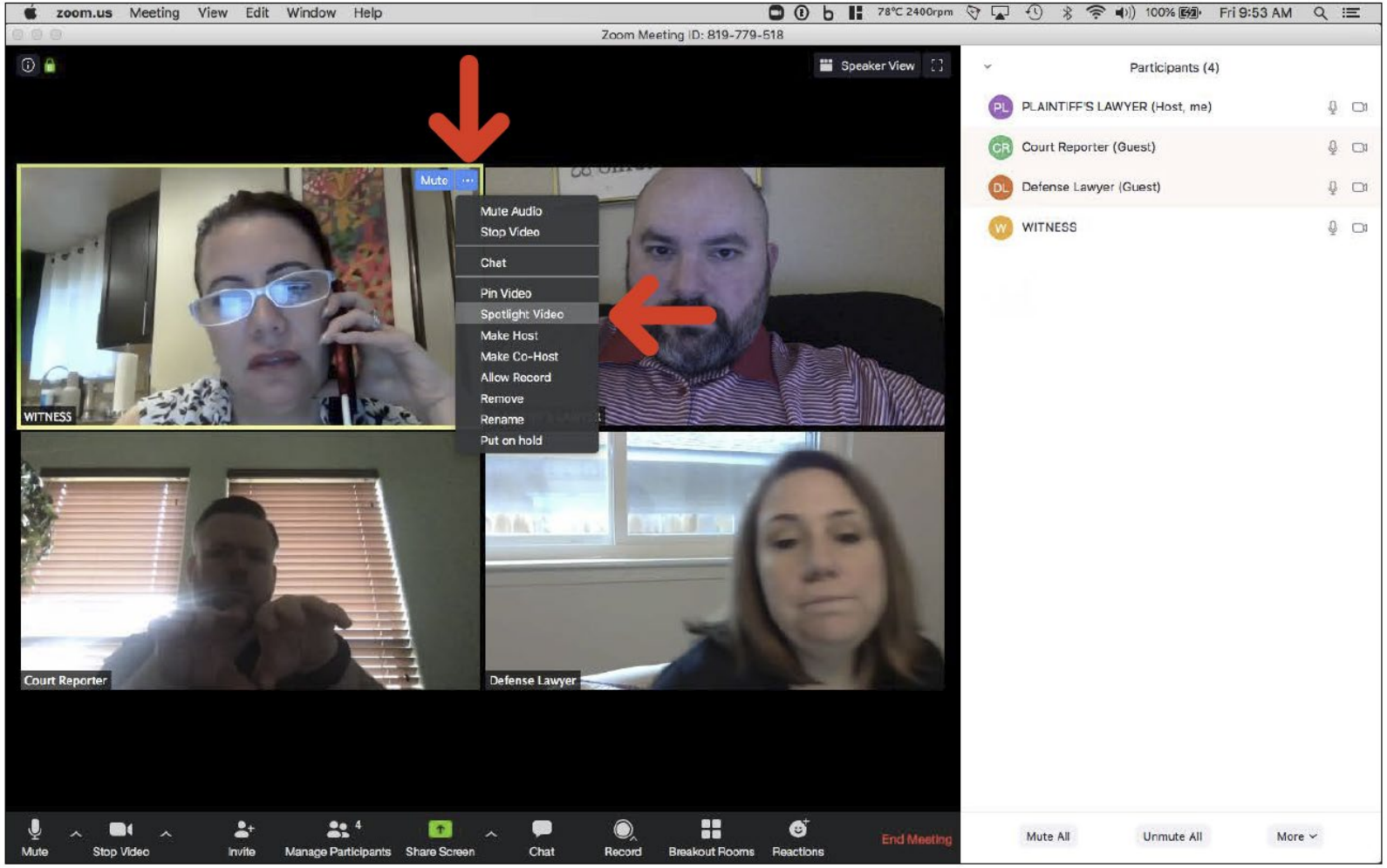
NOTICE IS FURTHER GIVEN that we reserve the right to conduct this Zoom deposition utilizing the secure web-based deposition option afforded by Veritext or in the alternative video teleconferencing (VTC) services offered by Veritext ("Web Deposition") or telephonically only to provide remote access for those parties wishing to participate in the

deposition via the internet and/or telephone. Also, take notice that the court reporter may also be remote via one of the options above for the purposes of reporting the proceeding and may or may not be in the presence of the deponent. Please contact the noticing attorney immediately to advise that it is your desire to appear via this remote participating means so that the necessary credentials, call-in numbers, testing, and information, if necessary, can be provided to you prior to the proceedings.

This deposition will be taken for the purpose of discovery, for use as evidence in this action, for use at trial, or for any other purposes as authorized under applicable statutes and the Federal Rules of Civil Procedure.

Dated this 29th day of December, 2020.

You can isolate a witness in the interface




zoom.us Meeting View Edit Window Help
Fri 9:55 AM
Zoom Meeting ID: 819-779-518
PLAINTIFF'S LAW...
WITNESS
Court Reporter
Defense Lawyer
Intepreter
Cancel the Spotlight Video
WITNESS
Participants (5)
PLAINTIFF'S LAWYER (Host, me)
Court Reporter (Guest)
Defense Lawyer (Guest)
Intepreter (Guest)
WITNESS
Mute
Stop Video
Invite
Manage Participants
Share Screen
Chat
Record
Breakout Rooms
Reactions
End Meeting
Mute All
Unmute All
More

How do participants join?

- Hosted by 3rd party itself?
- Law firm hosting via Zoom?
- Combination or backup if main system fails?

You're Invited to Join a Remote Session Using Veritext Virtual

PLEASE RETAIN THIS EMAIL. IT CONTAINS CRITICAL INFORMATION FOR YOUR REMOTE SESSION.

Albelo,Radames Molina v. Epic Landscape Productions LC | Wednesday, Dec 30 2020 4:30PM (Central Time (US & Canada)) | 4388522 | Luis Castillo

JOINING YOUR SESSION

Connect to Your Session through MyVeritext.

Click “Connect” to launch MyVeritext into your web browser and login with your username and password. Then select the “Live Sessions” button and click “Join Now" to launch your session.

CONNECT

MyVeritext Username:
tim@bertramgraf.com

Note: *If you have not used MyVeritext before you will need to activate your account. After clicking the connect button to the right, please select “Activate Account or Forgot Password”. This will prompt you to set your password prior to joining your session. Please note that your assigned Username is listed in this email under the “Connect” button to the right.*

OTHER INFORMATION

Self Test.

It is recommended that participants test all equipment and the Internet connection that will be used for the actual session at the location where the session will take place. This self test typically takes 3 to 5 minutes.

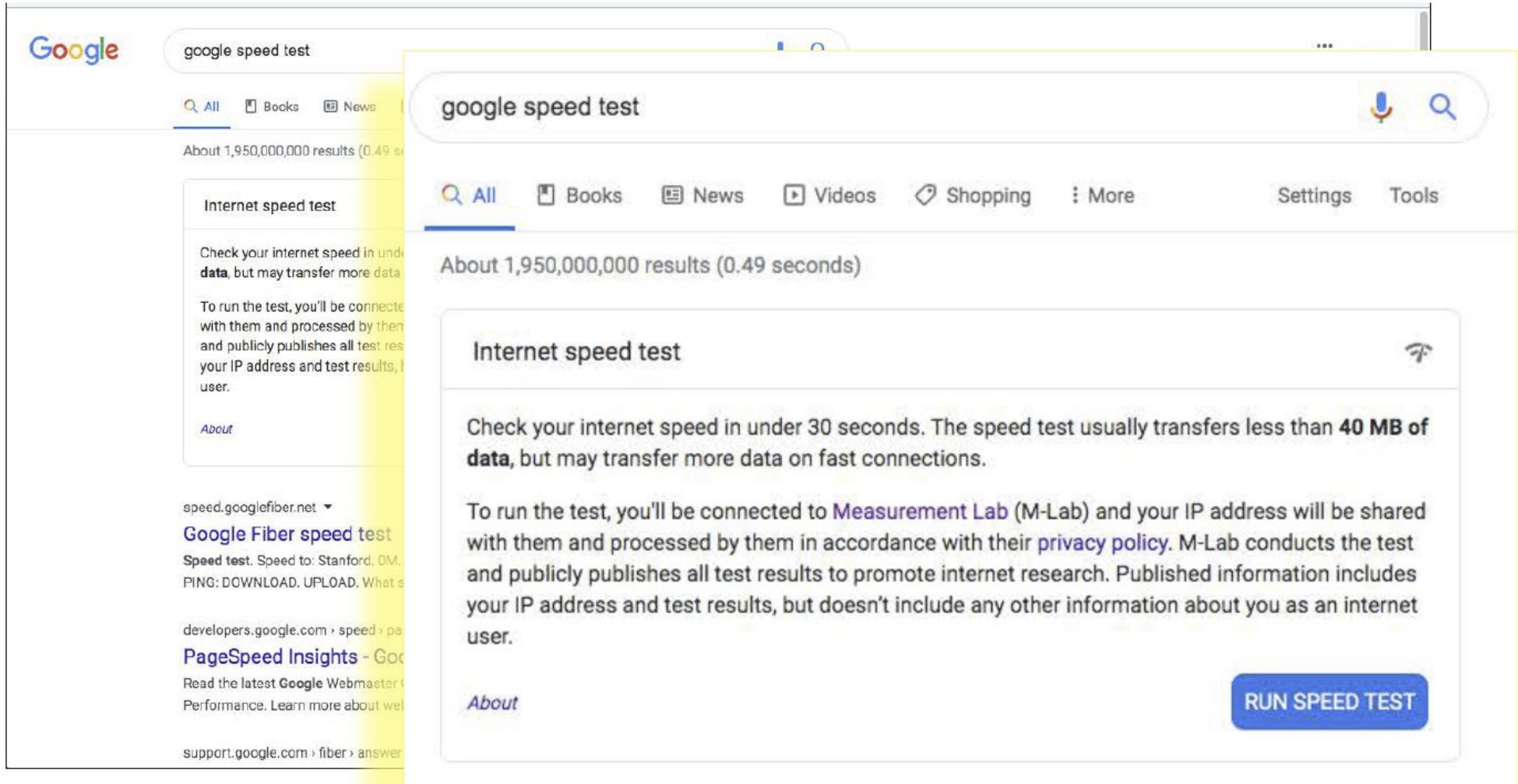
START SELF TEST

Did your system fail?
Contact: 855.440.4861

Have You Ordered Realtime or Exhibit Share.

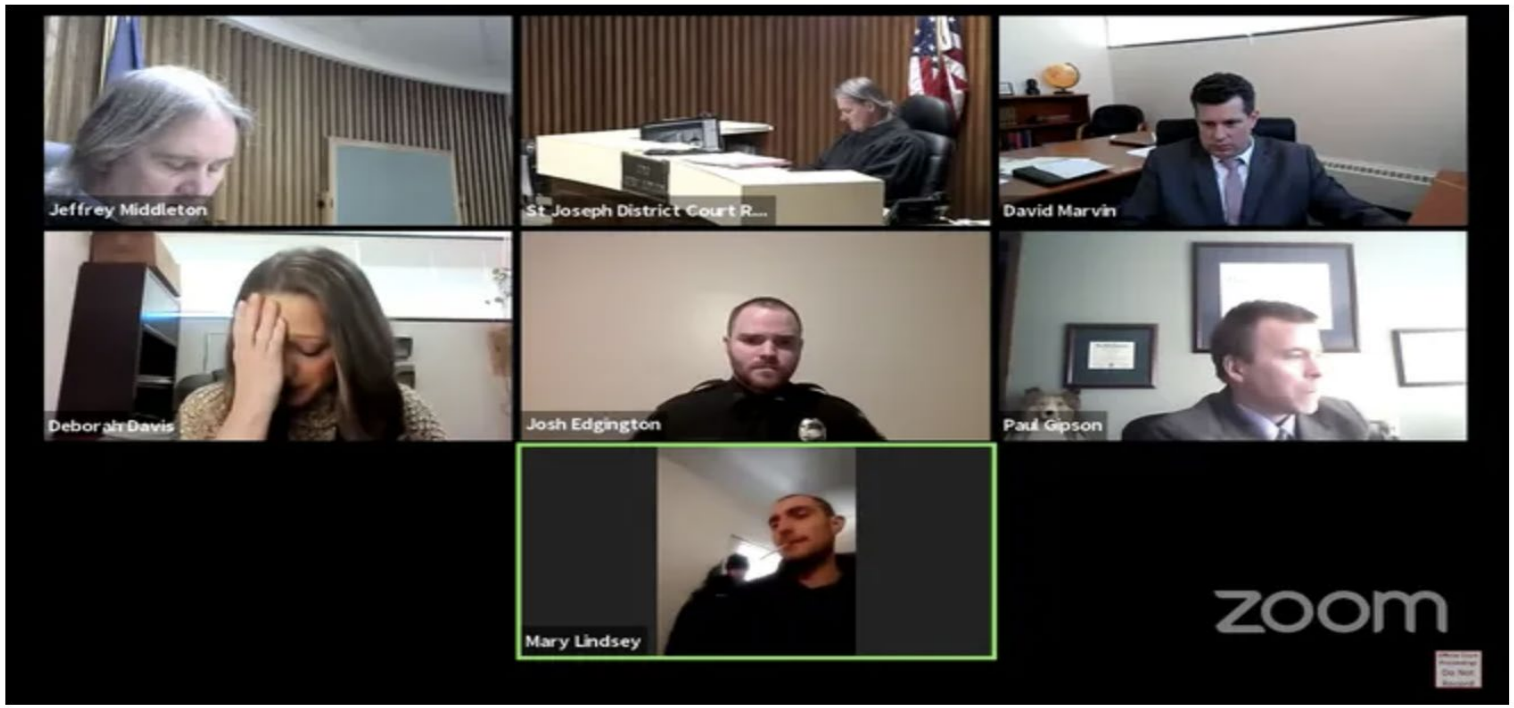
If so, you can expect an email with instructions for further setup.

A decent internet connection.



Where are participants located?

- Other parties nearby?
- Example from criminal case – Defendant and Victim in the same apartment….



Attorney Deborah Davis, left center, reacts during a livestream court proceeding March 2, after it was confirmed the defendant in an assault case was at the same house as the alleged victim, during the live hearing. Davis made her suspicion known to the court during the preliminary examination, after noting the witness' body language. *Provided*

The story continues…

About seven minutes into the proceeding, Deborah Davis, prosecuting attorney and representing Lindsey, said she believed Lindsey and Harris were in close proximity during the livestream, based on Lindsey's answers and body language.

"Your Honor … I have reason to believe that the defendant is in the same apartment as the complaining witness right now, and I am extremely scared for her safety," Davis said. "The fact that she's looking off to the side and he's moving around, I want some confirmation that she is safe before we continue."

Middleton told Harris to go outside with his cell-phone and take a photograph of the house number. Harris declined, saying he was limited by low phone battery and that his device was connected to a charger.A few moments later, Davis said the police were at the door of Lindsey's confirmed location to check on her.

"Your Honor, me and Mary both don't want the no-contact," Harris said. "I ask that be dropped. I'm sorry I lied to you. I knew the cops were outside. I don't know why I..."

Middleton interrupted Harris. "Mr. Harris, my advice is, don't say anything else"

What documents will be used?

- Reporter likely needs documents in advance
- Still good practice to file a deposition notice with a “deuces tecum” request if the other party is in possession of documents that will be reviewed at the deposition

If the remote proceeding is hosted by the Court, remember:

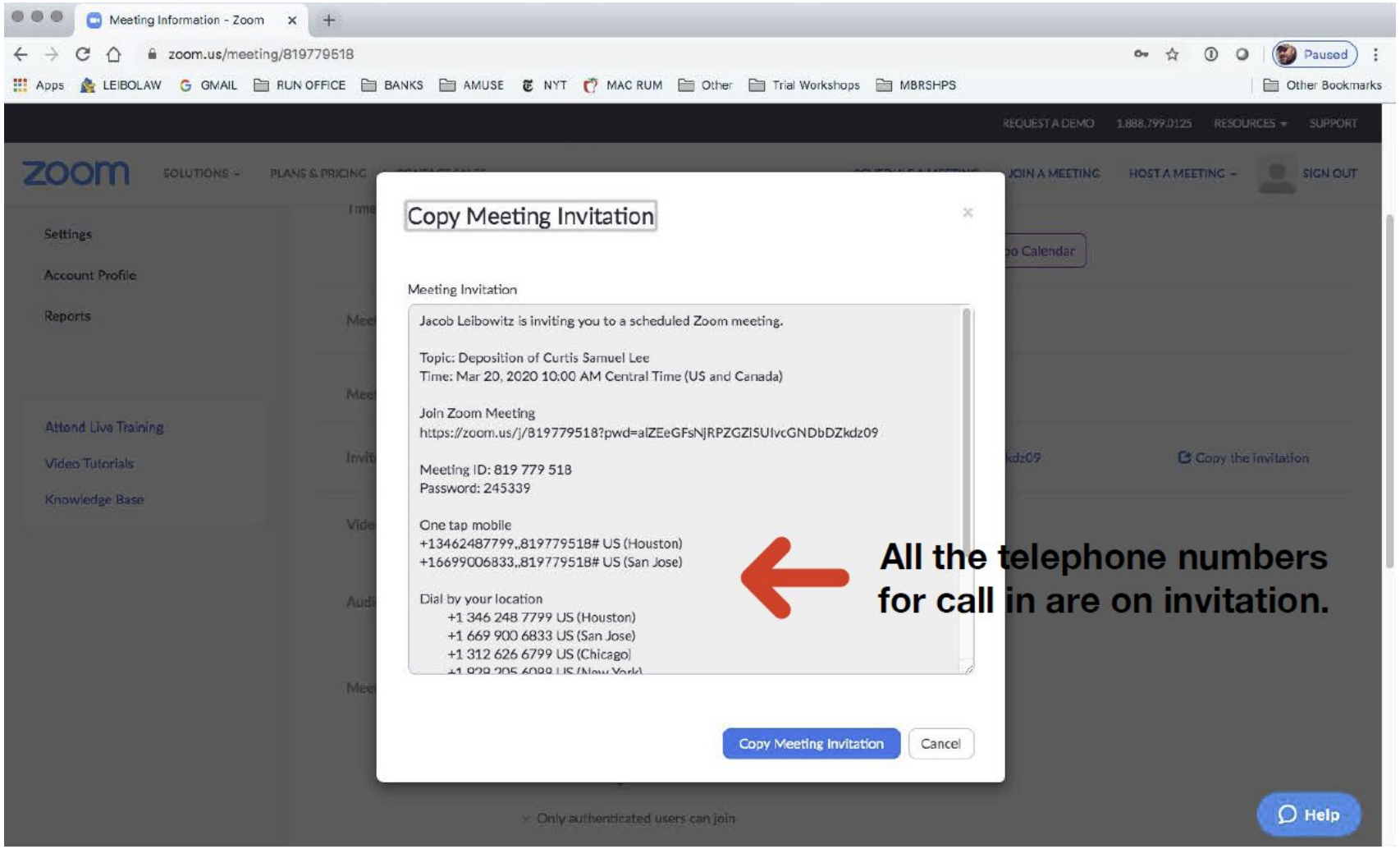
Every court is different!

Figure out logistics in advance!

Items specific to Zoom

- Best practices are for the court reporter and the witness (or anyone with a temperamental internet connection) to use a telephone for their AUDIO connection
  - Phone numbers all work in Zoom email listing

You can always call-in and run audio that way



Before your deposition, organize your exhibits in a folder on your desktop for quick access.

Sharing Exhibits

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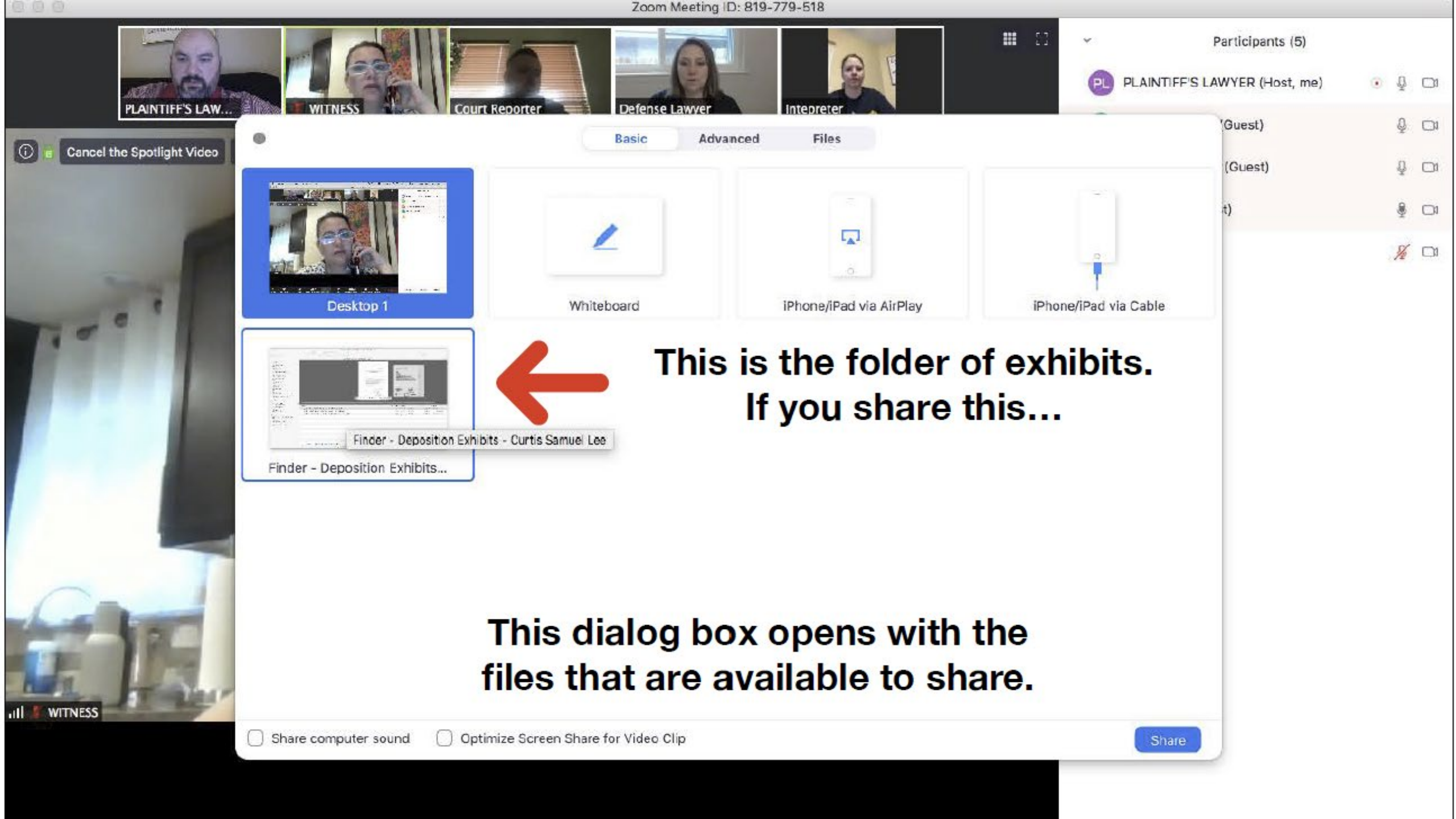
Zoom Meeting ID: 819-779-518
PLAINTIFF'S LAW...
WITNESS
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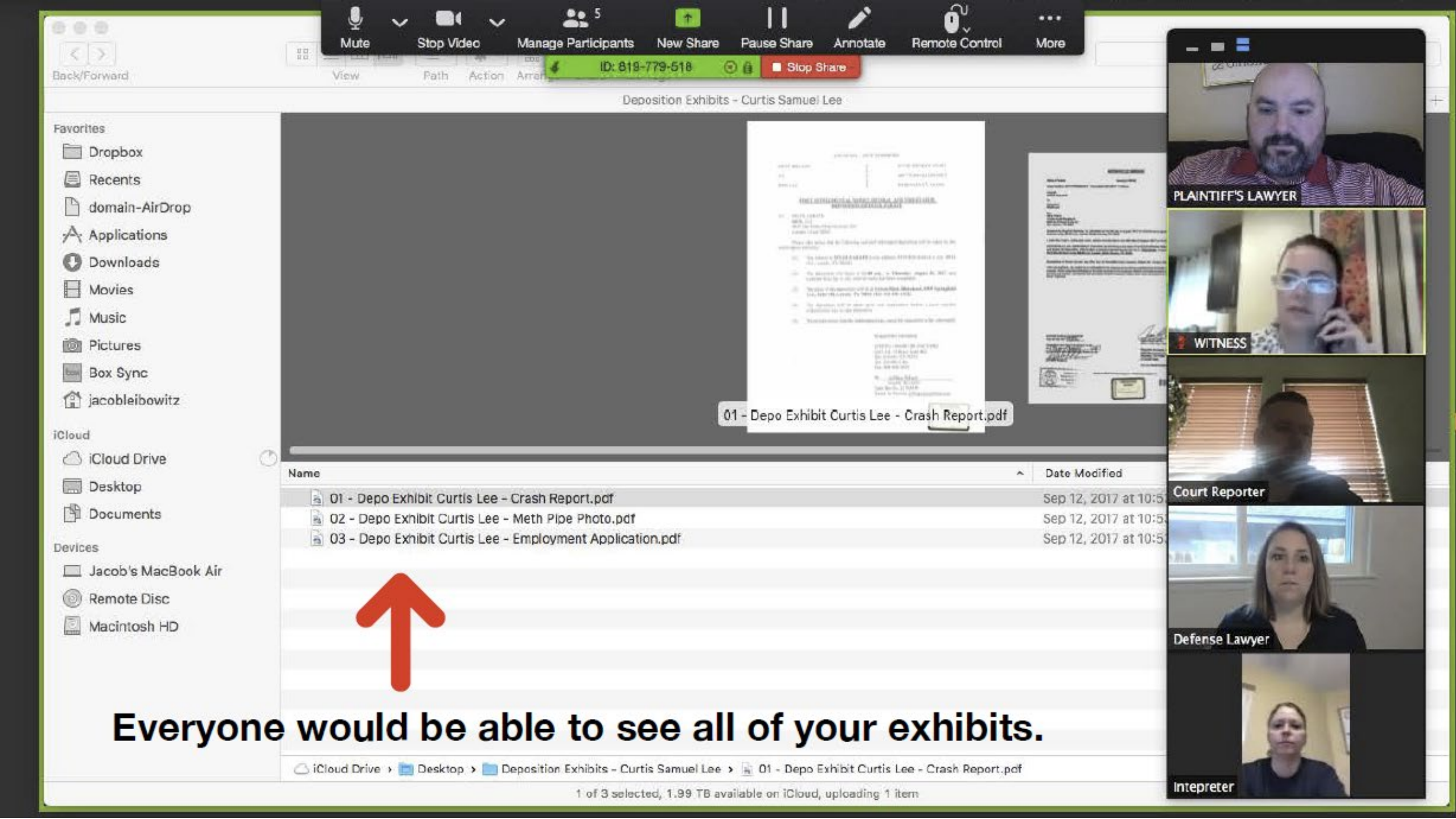
PLAINTIFF'S LAWYER (Host, me)
Cancel the Spotlight Video
Basic
Advanced
Files
Desktop 1
Whiteboard
iPhone/iPad via AirPlay
iPhone/iPad via Cable
Finder - Deposition Exhibits - Curtis Samuel Lee
Finder - Deposition Exhibits...
This is the folder of exhibits.
If you share this...
This dialog box opens with the
files that are available to share.
Share computer sound
Optimize Screen Share for Video Clip
Share
WITNESS


Mute
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New Share
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Devices
Jacob's MacBook Air
Remote Disc
Macintosh HD
01 - Depo Exhibit Curtis Lee - Crash Report.pdf
Name
Date Modified
01 - Depo Exhibit Curtis Lee - Crash Report.pdf
02 - Depo Exhibit Curtis Lee - Meth Pipe Photo.pdf
03 - Depo Exhibit Curtis Lee - Employment Application.pdf
Sep 12, 2017 at 10:5
Sep 12, 2017 at 10:5
Sep 12, 2017 at 10:5
Everyone would be able to see all of your exhibits.
iCloud Drive › Desktop › Deposition Exhibits - Curtis Samuel Lee › 01 - Depo Exhibit Curtis Lee - Crash Report.pdf
1 of 3 selected, 1.99 TB available on iCloud, uploading 1 item
PLAINTIFF'S LAWYER
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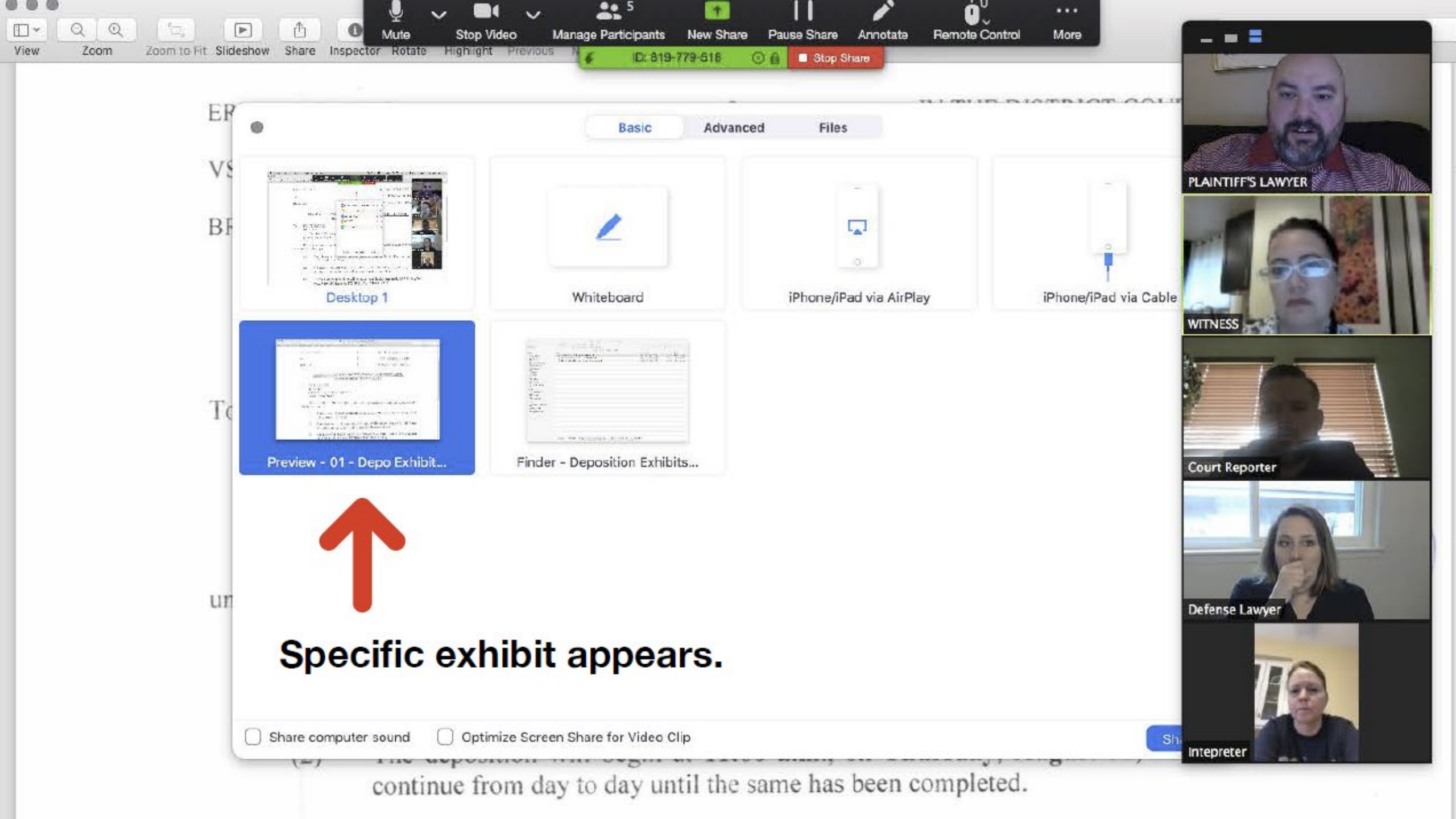
Court Reporter
Defense Lawyer
Intepreter


Mute
Stop Video
Manage Participants
New Share
Pause Share
Annotate
Remote Control
More
ID: 819-779-516
Stop Share
Basic
Advanced
Files
Desktop 1
Whiteboard
iPhone/iPad via AirPlay
iPhone/iPad via Cable
Preview - 01 - Depo Exhibit...
Finder - Deposition Exhibits...
Specific exhibit appears.
Share computer sound
Optimize Screen Share for Video Clip
PLAINTIFF'S LAWYER
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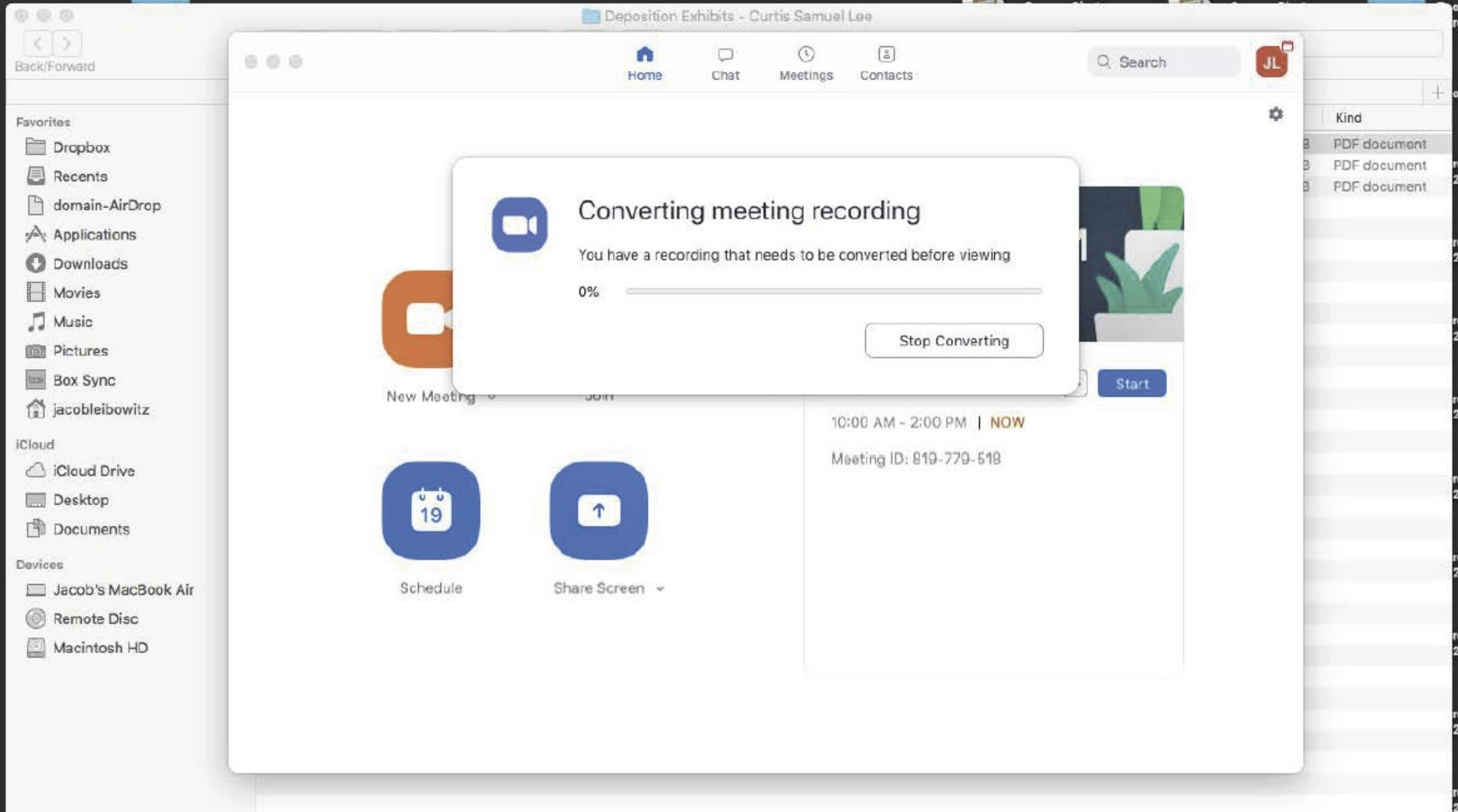
continue from day to day until the same has been completed.

Hard Drive space for recordings

- It took 10 minutes to convert a 10 minute, 122MB recording
- That means you need about 750MB of space on your computer for each hour of video you record


Deposition Exhibits - Curtis Samuel Lee
Back/Forward
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Music
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iCloud
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Jacob's MacBook Air
Remote Disc
Macintosh HD
Kind
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Home
Chat
Meetings
Contacts
Search
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You have a recording that needs to be converted before viewing
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Stop Converting
New Meeting
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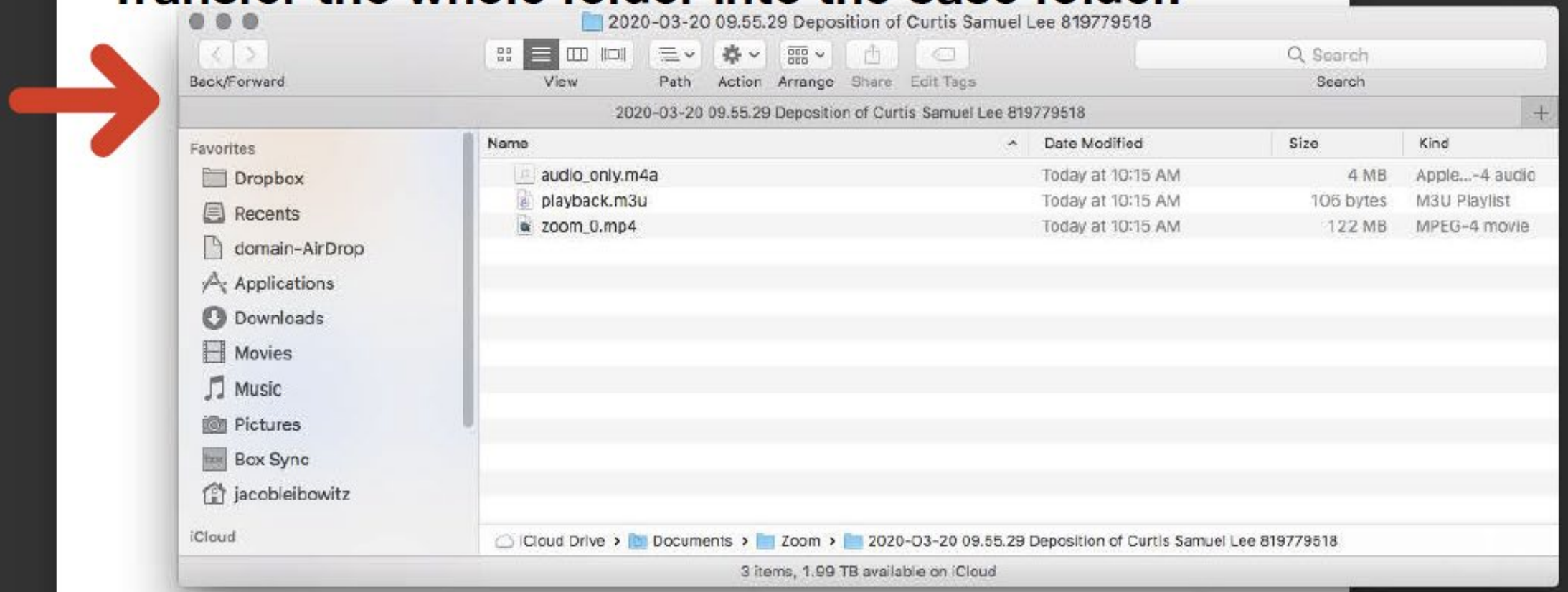
Meeting ID: 819-779-518
19
Schedule
Share Screen

When it's done, a folder like this one appears. Transfer the whole folder into the case folder.



REMOTE DEPOSTIONS AND HEARINGS – ZOOMING INTO TIPS & TRICKS

A. Core Authority on Remote Discovery and Hearings

1. Discovery Rules (very similar to Kansas Rules)
    a. FRCP 26
        i. KSA 60-226
    b. FRCP 30
        i. K.S.A 60-230

2. Local Rules and State Guidance
    a. 2020 Spec. Sess. House Bill 2016, § 24 & 2021 Senate Bill 14
        i. Legislative grant of authority to Courts
    b. 2021-PR-009
        i. Most recent Order from 1/26/2021 extending core administrative orders
        ii. Key parts of 2020-PR-123 that were extended into 2021:

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B. Tips & Tricks from Participation in Zoom Proceedings and Depositions

1. Working with a 3rd Party Reporter

    a. Who all is needed?
        i. Reporter
        ii. Interpreter?
            1. Website portal in same language?
        iii. Witness
            1. Having cell phone contact number can be important
    b. How do participants join?
    c. Where are participants located?
        i. Other parties nearby?
    d. What documents will be used?
        i. Reporter likely needs documents in advance

2. Hosted by The Court
    a. **Every court is different**! Figure out logistics in advance!

3. Items specific to Zoom

    a. Best practices are for the court reporter and the witness (or anyone with a temperamental internet connection) to use a telephone for their AUDIO connection.
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    b. Before you start your deposition, organize your exhibits in a folder on your desktop for quick access.

    c. Sharing Exhibits
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    d. Hard Drive space for recordings
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Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) REQUIRED DISCLOSURES.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report —prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) DISCOVERY SCOPE AND LIMITS.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may

nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) PROTECTIVE ORDERS.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) TIMING AND SEQUENCE OF DISCOVERY.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Early Rule 34 Requests.

Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(3) *Sequence.* Unlessthe parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) SUPPLEMENTING DISCLOSURES AND RESPONSES.

(1) *In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) *Expedited Schedule.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) SIGNING DISCLOSURES AND DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting,

or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Notes

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 29, 2015, eff. Dec. 1, 2015.)

Notes of Advisory Committee on Rules—1937

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§606–607; Calif.Code Civ.Proc. (Deering, 1937) §2021; 1 Colo.Stat.Ann. (1935) Code Civ.Proc. §376; Idaho Code Ann. (1932) §16–906; Ill. Rules of Pract., Rule 19 (Ill.Rev.Stat. (1937) ch. 110, §259.19); Ill.Rev.Stat. (1937) ch. 51, §24; 2 Ind.Stat.Ann. (Burns, 1933) §§2–1501, 2–1506; Ky.Codes (Carroll, 1932) Civ.Pract. §557; 1 Mo.Rev.Stat. (1929) §1753; 4 Mont.Rev.Codes Ann. (1935) §10645; Neb.Comp.Stat. (1929) ch. 20, §§1246–7; 4 Nev.Comp.Laws (Hillyer, 1929) §9001; 2 N.H.Pub.Laws (1926) ch. 337, §1; N.C.Code Ann. (1935) §1809; 2 N.D.Comp.Laws Ann. (1913) §§7889–7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§11525–6; 1 Ore.Code Ann. (1930) Title 9, §1503; 1 S.D.Comp.Laws (1929) §§2713–16; Tex.Stat. (Vernon, 1928) arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) §104–51–7; Wash. Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) §308–8; W.Va.Code (1931) ch. 57, art. 4, §1. Compare [former] Equity Rules 47 (Depositions—To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, Sections 863, 865, 866, 867—Cross-Examination); 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, [former] §§639 (Depositions *de bene esse;* when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem;* how taken). These statutes are superseded insofar as they differ from this and subsequent rules. U.S.C., Title 28, [former] §643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) *Notice in General.* A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing Documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) *Method of Recording.*

(A) *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) *Additional Method.* With 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. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) *By Remote Means.* The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) *Officer's Duties.*

(A) *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must

designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) *Participating Through Written Questions.* Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.*

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

(e) REVIEW BY THE WITNESS; CHANGES.

(1) *Review; Statement of Changes.* On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes Indicated in the Officer's Certificate.* The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) CERTIFICATION AND DELIVERY; EXHIBITS; COPIES OF THE TRANSCRIPT OR RECORDING; FILING.

(1) *Certification and Delivery.* The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and Tangible Things.*

(A) *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the Transcript or Recording.* Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of Filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

Notes

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Mar. 1, 1971, eff. July 1, 1971; Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 29, 2015, eff. Dec. 1, 2015.)

Notes of Advisory Committee on Rules—1937

Note to Subdivision (a). This is in accordance with common practice. See U.S.C., Title 28, [former] §639 (Depositions *de bene esse;* when and where taken; notice), the relevant provisions of which are incorporated in this rule; Calif.Code Civ.Proc. (Deering, 1937) §2031; and statutes cited in respect to notice in the *Note* to Rule 26(a). The provision for enlarging or shortening the time of notice has been added to give flexibility to the rule.

Note to Subdivisions (b) and (d). These are introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26.

336 F.R.D. 206
United States District Court, D. Nevada.

Sean SWENSON, Plaintiff(s),

v.

GEICO CASUALTY COMPANY, Defendant(s).

Case No.: 2:19-cv-01639-JCM-NJK

Signed August 19, 2020

Synopsis

Background: Insured brought action against automobile liability insurer, alleging breach of contract arising from insurer's failure pay policy limit for underinsured motorist benefits under his policy. Insurer moved for protective order to prevent insured from taking depositions by remote means.

The District Court, Nancy J. Koppe, United States Magistrate Judge, held that defendant failed to make particularized showing of need to support issuance of protective order.

Motion denied.

Attorneys and Law Firms

***207** Ashley Marie Ganier, Bradley S. Mainor, Joseph J. Wirth, Mainor Wirth, LLP, Las Vegas, NV, for Plaintiff.

Wade M. Hansard, Jonathan W. Carlson, Renee Maxfield, McCormick, Barstow, Sheppard, Wayte & Carruth, LLP, Las Vegas, NV, for Defendant.

Order

[Docket No. 42]

Nancy J. Koppe, United States Magistrate Judge

Pending before the Court is Defendant's motion for protective order. Docket No. 42. Plaintiff filed a response in opposition. Docket No. 43. Defendant filed a reply. Docket No. 44. The motion is properly resolved without ***208** a hearing. *See* Local Rule 78-1. For the reasons discussed below, Defendant's motion for protective order is hereby **DENIED**.

I. BACKGROUND

The instant action arises from an insurance dispute.[1] On July 19, 2017, a nonparty driver struck and injured Plaintiff. Plaintiff incurred medical expenses totaling $39,460.24. His treating physician also recommended a surgery costing $109,750. Plaintiff received the $50,000 policy limit from the nonparty driver's insurance carrier and, on May 14, 2018, Plaintiff demanded the $100,000 policy limit for underinsured motorist benefits under his policy with Defendant GEICO.

1 This background section is derived largely from United States District Judge James C. Mahan's order resolving Defendant's motion to dismiss. Docket No. 36. As such, citations will generally not be provided herein.

Roughly two weeks after receiving Plaintiff's demand, GEICO requested a recorded statement, which Plaintiff gave on June 20, 2018. When Plaintiff gave his recorded statement, a GEICO claims adjuster indicated that an independent medical examination ("IME") was necessary and also requested Plaintiff's diagnostic studies. Plaintiff claims GEICO "failed to follow through with obtaining the diagnostic studies." Plaintiff provided at least one of his diagnostic studies to GEICO on October 1, 2018. On October 8, 2018, Plaintiff scheduled the IME with Dr. Daniel Lee, which he attended on November 26, 2018.

After attending the IME, Plaintiff followed up with GEICO regarding his claim several times. On December 21, 2018, the adjuster informed Plaintiff that GEICO had received Dr. Lee's report. GEICO offered plaintiff $5,000 based on Dr. Lee's opinion that Plaintiff was misdiagnosed. Plaintiff alleges that disregarding his treating physician's surgery recommendation and offering $5,000 was unreasonable. Plaintiff sent GEICO and Dr. Lee a rebuttal report. Plaintiff then followed up with GEICO regarding his claim. GEICO's $5,000 offer did not change.

On May 21, 2019, Plaintiff brought suit in state court for claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of Nevada's Unfair Claims Practices Act. Docket No. 1-1.[2] On September 19, 2019, the case was removed to federal court. Docket No. 1. On November 1, 2019, the Court entered a scheduling order setting a discovery cutoff of March 23, 2020. Docket No. 18.

The discovery cutoff has been extended three times and is currently set for September 28, 2020. Docket No. 37.

2 Plaintiff initially included the claims adjusters as defendants, but later agreed to dismiss them. *See* Docket No. 29.

The parties are now before the Court on a dispute as to whether depositions should move forward in light of the COVID-19 pandemic or whether such depositions should be stayed for an indefinite period of time until conditions have improved.

II. STANDARDS

"[B]road discretion is vested in the trial court to permit or deny discovery." *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002); *see also Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998).

"The discovery process in theory should be cooperative and largely unsupervised by the district court." *Sali v. Corona Reg. Med. Ctr.*, 884 F.3d 1218, 1219 (9th Cir. 2018). Nonetheless, a party from whom discovery is sought may move for a protective order to prevent annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Civ. P. 26(c)(1). The party seeking issuance of a protective order bears the burden of persuasion. *U.S. E.E.O.C. v. Caesars Entm't, Inc.*, 237 F.R.D. 428, 432 (D. Nev. 2006) (citing *Cipollone v. Liggett Grp.*, 785 F.2d 1108, 1121 (3d Cir. 1986)). Such a burden is carried by demonstrating a particular need for protection supported by specific facts. *Id.* To that end, courts "insist[ ] on a particular and specific demonstration of fact, as distinguished from conclusory statements," to issue a protective order. *Twin City Fire Ins. Co. v. Employers Ins. of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989). Broad allegations of harm, unsubstantiated ***209** by specific examples or articulated reasoning, are insufficient. *Caesars Entertainment*, 237 F.R.D. at 432. A showing that discovery may involve some inconvenience or expense is likewise insufficient to obtain a protective order. *Turner Broad. Sys., Inc. v. Tracinda Corp.*, 175 F.R.D. 554, 556 (D. Nev. 1997).[3]

3 These standards are effectively the same as those applicable to motions to compel discovery, for which the party seeking to avoid discovery bears the burden of persuasion and must make a showing as outlined herein. *See V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 306, 309 (D. Nev. 2019); *see also* Fed. R. Civ. P. 37(a)(5)(B) (upon denying a motion to compel discovery, courts may instead issue a protective order authorized under Rule 26(c)).

District courts possess "wide discretion to determine what constitutes a showing of good cause and to fashion a protective order that provides the appropriate degree of protection." *Grano v. Sodexo Mgmt., Inc.*, 335 F.R.D. 411, 414 (S.D. Cal. Apr. 24, 2020). Where grounds for a protective order have been established, courts have a variety of options to rectify the situation, including preventing the discovery or specifying the terms on which the discovery will be conducted. Fed. R. Civ. P. 26(c)(1)(A), (B).

In-person depositions have been standard operating practice,[4] but the rules also provide courts with the authority to order a deposition to take place by telephone or other remote means if the circumstances so warrant. Fed. R. Civ. P. 30(b)(4). Generally, leave to take depositions by remote means should be granted liberally. *Brown v. Carr*, 253 F.R.D. 410, 412 (S.D. Tex. 2008); *see also Lopez v. CIT Bank, N.A.*, Case No. 15-cv-00759-BLF (HRL), 2015 WL 10374104, at *2 (N.D. Cal. Dec. 18, 2015) (citing case law from within the Ninth Circuit). Analyzing whether to permit remote depositions generally consists of two steps. First, the proponent must advance a legitimate reason for seeking a remote deposition. *Jahr v. IU Int'l Corp.*, 109 F.R.D. 429, 431 (M.D.N.C. 1986). Second, if that foundational showing is made, then the burden shifts to the opposing party to make a "particularized showing" that conducting the deposition by remote means would be prejudicial. *United States v. $160,066.98 from Bank of Am.*, 202 F.R.D. 624, 629 (S.D. Cal. 2001) (collecting cases).

4 To be more precise, in-person depositions have been the standard operating practice in ordinary times. As will be discussed below, "[d]ue to the COVID-19 pandemic, conducting depositions remotely has become the 'new normal.' " *Grupo Petrotemex, S.A. de C.V. v. Polymetrix A.G.*, Case No. 16-cv-2401 (SRN/HB), 2020 WL 4218804, at *2 (D. Minn. July 23, 2020) (quoting *In re Broiler Chicken Antitrust Litig.*, Case No. 16-cv-08637, 2020 WL 3469166, at *5 (N.D. Ill. June 25, 2020)).

Courts possess wide discretion in determining the manner for taking depositions, including whether they should take place by remote means. *Learning Res., Inc. v. Playgo Toys Enters. Ltd.*, 335 F.R.D. 536, 537-38 (N.D. Ill. June 16, 2020); *see also Hyde & Drath v. Baker*, 24 F.3d. 1162, 1166 (9th Cir. 1994) (addressing discretion with respect to time and place of depositions). As with the Federal Rules of Civil Procedure more generally, courts are mindful to construe Rule 30(b)(4)

in a manner that secures the just, speedy, and inexpensive determination of the case. *See United States v. K.O.O. Constr., Inc.*, 445 F.Supp.3d 1055, 1056-57 (S.D. Cal. May 8, 2020).

III. ANALYSIS

The dispute currently before the Court arises out of Plaintiff's notices for depositions of two claims adjusters and for a Rule 30(b)(6) corporate deponent. Docket Nos. 42-1, 42-2, 42-3. The parties agree that these depositions cannot take place in person right now given the health concerns arising out of the current pandemic, as well as the governmental and personal restrictions in place to curtail the spread of the COVID-19 virus. The parties, however, dispute the proper course to take in light of the inability to conduct in-person depositions at this time. Plaintiff urges that the depositions should move forward by remote means. *See* Resp. at 3. Defendant argues that the depositions should be halted so that they can take place in-person at some future time when the pandemic is no longer an impediment to normal ***210** litigation practices. *See, e.g.*, Mot. at 6-7. Plaintiff has the better argument.

"The Court is mindful of the unprecedented magnitude of the COVID-19 pandemic and the extremely serious health risks it presents." *United States v. Boatwright*, —— F. Supp. 3d ——, ——, 2020 WL 1639855, at *5 (D. Nev. Apr. 2, 2020). At the same time, mere reference to the pandemic is not a golden ticket that provides the movant admission into the chocolate factory. This general proposition holds true for requests to avoid depositions. "While the court is sympathetic to the challenges facing the legal community during this global pandemic—not unlike the rest of society, attorneys and litigants are adapting to new ways to practice law, including preparing for and conducting depositions remotely." *Newirth v. Aegis Senior Communities LLC*, Case No. 16-cv-03991-JSW (RMI), 2020 WL 4459120, at *1 (N.D. Cal. May 27, 2020). Neither party cites case law from this District, but other courts within the Ninth Circuit routinely highlight remote depositions as an effective and appropriate means to keep cases moving forward notwithstanding pandemic-related restrictions. *See K.O.O. Construction*, 445 F.Supp.3d at 1056-57 (collecting cases); *Grano*, 335 F.R.D. at 414-15 n.5 (collecting cases); *see also Christensen v. Goodman Distrib. Inc.*, Case No. 2:18-cv-02776-MCE-KJN, 2020 WL 4042938, at *5 n.3 (E.D. Cal. July 17, 2020); *Highlander Holdings, Inc. v. Fellner*, Case No. 3:18-cv-1506-AHG, 2020 WL 3498174, at *9 (S.D. Cal. June 29, 2020); *Lundquist v. First Nat'l Ins. Co. of Am.*, Case No. 18-5301 RJB, 2020 WL 3266225, at *2 (W.D. Wash. June 17, 2020); *Jammeh v. HNN Assocs., LLC*, Case No. C19-0629JLR, 2020 WL 3000775, at *3 n.3 (W.D. Wash. June 4, 2020); *Newirth*, 2020 WL 4459120, at *1; *Jae Props., Inc. v. Amtax Holdings 2001-XX, LLC*, Case No.: 19cv2075-JAH-LL, 2020 U.S. Dist. Lexis 83418, at *4-7 (S.D. Cal. May 12, 2020); *Ogilvie v. Thrifty PayLess Inc.*, Case No. C18-0718JLR, 2020 WL 2630732, at *2 (W.D. Wash. May 12, 2020); *Cavanaugh v. Cty. of San Diego*, Case No. 18cv2557-BEN-LL, 2020 U.S. Dist. Lexis 80792, at *3 (S.D. Cal. May 7, 2020); *In re Outlaw Labs, LP Litig.*, Case No. 19CV840 GPC, 2020 WL 2111920, at *5 n.6 S.D. Cal. May 4, 2020; *Planned Parenthood of Great Nw. and the Haw. Islands v. Wasden*, Case No. 1:18-CV-00555-BLW, 2020 WL 1976641, at *4 (D. Id. Apr. 24, 2020); *Velicer v. Falconhead Capital LLC*, Case No. C19-1505 JLR, 2020 WL 1847773, at *2 (W.D. Wash. Apr. 13, 2020). In short, vague reference to pandemic-related restrictions does not substitute for the required factual showing specifically tailored to the pending case as is necessary to succeed on a motion for protective order, and courts have overwhelmingly endorsed depositions moving forward by remote means during the pandemic.

Given the similarities to the issues presented in this case, the Court finds the recent analysis by United States Magistrate Judge Barbara L. Major to be particularly instructive. *See Grano*, 335 F.R.D. 411. In that case, the plaintiff and one of the defendants sought to move forward with depositions by video, but another defendant resisted by arguing that pandemic-related restrictions warranted delaying depositions outright on the hope that conditions might improve in the short term to allow for in-person depositions. *See id.* at 412-13. The movant attempted to establish undue burden and prejudice by throwing the kitchen sink at the Court:

> Sodexo argues that there is good cause for the requested relief because (1) circumstances have changed since the [case management conference] and the worsening of the COVID-19 pandemic has led to additional restrictions on businesses and individuals throughout the country, (2) not granting the relief would unfairly prejudice Sodexo as Sodexo is the only party "that must prepare for depositions with one hand tied behind its back[,]" (3) preparing for and conducting depositions via videoconference "is unworkable[,]" (4) Ms. Almedom requires an interpreter, does not have reliable Wi-Fi access or a device with a camera, and does not have a private space at her place of employment where she can meet, (5) Mr. Bowser's deposition preparation will be document intensive, he is in a vulnerable demographic, and refuses to meet with counsel in person, (6) Ms. ***211** Snyder is exceptionally busy right now responding to the COVID-19 pandemic, (7) Sodexo's

lead counsel are all in a vulnerable demographic, (8) "gathering, reviewing, and providing pertinent documents to the witnesses ha[s] become very difficult in the current climate[,]" and (9) conducting depositions via videoconference will be "cumbersome."

Id. at 413. Judge Major rejected each of these contentions. With respect to the particular logistical objections that video depositions are "unworkable" or "cumbersome," Judge Major was unmoved given the resources and training available to ensure video depositions proceed with limited inconvenience. *Id.* at 414-15. With respect to the health concerns raised, Judge Major flatly rejected reliance on such concerns because "the remote deposition structure eliminates those concerns." *Id.* at 415-16 n.4. In short, Judge Major's decision makes clear that there has been widespread use of video depositions during the pandemic and that video depositions are an effective tool to keep cases moving forward in the current climate. Hence, the motion for protective order was denied and depositions were ordered to move forward by remote means.

The arguments advanced in Defendant's motion for protective order in this case track closely with the arguments rejected by Judge Major. Defendant's motion is predicated on assertions that pandemic-related restrictions impede travel and "preclude[ ] GEICO's Counsel's ability to adequately prepare and defend GEICO personnel in person, for and at, their depositions." Mot. at 3. Without meaningful explanation, the motion then raises the "burden, hardship[,] and inequity" in moving forward with depositions by remote means as doing so would "irreparably harm GEICO's defenses" and would "unnecessarily place[ ] lives at risk." *Id.* at 6. The motion challenges video depositions as "half-measures" that cannot "ever be as effective as in-person" depositions. *Id.* Defendant points to the fact that at least one deponent is in a "high-risk" category and that remote depositions are unsafe in that they would "likely" involve travel to a court reporter's office. *Id.* at 7. Given these assertions, the motion indicates that the "only logical recourse" is to prohibit video depositions and to instead stop depositions altogether. *Id.* The Court is unpersuaded.

The Court begins by analyzing whether there are legitimate reasons for Plaintiff's desire to take depositions remotely. Legitimate reasons plainly exist. As numerous courts have recognized, "the physical distancing orders related to the current pandemic are a legitimate reason for holding depositions remotely." *Cavanaugh*, 2020 U.S. Dist. Lexis 80792, at *3; *see also Broiler Chicken*, 2020 WL 3469166, at *7 (finding pandemic conditions justify a request for conducting depositions remotely and that such reason transcends any particular deposition).

Plaintiff having met the initial burden in the inquiry, the key analytical issue is then whether Defendant has established grounds to prevent the remote depositions. Defendant fails to meet its burden. The overarching problem with Defendant's position is that it is based on speculation and assumption rather than meaningful explanation supported by a factual showing or legal authority. By way of example, Defendant contends that the deponents' safety will be at risk because they would be required to travel to a court reporter's office for the video depositions. Mot. at 7. Defendant presents no citation to legal authority to support the foundation of this argument, which is that the deponent and the court reporter must always be physically present in the same room. The case law is to the contrary. *E.g., Grano*, 335 F.R.D. at 414 n.5 (collecting decisions issued during the pandemic that a deposition will be construed as being conducted "before" an officer so long as the officer is connected to the deposition by remote means; physical presence is not required).[5] In short, holding depositions remotely ***212** entirely "eliminates" the safety concerns identified by Defendant here. *E.g., id.* at 415-16 n.4. Similarly, the motion speculates that remote depositions are cumbersome and are otherwise insufficient substitutes for in-person depositions. *See* Mot. at 5, 6. Defendant presents no citation to legal authority supporting this position,[6] nor any factual showing supporting this position. Again, the case law is the contrary. *E.g., Grano*, 335 F.R.D. at 414-15; *K.O.O. Construction*, 445 F.Supp.3d at 1056-57 (collecting cases that the need to use voluminous and highly detailed exhibits does not establish prejudice for video deposition).[7] In short, ample resources exist for counsel to prepare themselves to proceed by video to facilitate the smooth operation of a remote deposition. *E.g., Grano*, 335 F.R.D. at 414-15. Hence, none of the arguments advanced by Defendant is persuasive. Having failed to make a particularized showing of need, Defendant has not met its burden to support issuance of a protective order prohibiting Plaintiff from taking the depositions at issue by remote means.

5 Even absent this case law, the motion provides no explanation why the parties could not stipulate that physical presence of the court reporter was unnecessary. *See* Fed. R. Civ. P. 29(a) (giving parties a broad ability to stipulate to deposition procedures).

6 The motion points to one case as supporting this argument. *See* Mot. at 5 (citing *Testone v. Barlean's*

Organic Oils, LLC, Case No. 19-cv-169 JLS, 2020 WL 2838689, at *2 S.D. Cal. May 29, 2020). The reliance on that case, however, is misplaced. Although the parties there had presented competing arguments regarding the appropriateness of video depositions, *see Testone*, 2020 WL 2838689, at *2, the court did not make any findings on the issue because it instead stayed the case to avoid potentially duplicative discovery in the event a pending motion to disqualify counsel was granted, *id.*

7 The Court rejects Defendant's assertion that its preference for in-person depositions constitutes grounds for a protective order. "If the lack of being physically present with the witness were enough prejudice to defeat the holding of a remote deposition, then Rule 30(b)(4) would be rendered meaningless." *Rouviere v. DePuy Orthopaedics, Inc.*, Case No. 1:18-cv-04814 (LJL) (SDA), 2020 WL 3967665, at *4 (S.D.N.Y. July 11, 2020).

The Court notes further Plaintiff's argument that the indefinite timeline proffered in the motion for protective order is problematic. *See* Resp. at 2. The discovery cutoff has already been extended three times in this case. *See* Docket Nos. 23, 28, 37. Defendant's motion for protective order seeks to delay the depositions at issue to an unspecified date once "the health and safety concerns due to the pandemic" permit. Mot. at 5. Defendant speculates that this new reality will dawn "most likely [in] only a few months [when] a vaccine becomes available or the number of cases decreases substantially." *Id.* at 6. Defendant provides no basis for its projected timeline, however, and it appears to be based on pure speculation. *Cf. Cavanaugh*, 2020 U.S. Dist. Lexis 80792, at *4. The Court is similarly unable to predict the creation and distribution of an effective vaccine or the ebbs and flows of the spread of the virus in the meantime. Unfortunately, it could well be that pandemic-related restrictions exist for many months to come, in which scenario granting Defendant's motion for protective order would cause extreme delay in this case.[8] "It is not feasible for the Court to extend deposition deadlines until a time when [depositions] can be safely conducted in person because no one knows when that will occur and there are alternatives" in that such depositions can be taken now by remote means. *K.O.O. Construction*, 445 F.Supp.3d at 1056-57; *see also Newirth*, 2020 WL 4459120, at *2.[9] Stated differently, granting Defendant's motion for protective order would run afoul of the mandate to construe the rules in a manner that secures the just, ***213** *speedy*, and inexpensive determination of cases. Fed. R. Civ. P. 1.

8 Assessments from government health officials undermine Defendant's prediction. *E.g., Broiler Chicken*, 2020 WL 3469166, at *8 (collecting such assessments). For example, a chief adviser of the federal government's vaccine program said recently that he was optimistic that a sufficient supply of vaccines for all Americans would be available by the end of 2021 or, possibly, within the first half of 2021. *See* https://www.cnn.com/videos/health/2020/07/30/coronavirus-vaccine-timeline-effectiveness-cohen-lead-bts-vpx.cnn (last viewed August 7, 2020).

9 The Court herein rules only on the arguments presented in the motion that is now pending in this case. Further militating against granting the motion, however, is the fact that Defendant's arguments could be made in nearly every civil case. Accepting Defendant's position would open the door to significant delays in thousands of cases that are currently pending in this courthouse.

Accordingly, Defendant has not met its burden for issuance of a protective order prohibiting Plaintiff from taking depositions by remote means.

IV. CONCLUSION

For the reasons discussed above, Defendant's motion for protective order is **DENIED**.

IT IS SO ORDERED.

All Citations

336 F.R.D. 206, 107 Fed.R.Serv.3d 1035

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335 F.R.D. 536
United States District Court,
N.D. Illinois, Eastern Division.

LEARNING RESOURCES, INC., Plaintiff,
v.
PLAYGO TOYS ENTERPRISES LTD., Sam's West, Inc., Sam's East, Inc., Jet.Com, and Walmart Inc., Defendants.

No. 19-CV-00660
|
Signed June 16, 2020

Synopsis
Background: In copyright infringement action, following copyright owner's notice of in-person deposition, alleged infringers filed motion for entry of an order requiring that deposition be conducted by remote video conference because of health concerns related to the on-going COVID-19 pandemic.

The District Court, Jeffrey Cummings, United States Magistrate Judge, held that health concerns created by the COVID-19 pandemic created good cause for the entry of an order requiring that deposition take place by remote video conference.

Motion granted.

Attorneys and Law Firms

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William T. McGrath, Amy T. Adler, Davis McGrath LLC, Chicago, IL, for Defendants Sam's West, Inc., Sam's East, Inc., Jet.Com, Inc., Walmart Inc.

MEMORANDUM OPINION AND ORDER

Jeffrey Cummings, United States Magistrate Judge

Plaintiff Learning Resources, Inc. filed this copyright infringement action alleging that the Walmart defendants (Walmart Inc., Sam's West, Inc., Sam's East, Inc., and Jet.Com) and Playgo Toys Enterprises Ltd. violated the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, by selling play food items intentionally copied from Learning Resources. Learning Resources has noticed the in-person deposition of Ms. Shelley Latham in Fayetteville, Arkansas, for June 30, 2020. Ms. Latham is a Senior Merchant for Toys for the Walmart defendants and was – according to Learning Resources – "the 'buyer' of (and executive responsible for) the infringing products in this case." (Dckt. #101 at 1). The Walmart defendants do not believe that Ms. Latham's deposition should be conducted in-person because of concerns related to the on-going COVID-19 pandemic. Although Playgo agrees that the deposition need not be conducted in-person, Learning Resources insists that it must be. Consequently, the Walmart defendants have filed a motion pursuant to Federal Rules of Civil Procedure 26(c) and 30(b)(4) for the entry of an order requiring that Ms. Latham's deposition be conducted by remote videoconference. The Walmart defendants' motion is granted for the reasons stated below.

I. STANDARD

Federal Rule of Civil Procedure 26(c) provides that this Court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Fed.R.Civ.P. 26(c). This Court is vested with "broad discretion to decide when a protective order is appropriate and what degree of protection is required." *Shockey v. Huhtamaki,* 280 F.R.D. 598, 600 (D. Kan. 2012). Federal Rule of Civil Procedure 30(b)(4) authorizes this Court in its discretion to order that a deposition "be taken by telephone or other remote means." Fed.R.Civ.P. 30(b)(4); *Usov v. Lazar,* No. 13 CIV 818, 2015 WL 5052497, at *1 (S.D.N.Y. Aug. 25, 2015); *Graham v. Ocwen Loan Servicing, LLC,* No. 16-80011-CIV, 2016 WL 7443288, at *1 (S.D. Fla. July 1, 2016) ("[C]ourts enjoy wide discretion to control and place appropriate limits on discovery, which includes authorizing depositions to be taken by remote means"). When exercising its discretion, this Court "must 'balance claims of prejudice and those of hardship and conduct a careful

weighing of the relevant facts.' " ***538** *Usov,* 2015 WL 5052497, at *1, *quoting RP Family, Inc. v. Commonwealth Land Title Ins. Co.,* No. 10 Civ. 1149, 2011 WL 6020154, at *3 (E.D.N.Y. Nov. 30, 2011).

II. DISCUSSION

The Walmart defendants seek to have Ms. Latham's deposition conducted by remote videoconference based on safety concerns created by the COVID-19 pandemic. In particular, the Walmart defendants' lead counsel (Mr. William McGrath) is in a high-risk category if exposed to COVID-19 due to the fact that he is over 65 years-old. (Dckt. #100-1 at 2). Mr. McGrath's wife and his son-in-law (who lives nearby) are likewise in high risk categories. (*Id.*). The Walmart defendants believe that an unnecessary and unacceptable risk to the health of Mr. McGrath and others will be created if he is forced to fly from Chicago to Arkansas to attend a deposition in a confined room with other counsel (who will travel from New York City and Austin), Ms. Latham, and a court reporter. (*Id.*).

For its part, Learning Resources asserts that "in-person depositions are the norm in American jurisprudence, and a party is well within its rights to cross-examine an adverse witness face-to-face." (Dckt. #101 at 3). Furthermore, while Learning Resources is "sensitive to health and safety concerns raised by Defendants' counsel", it asserts that the "conditions on the ground in Arkansas are much different than in Chicago.... because [t]he governor has lifted most aspects of the shut-down orders.... [and] [l]ife in Arkansas is rapidly returning to business a[s] usual." (*Id.* at 2, 3). Finally, Learning Resources insists that its proposed compromise of having Mr. McGrath attend the deposition by video while a Walmart attorney based in Arkansas attends in person would "address any fairness concerns" raised by the Walmart defendants. (*Id.* at 2).

1. COVID-19 related health concerns provide "good cause" for a remote videoconference deposition under the circumstances of this case

As other courts have recognized, "[t]he President of the United States has declared a national emergency due to the spread of the COVID-19 virus, and the Centers for Disease Control have noted that the best way to prevent illness is to minimize person-to-person contact." *Sinceno v. Riverside Church in City of New York,* No. 18-CV-2156 (LJL), 2020 WL 1302053, at *1 (S.D.N.Y. Mar. 18, 2020). To protect Court personnel, the bar, and the public against the severe risks posed by COVID-19, federal courts around the country – including the Western District of Arkansas where Fayetteville is located – have authorized video teleconferencing for a number critical criminal proceedings that had previously been conducted in person and imposed a moratorium on various other court proceedings. *See, e.g.,* Western District of Arkansas, Admin. Order 2020-3 Use of Video Teleconferencing and Telephone Conferencing During Course of the Covid-19 Pandemic (dated 3/31/20); Western District of Arkansas, Admin. Order 2020-5 Court Operations During the COVID-19 Pandemic (dated 5/21/20). These restrictions, as Learning Resources acknowledges, remain in effect through the present day. (*Id.*; Dckt. #101 at 3 n.3).

The general concern over the risks posed by COVID-19 are heightened in this case for three reasons. First, the Walmart defendants' lead counsel, Mr. McGrath, and members of his family are in a high risk category if exposed to COVID-19. Second, counsel for the parties will be traveling to Arkansas from three areas that have either been COVID-19 "hot spots" (namely, New York City and Chicago) or where COVID-19 hospitalization rates are currently on the rise (Austin). *See* "Austin enters Stage 4 COVID-19 risk-based level after a spike in hospitalizations," KVUE ABC (June 14, 2020) available at: https://www.kvue.com/article/news/health/coronavirus/austin-texas-covid19-risk-level-4-hospitalizations-coronavirus/269-8eacb5c4-d441-47d5-a902-3aba79b93317. Finally, notwithstanding the fact that the governor of Arkansas has lifted most aspects of the shut-down orders,[1] "Northwest Arkansas (where ***539** Fayetteville is located) is experiencing a surge in community spread of the [COVID-19] virus ... and has witnessed a significant increase in the number of hospitalized individuals with COVID-19." *See* "Washington Regional official: COVID-19 spike in NWA" is a "serious public health emergency," ABC 4029 News (June 11, 2020) available at: https://www.4029tv.com/article/washington-regional-official-covid-19-spike-in-nwa-is-a-serious-public-health-emergency/32831055.

1 As the Southern District of New York recently observed, "[t]he fact that certain jurisdictions are beginning to relax their restrictions, a process based in part on political or economic considerations, does not mean that community spread has ceased or that individuals need not be concerned about potential exposure." *Joffee v. King & Spalding, LLP,* No. 17 Civ. 3392 (VEC) (SDA), Order (6/4/20) (Dckt. #239 at 6) [hereinafter "*Joffee* Order"].

For these reasons, the Court finds that the health concerns created by the COVID-19 pandemic create "good cause" for the entry of an order requiring that Ms. Latham's deposition take place by remote videoconference under the circumstances in this case.[2] *See, e.g., In re RFC & ResCap Liquidating Tr. Action,* No. 013CV3451SRNHB, 444 F.Supp.3d 967, 971 (D. Minn. Mar. 13, 2020) ("[u]nder the circumstances, COVID-19's unexpected nature, rapid spread, and potential risk establish good cause for remote testimony"); *Joffee* Order ("Plaintiff's proposal requires counsel or witnesses to travel across state lines from disparate places of origin, congregate for several hours in a confined space, and then disperse back to their homes.... The burden on witnesses, in the form of potential exposure and infection for them and their families, needs no further elaboration. Indeed, for essentially those same reasons, the Court has not resumed in-person proceedings."); *SAP, LLC v. EZCare Clinic, Inc.,* No. CV 19-11229, 2020 WL 1923146, at *2 (E.D. La. Apr. 21, 2020) ("This court will not require parties to appear in person with one another in the midst of the present pandemic.").

2 The Court's holding in this case is not tantamount to a finding that concerns raised regarding COVID-19 will *always* suffice to support the entry of an order requiring a remote videoconference deposition. *Cf. Manley v. Bellendir,* No. 18-CV-1220-EFM-TJJ, 2020 WL 2766508, at *3 & n.10 (D. Kan. May 28, 2020) (finding that a remote videoconference deposition was not warranted where defendant asserted that "due to Plaintiff's past substance abuse, his in-person deposition [wa]s necessary to keep Plaintiff focused and efficiently conduct the deposition," "Defendant's need and ability to safely depose Plaintiff in person with the precautions outlined by Defendant outweigh[ed] Plaintiff's general concerns regarding COVID-19," and plaintiff's counsel failed to substantiate her suggestion that she was in a high risk group for contracting the virus).

2. The frustration of Learning Resources' intent to question Ms. Latham in person does not create prejudice sufficient to overcome the risks created by COVID-19 under the circumstances here

Ms. Latham is seemingly an important witness given her role as the Walmart defendants' "buyer" of the allegedly infringing products in this case. It is certainly understandable that Learning Resources would like to question her face-to-face and this Court recognizes that "a party's ability to observe a deponent in person does have value." *Usov,* 2015 WL 5052497, at *2. Nonetheless, "remote depositions are a presumptively valid means of discovery" even without the in-person interaction (*Id.* (internal quotation marks omitted)), and many courts have held that remote videoconference depositions offer the deposing party a sufficient opportunity to evaluate a deponent's nonverbal responses, demeanor, and overall credibility. *See, e.g., Id.,* at *2; *Sec. & Exch. Comm'n v. Aly,* 320 F.R.D. 116, 119 (S.D.N.Y. 2017); *Tangtiwatanapaibul v. Tom & Toon Inc.,* No. 117CV00816LGSKHP, 2017 WL 10456190 at *3 (S.D.N.Y. Nov. 22, 2017); *Graham,* 2016 WL 7443288 at *2; *Shockey,* 280 F.R.D. at 602; *Gee v. Suntrust Mortgage, Inc.,* No. 10-CV-01509 RS NC, 2011 WL 5597124 at *3 (N.D. Cal. Nov. 15, 2011).

Moreover, the cases cited by Learning Resources are inapposite and do not support the proposition that remote videoconference deposition would be inappropriate in this case. Two of the cases[3] concern whether the ***540** deponent should be deposed either in-person or through a telephone deposition – which is a clearly less desirable method than taking a deposition through a remote videoconference. *See, e.g., Shockey,* 280 F.R.D. at 602 (the "disadvantages of telephonic depositions ... do not apply at all, or to the same degree, when the depositions are to be taken via videoconference"); *United States v. One Gulfstream G-V Jet Aircraft,* 304 F.R.D. 10, 17 n.4 (D.D.C. 2014) ("[T]elephonic depositions are disfavored because it is impossible to see the witness's demeanor, watch what documents the witness is reviewing, or monitor who else the witness is talking with"). In the third case, the Seventh Circuit recognized that it was generally more desirable to present testimony at trial in-person rather than through videoconferencing but nonetheless affirmed the district court's decision to force a plaintiff inmate to testify at trial by videoconferencing rather than in-person as he had sought to do. *Perotti v. Quinones,* 790 F.3d 712, 721-25, 729 (7th Cir. 2015).

3 *Mattar v. Cmty. Mem'l Hosp.,* No. 1:04CV95, 2005 WL 6486402 at *1-2 (N.D. Ind. Feb. 18, 2005); *In re: The TJX Companies, Inc., Fair & Accurate Credit Transactions Act (FACTA) Litig.,* No. 07-MD-1853-KHV, 2008 WL 717890, at *2 (D. Kan. Mar. 17, 2008); *see also Clayton v. Velociti, Inc.,* No. 08-2298-CM/GLR, 2009 WL 1033738, at *5 (D. Kan. Apr. 17, 2009) (citing *TJX* for the proposition that "nothing in the Federal Rules of Civil Procedure requires the Court to order that depositions be taken telephonically").

3. Learning Resources' proposal that the Walmart defendants hire additional counsel to represent Ms. Latham at her in-person deposition is unreasonable

Learning Resources asserts that the risk to Mr. McGrath can be averted if the Walmart defendants retain additional counsel in Arkansas to represent Ms. Latham in-person while Mr. McGrath attends the deposition by video. (Dckt. #101 at 2-3). Learning Resources' counsel asserts that Walmart has retained the same local law firm to represent three of its witnesses whom he has deposed within the last fifteen months and it can follow the same procedure in this case. (*Id.*). While the Walmart defendants do not challenge this representation, they do argue that requiring them to "engage additional local counsel unfamiliar with the case to be physically present while Mr. McGrath appears remotely would unnecessarily deprive Walmart of the effective assistance of its current counsel." (Dckt. #100, at 2). The Court agrees. The fact that Walmart voluntarily chose to retain local counsel to represent its witnesses of unspecified importance in other unspecified cases does not automatically mean that it would be fair to order it to retain local counsel in this case. Moreover, as stated above, Ms. Latham appears to be an important witness and an attorney should be thoroughly conversant with the issues in this case to properly represent her during her deposition. It is unreasonable to expect the Walmart defendants to hire new counsel – even counsel who have previously represented Walmart in other litigation – and incur the expense and effort to get them fully up to speed in the next couple of weeks when the option of conducting Ms. Latham's deposition by videoconference is available.

In sum: while the Court is sympathetic to Learning Resources' preference for an in-person deposition, that preference is outweighed by the risks posed by the COVID-19 pandemic and the hardship that the Walmart defendants will likely experience if their lead counsel is unable to be physically present during Ms. Latham's in-person deposition. Consequently, in its discretion, the Court orders that Ms. Latham's deposition take place via remote videoconference. The Court further orders that the Walmart defendants bear any additional costs that are created by use of the videoconferencing format. *See, e.g., Graham,* 2016 WL 7443288, at *2 (imposing videoconferencing costs on the party who successfully moved to have the deposition conducted by videoconference); *Tangtiwatanapaibul,* 2017 WL 10456190 at *4 (same).

CONCLUSION

For these reasons, the Walmart defendants' motion to require deposition by remote means [Dckt. #100] is granted.

All Citations

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