THE DEFENSE LINE

May 2020

A Publication From Maryland Defense Counsel, Inc.

TELEMEDICINE: Welcome to the Future

By Rachel E. Brown and John T. Sly

Featured

Also Included

President's Message

Welcome to the latest edition of *The Defense Line*. Many thanks to our editor Sheryl Tirocchi and her publications team, and graphics consultant Brian Greenlee, for their fine work creating this issue. As always, we have attempted to include interesting and informative articles that we think can be of practical value to your practice.

Dwight W. Stone, II, Esquire

Miles & Stockbridge P.C.

I hope you and your families are safe and well. Given the gravity of the COVID-19 pandemic, a typical "President's Message" seems inappropriate; instead, I will just touch on a few items that may be of interest.

Before the Maryland General Assembly was forced to suspend its session, MDC engaged with the legislature on a number of issues and bills important to our members. As one example, we joined with the Maryland State Bar Association and the Maryland Association for Justice in providing testimony in opposition to the proposed bill to expand the sales tax to professional services. It was clear to the members of the House Ways and Means Committee that Maryland attorneys of all stripes were united in opposition to the bill, for good reasons, as were members of other affected professions. The bill did not advance.

Once COVID-19 caused our courts to suspend most operations, MDC again worked with the MSBA by providing questions from our members for the MSBA to address with leaders of the state judiciary. We commend the MSBA leaders such as Executive Director Victor Velazquez for their hard work in submitting a series of question sets to the judiciary, engaging in extensive follow-up dialogue, and reporting the answers to these "Judiciary FAQs Regarding COVID-19" on www.msba.org and through other channels. We thank the MSBA for soliciting the input of MDC and other specialty and local bar associations in this important process.

MDC also worked with the MAJ in issuing a joint statement to our respective members encouraging cooperation on discovery and scheduling issues during the pandemic. From the reports I have heard, most members of the plaintiffs' and defense bar were already working hard on these efforts, and continue to do so. They are to be applauded for working together to represent their clients in these extraordinarily challenging circumstances.

Finally, several members have asked me about our Crab Feast/Annual Meeting. We normally have this event in early June, but of course that is not possible this year. Unfortunately, due to the uncertainty about when it will be lawful and safe to hold such an event, we have made the decision to cancel it for this year. We do plan to hold a telephonic annual meeting of members sometime in June, and will send an email to all members about that in the near future.

Stay safe, my friends.

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58 Years of Service to Our Members (1962–2020)

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Telemedicine: Welcome to the Future

Rachel E. Brown and John T. Sly

Telehealth has become an essential tool for all health care professionals. This is particularly true in the face of the COVID-19 pandemic. On April 3, 2020, Governor Hogan signed new telehealth bills into law that expand the definition and use of telehealth. The laws went into effect immediately.

An Expanded Definition of Telehealth

Maryland's formal definition of telehealth now includes asynchronous services. MD Code, Health Occupations, § 1-1001(e). Health care providers are now authorized to establish a practitioner-patient relationship through synchronous or asynchronous telehealth interactions. An "asynchronous telehealth interaction" means an exchange of information between a patient and a health care practitioner that does not occur in real time. HO § 1-1001(b). Telehealth does not include the provision of health care services solely through audio-only calls, email messages, or facsimile transmissions.

Asynchronous telehealth communications allow patients and providers to interact on their own timelines. One can imagine, however, the potential pitfalls for health care providers utilizing this mode of communication. Providers must be vigilant — a telehealth practitioner is held to the same standards of practice applicable to the in-person health care setting. Heath care providers should consult with their insurance carrier to ensure professional liability coverage for telehealth services.

Contemporaneous record keeping is also extremely important. Documentation should include what was known at any particular time and why the care provided was in response to what was known to the provider. Documentation should also indicate that the patient understood the information provided during the consent process before receiving any telehealth services.

One can imagine a circumstance where a patient has notified a provider through an asynchronous communication about certain symptoms. The provider may then respond with specific recommendations and instructions not knowing that the patient's circumstances have changed during the interim. Providers must understand that medicine and the law have yet to develop clear guidelines regarding the timeliness of communications in an asynchronous environment.

Privacy and Security Requirements for Modes of Telemedicine Delivery

Health care providers seeking to communicate with patients and provide telehealth services through remote communications technologies must abide by the requirements of respective state and federal privacy laws. All laws regarding the confidentiality of health information apply to telehealth interactions in the same manner as the laws apply to in-person health care interactions. HO § 1-1004(b). Accordingly, health care providers performing telemedicine must comply with regulatory requirements under HIPAA and Maryland's Confidentiality of Medical Records Act, MD Code, Health General §§ 4-301-4-309.

Providers must develop policies and procedures to implement necessary safe-

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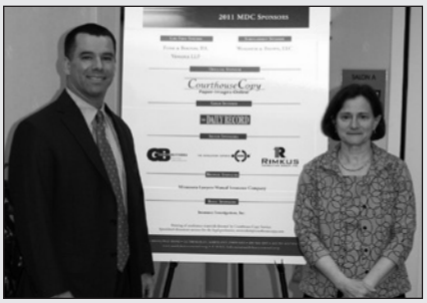
See photos from past events at mddefensecounsel.org/gallery



(TELEMEDICINE) *Continued from page 5*

guards to ensure patient PHI is transmitted and stored securely. Beware — some telehealth technologies may not be compliant with these requirements. Health care providers should utilize platforms that include security features to protect PHI transmitted between health care providers and patients (e.g. end-to-end data encryption, unique individual logins and passwords). Health care providers should consider whether to enter into a business associate agreement (BAA) with any such provider. Additionally, telehealth should be provided in a dedicated space that allows for the implementation of reasonable HIPAA safeguards that limit incidental use of the communication platform to limit any inadvertent disclosure of protected health information. Bottom line — health care providers are ultimately responsible for safeguarding PHI for health care services provided in-person or remotely.

Telehealth Prescribing Pitfalls

Prescribers must be cautious and understand state and federal laws regarding prescriptions. In Maryland, a health care provider must perform a clinical evaluation (which can be through a synchronous or an asynchronous telehealth interaction) that is appropriate for the patient and the condition with which the patient presents prior to issuing a prescription.

Further, a provider cannot prescribe a Schedule II opiate for the treatment of pain through telehealth unless the individual receiving the prescription is in a specified health care facility or the Governor has declared a state of emergency due to a catastrophic health emergency. Providers are also still limited by any other applicable regulations or limitations under federal and state law relating to prescribing controlled dangerous substances.

Telehealth and Billing

If a provider does not see the patient, how does one bill for the interaction? The Maryland State Medical Association ("Med Chi") has been working with providers and third-party payors to develop new codes for billing. This is still a work in progress so any provider seeking to engage in telehealth services is strongly advised to consult with relevant insurers to confirm the relevant codes and any further information they may require for billing.

Telehealth and the Law

We have touched on some of the legal pitfalls that may present in the telehealth arena — especially in the context of asynchronous communications. Any lawyer advising health care facilities and providers needs to aware of the new statute and rules that have been adopted in Maryland. We recommend that providers be conservative in their approach to this new technology. While helpful, and potentially indispensable, telehealth brings new risks. Has the provider met privacy requirements? Has the provider responded in a timely fashion to an asynchronous communication from a patient? When does the circumstance require follow-up by the provider to an asynchronous communication before making recommendations? Will juries defer to a provider's impression of a patient's situation when it occurs virtually?

And, what will be required by third-party payors, including Medicare and Medicaid, to demonstrate the care provided comports with invoices?

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www.mddefensecounsel.org/leadership.html

We are entering a brave new world in the provision of medical care. New challenges will present themselves to both the practitioner and the lawyer advising and defending the provider. To both, we stress caution while collectively navigate these uncharted waters.

Rachel E. Brown is an associate at Waranch & Brown. She was previously published in The Defense Line *in 2019 for her article*, Telemedicine Liability: A Blended Standard of Care for the Modern World.

John T. Sly is a partner at Waranch & Brown. He is Immediate Past President of MDC and specializes in medical malpractice and mass torts defense.

Editors' Corner

The editorial staff are pleased to present this edition of *The Defense Line*. We appreciate MDC members that took time to submit articles for this edition especially in light of the unique circumstances and challenges we are facing. The articles in this edition are dedicated to navigating through legal issues that are likely to arise in a time, such as now, when remote interactions and social distancing are the norm. We wish to thank the contributors to this edition: **Rachel E. Brown** and **John T. Sly** of Waranch & Brown, **Leslie Robert Stellman** and **Adam Konstas** of Pessin Katz Law, **Jeff Trueman** of Jeff Trueman Mediation & Negotiation, and the entire MDC membership for the resilience and dedication you have shown and continue to show during these unprecedented times.

If you have any comments or suggestions, or would like to submit material for a future edition, please contact the Publications Committee.

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Can Workers Walk Off the Job Due to Fears of Exposure to the COVID-19 Virus?

Leslie Robert Stellman

Since the outbreak of the deadly COVID-19 coronavirus in the United States, individual workers and groups of workers have begun to stage walkouts and other expressions of fear and concern over potential exposure to the virus. It is hard to argue that these fears are unfounded, given the swift and easy spread of the virus. The immediate consequences of such fears, whether real or imagined, has been a number of highly publicized walkouts at such well known named companies as Instacart, Whole Foods, and Amazon. In each of these instances, none of the employers in question were unionized, yet collective action took place by workers claiming to have been denied minimal personal protective equipment ("PPE") and who have even demanded additional "hazardous duty" pay in consideration of their continuing to go to work.

There are a number of legal issues that these walkouts have raised. As the number of coronavirus cases in the United States continues to climb, with an attendant rise in virus-related deaths, it will not be unexpected if workers in a variety of occupations and industries ranging from delivery drivers to grocery and pharmacy workers to health care workers who are on the front lines of the pandemic. If such work stoppages escalate throughout the nation, we may soon see spot shortages of essential goods and services, including food and pharmaceuticals. It is the fear and concern of these walkouts which are facing those employers who remain in business and who need their employees to show up for work each and every day, regardless of their subjective fears of being exposed to the virus.

One of the most fundamental principles of the 1935 Wagner Act, as amended by the 1948 Taft-Hartley Act governing collective bargaining in the private sector, is that even non-union workers have the statutory right to engage in what the law calls "protected concerted activities." This means that even workers who have never organized or joined a union have the right under federal law to walk off their job without fear of consequences in order to protest what they believe to be inadequate or dangerous working conditions. This concept was reinforced by the United States Supreme Court in its *NLRB v. Washington Aluminum Co.*, a 1962 ruling in which the Court held that workers had the right to walk off the job in a Baltimore machine shop because the plant was bitterly cold following a break-down of the company's furnace. 370 U.S. 9. When the employer fired the employees who had walked out, the NLRB found that they had engaged in protected concerted activity which was protected under Section 7 of the Taft-Hartley Act. Accordingly, the NLRB, in a ruling upheld by the Supreme Court, ordered the strikers reinstated with back pay. In so ruling, the Court found that the company's established rule forbidding employees to leave their work without permission was not justifiable cause for their discharge. As the Court noted:

> Concerted activities by employees for the purpose of trying to protect themselves from working conditions [found to be] uncomfortable are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have tolerated in a humane and civilized society like ours.

Id. at 17. The *Washington Aluminum* case is alive and well today. In response to the COVID-19 pandemic, unions like the Communications Workers have referenced the case in their website, offering the following Q&A to its members:

> My employer refuses to close down even though a coworker tested positive for COVID-19. We don't feel safe. Can we walk out if the company isn't listening to us?
>
> Under some circumstances, yes! Workers have the legally protected right to walk out in protest of critically unsafe working conditions. In Detroit, bus drivers refused to drive until the buses were properly cleaned. Their refusal of working in unsafe conditions was protected concerted activity. They are now back to work. In an example prior to the Coronavirus, a group of employees in Omaha, NE walked off the production line to protest the speed of the line and other working conditions, and thereafter met with the plant manager. An NLRB administrative law judge found that the Employer had unlawfully discharged the employees in retaliation for engaging in concerted protected activity and ordered the Employer to reinstate the employees with full back pay and benefits.

Source: www.cwa-union.org ("COVID-19" FAQ for Engaging in Protected Concerted Activity to Stay Safe from COVID-19 at Work.").

In order to be protected by federal law, concerted activity requires the actions of more than a single worker. Thus, if only one individual insists that he feels unsafe, if such concerns appear to be unreasonable, appropriate disciplinary action may be taken against him. And engaging in protected activity such as complaining of a fear of an unsafe workplace will not immunize an employee from discipline or discharge if he engages in misconduct. The current situation at a Staten Island Amazon warehouse involves an employee who insisted he was terminated for having complained of insufficient personal protection from the coronavirus. Amazon, in turn, claimed to have fired the worker because he refused to go home after coming into contact with a fellow employee who showed symptoms of the virus. The case is presently before the NLRB, and as it turns out the fired employee was being provided legal support from the Retail, Wholesale & Department Store Union ("RWDSU").

Unions are clearly taking advantage of the COVID-19 pandemic to insist upon additional compensation for members already subject to union contracts as well as better safety precautions in the workplace, such as more PPE. While employers are entitled to resist any changes to their negotiated contracts, unions have been pressuring employers to offer telecommuting options and supplemental agreements (called "MOU's" or memoranda of agreement) cov-

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(WORKERS) *Continued from page 9*

ering the unique workplace circumstances presently facing those employers that choose to remain in operation. If an employer is prepared to make significant alterations to working conditions due to the coronavirus, such as changing shifts, hours, or locations, there is a duty to negotiate these changes with the union representing the affected workers. Major business decisions such as shutting down an operation altogether, unless already addressed in an existing union contract, requires negotiations over the impact of such a decision on the workforce. Failure to engage in such negotiations may lead to unfair labor practice charges and claims of bad faith bargaining.

Even in a union workplace where there is an existing contract containing a "no-strike" clause, workers have the right to engage in a so-called "wildcat" walkout that is not sanctioned by the union if doing so is deemed to be protected concerted activity. *East Chicago Rehabilitation Center v. NLRB*, 710 F.2d 397 (7th Cir. 1983). In other words, a union's repudiation of an illegal walkout by its members does not necessarily render the strike unprotected if it is based upon concerns over working conditions, such as alleged safety problems due workplace exposure to the coronavirus. If the union itself sanctions or calls such a walkout, it may be enjoined if it is in breach of a contractual no-strike clause or, in the case of a health care institution (such as a hospital or nursing home), if it is not preceded by a 10-day notice, as prescribed by Section 8(g) of the Taft-Hartley Act. In a 1974 decision the U.S. Supreme Court held in *Gateway Coal Co. v. United Mine Workers* that employees in a walkout, even if it over *bona fide* safety concerns, could be punished if their union contract mandates that such disputes proceed to binding arbitration.

A classic safety-based walkout was found to be protected under the Tart-Hartley Act in the 1982 federal appeals court decision of *NLRB v. Tamara Foods, Inc*. There, 11 workers left their job over hazardous ammonia fumes, and when they were fired, the NLRB ordered they be reinstated with back pay. 692 F.2d 1171 (8th Cir. 1982). However, where a walkout was found to be based upon an unreasonable rationale, it was not deemed protected, and employees engaging in such action were properly disciplined. In one 1979 decision, a federal appeals court in Denver noted the following relevant scenarios involving informal employee walkouts over safety hazards:

> In *Du-Tri Displays, Inc., 231 NLRB 1261 (1977)*, the condition complained of by the employee here was lacquer fumes which were present in the plant. There was a threat to obtain a National Institute of Occupational Safety & Health study for the benefit of all of the workers.
>
> The NLRB held that the fact that the fumes did not present a health hazard did not render unprotected the efforts to remove what was honestly believed to be a danger.
>
> *See Alleluia Cushion Co., Inc., 221 NLRB 999 (1975)*. Here an employee was discharged for reporting lack of safety conditions to OSHA. It was said that there was a sort of constructive, concerted action because he was acting on behalf of other employees.

Similarly, under the federal Occupational Safety & Health Act and many analogous state laws, there is a so-called "general duty" obligation to "furnish to each employer's employees "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees." This same provision of the statute compels employees to conform to safety requirements, which today would include "social distancing." This means that employers are free to discipline employees who fail to adhere to workplace safety expectations. Section 11(c) of the OSHA law prohibits retaliation against employees who voice legitimate or reasonable safety concerns. According to the U.S. Department of Labor in a regulation intended to interpret this provision, an employee (or group of employees) has the right to refuse to do a task if: (1) the employee or employees have first asked the employer to eliminate the danger, and the employer failed to do so; (2) the employee or employees refused to work in "good faith," meaning that he, she, or the group of workers "must genuinely believe that an imminent danger exists and a reasonable person would agree that there is a real danger of death or serious injury;" and (3) there is insufficient time due to the urgency of the hazard to have it corrected through regular enforcement channels, such as requesting an OSHA inspection.

Thus, before a worker or group of employees can walk off the job with impunity, OSHA requires that they first ask the employer to eliminate the danger. If the perception of danger is deemed to be reasonable, employees may not be retaliated against for refusing to work. The question in the current environment is whether employees may be deemed to have a reasonable right to refuse work due to a "real danger of death or serious injury." In *Whirlpool Corp. v. Marshall*, the Supreme Court in 1980 upheld the Department of Labor regulation that supported the right of workers to refuse to work at unsafe jobs, but reaffirmed Congress' intent that such a walkout would be without pay. 441 U.S. 1.

Merely being fearful that a workplace may be the source of the virus and that one's presence in a particular workplace poses a risk of contagion may not be sufficient to justify a walkout or refusal to work. In a 2001 decision, the federal appeals court for the District of Columbia rejected a retaliation claim following the discharge of an electrician working in a hazardous environment where he was tasked with destroying chemical weapons. The court in *Wood v. Department of Labor* rejected the employee's claim that he was given insufficient training and inadequate PPE, thus his discharge for walking off the job was upheld. 275 F.3d 107 (D.C. Cir. 2001). Choosing not to address the underlying concerns expressed by the employee, the Court observed that under OSHA, only the Secretary of Labor could determine whether retaliation occurred, and with the Secretary's refusal to so find, the termination was upheld. *Id.* The concerns expressed by the employee in *Wood*, however, are quite similar to those employers are facing today: inadequate respirators and an unapproved face piece, for example. Despite failing to pursue a retaliation claim, OSHA cited the employer with inadequate safety protection.

It is likely that OSHA and its state counterparts will be called into numerous workplaces in order to investigate employee- or union-initiated complaints of inadequate PPE or other safety hazards in the face of the coronavirus pandemic. The issue of citations by OSHA or their state counterparts will support retaliation claims against employers who punish workers for walking out. OSHA issued guidance on preparing for COVID-19, which includes the use of respiratory protection (PPE), fit tests for such equipment, training on usage and storage of PPE, and medical evaluations. The guidance concludes with the admonition that "OSHA is out inspecting workplaces and issuing citations." Perceived violations of any of these new guidelines could justify a walkout by one or more employees.

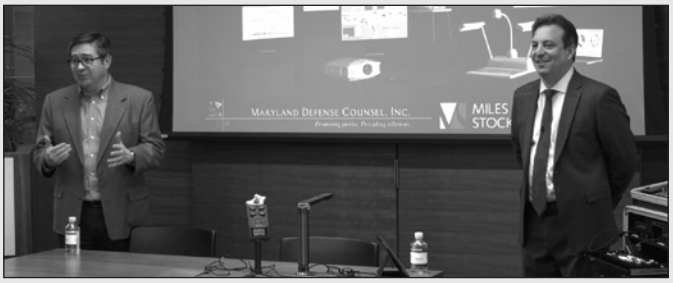
Our recommendations in order to minimize the risk of walkouts and to justify taking disciplinary action against employees who

Lunch & Learn — March 10, 2020

"Effective Use of Technology at Trial (ft. UltraDep)"

Speaker: Mike Miller • Sponsored by MGM Trial Services

On March 10, MDC hosted its first Lunch and Learn of the year. The presentation, entitled "Effective Use of Technology at Trial (ft. UltraDep)," focused on the ways that attorneys can utilize technology to assist their courtroom advocacy and also highlighted the role that litigation/trial support professionals can play in presenting complication subject matter in a more dynamic way in the courtroom. One of the highlights of the presentation was the demonstration of the UltraDep technology offered by **MGM Trial Services**. UltraDep is a picture-in-picture video deposition service that allows attorneys to present exhibits to a witness while also allowing the witness to highlight and discuss relevant portions of the exhibit, all in real time. MGM president **Mike Miller** also spoke about, and demonstrated, the effective use of drone video to engage a jury's attention and provide jurors a compelling visual appreciation of key buildings, topographical features or other "outside evidence" that is so important in certain types of trials. MDC thanks MGM Trial Services for conducting this informative presentation.



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engage in an alleged safety-related walkout are as follows:

- Stay on top of OSHA guidelines, such as those issued just this week, in regards to workplace safety as it is impacted by COVID-19. Be sure that workers have adequate, up-to-date, and properly fitting PPE if they are to come into contact with members of the public or cannot engage in "social distancing."
- Make social distancing a workplace requirement, violation of which is punishable by disciplinary action. Put this rule in writing and display it prominently.
- Require employees who feel sick to stay at home and, if they show signs of illness on the job, immediately send them home.
- If employees claim to be unwilling to work over nothing more than an undifferentiated concern about "getting infected," let them know that you understand their anxiety but that their jobs are important and that, absent evidence of a true risk to their health, they must continue to perform their jobs or risk disciplinary action up to and including termination.
- Encourage employees to report any concerns, no matter how trivial, about workplace safety and health to a designated safety officer or human resources person. Take every reported concern seriously and, if possible, attempt to address them with constructive action. Do not ignore any complaints about safety.
- If a workplace action occurs: (1) if it is by a single individual, the Taft-Hartley Act is no protection to that worker, since the law requires protected *concerted* activity; (2) if the action involves two or more employees, it may be protected if it is based upon a reasonable concern that workplace safety or health has been compromised; and (3) if it is determined that an employee or group of employees has simply insisted that they are too "fearful" to go to work, without more, you have the right to take disciplinary action. Consider an unpaid suspension or leave rather than discharge in the first such instance. The optics of discharging employees who protest their safety in the current environment would be very poor for any employer, regardless of the legitimacy of any discipline being considered.

Mr. Stellman has over 40 years of experience as an education law, labor and employment attorney. A labor lawyer by training, early in his labor law career Mr. Stellman appeared regularly before the National Labor Relations Board and participated in arbitration proceedings and hearings before the NLRB, serving as chief negotiator in collective bargaining. Becoming more involved in the public sector, in the 80s Mr. Stellman began to focus his career on education law. Throughout his career he has represented the majority of Maryland's school districts in virtually every type of school related litigation ranging from employment and personnel matters to school construction, property, land use, and real estate law, special education law, the laws governing disability rights including Section 504 of the Rehabilitation Act and the Americans With Disabilities Act, Title IX of the Education Amendments of 1972, student discipline, speech, religion, and other constitutional rights asserted by students and school employees, student records law (FERPA) compliance, and purchasing and procurement. He has appeared in many cases before local boards of education, the Maryland State Board of Education, and the State Higher Education Labor Relations Board ("SHELRB"). Mr. Stellman has also litigated widely in both the public and private sectors, defending employment discrimination and wrongful discharge lawsuits against employers. He regularly appears before the EEOC, the Maryland Commission on Civil Rights, and the Howard County Office of Human Rights. He also has extensive wage-hour law and occupational safety and health law experience.

Note: This article appeared previously at www.pklaw.com on April 4, 2020.

Coronavirus, Paid Sick Leave, and the Americans with Disabilities Act — Where do Maryland Employers Stand?

Adam Konstas

As more news breaks of the spread of the Coronavirus and the measures taken by government and private sector institutions in response, one topic that persistently arises is paid sick leave. The CDC has advised employers to encourage sick employees to stay home, to ensure that employees are aware of sick leave policies, and to ensure that their policies are flexible and consistent with public health guidance. In response, companies across the country attempting to deal with the impact of coronavirus have already revisited their existing paid leave policies or implemented new paid leave policies in order to protect their workers. This week, companies like Walmart and Darden Restaurants (parent company of Olive Garden, Longhorn Steakhouse, and other nationwide chains) announced new policies in response to the outbreak.

In Walmart's case, employees who contract the virus or are subject to mandatory quarantines will receive up to two weeks' pay (the recommended length of quarantine) and that absences would not be counted against attendance. Even workers who are not sick or quarantined, but are uncomfortable reporting to work during the outbreak, would not be subject to penalties.

Darden announced a policy that should look familiar to Maryland employers — one in which all hourly employees will receive permanent paid sick leave benefits accruing at the rate of 1 hour for every 30 hours worked.

If you have been following these HR Tips over the last two years, you know that the Maryland Healthy Working Families Act became law on February 11, 2018. You would also know that the law requires employers with over 14 employees to provide paid sick and safe leave and employers with 14 employees or less to provide unpaid sick and safe leave, and that a company policy must allow an employee to earn at least 1 hour of paid sick and safe leave for every 30 hours worked (just like the new Darden policy). While the Maryland law allows employers to impose a number of limitations on accrual and use of leave, we know from the CDC guidance that now is the time to be more flexible in the application of your existing policies. What does this mean for Maryland employers?

- If your policy prohibits employees from using leave within the first 106 days of employment, consider waiving that restriction during the state of emergency.
- If your policy requires employees to provide notice and verification from a doctor in order to utilize sick and safe leave, consider waiving this requirement during the state of emergency and allowing the employee to use the leave without penalty even if they do not supply a doctor's note. On this point, the CDC has advised that employers should "not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way."
- If you updated your policies in response to the enactment of the Maryland Healthy Working Families Act, make sure your employees are aware of this benefit under Maryland law. With the barrage of news about paid sick leave from around the country, it is important that workers in Maryland know what laws and policies apply to them so they do not get confused with news from other states.

Once an employee has exhausted any paid leave available under your Company's policies, there is no requirement that they be paid, and you should refer to any unpaid leave policies your Company maintains while keeping in mind the CDC's recommendation of being flexible with those policies.

Additionally, an employee on leave due to experiencing coronavirus symptoms or caring for an immediate family member with coronavirus symptoms may be entitled to unpaid leave under the Family Medical Leave Act, which provides eligible employees who are incapacitated by a serious health condition (which may include coronavirus or accompanying complications), or who are needed to care for covered family members who are incapacitated by a serious health condition, with 12 weeks of job-protected leave. Leave taken by an employee who does not have a serious health condition or whose immediate family member does not have a serious health condition, but instead for the purpose of avoiding exposure, would not be protected under the FMLA.

On a related note, Maryland employers should also consider the restrictions imposed by the Americans with Disabilities Act and the Maryland Fair Employment Practices Act, which generally prohibit employers from making inquiries regarding an employees' medical condition. However, the EEOC recently issued guidance as to how the medical inquiry restrictions apply during a pandemic so that employers can navigate the fine lines between the CDC guidance and the ADA. Specifically, the EEOC advises that employees who become ill or symptomatic at work should leave the workplace and employers may ask such employees if they are experiencing influenza-like symptoms such as fever, chills, cough, or sore throat. You may access the EEOC coronavirus guidance here: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm, and the guidance titled "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" may be accessed here: https://www.eeoc.gov/facts/pandemic_flu.html.

Adam E. Konstas is an Attorney in PK Law's Education and Labor Group. He represents local school boards, superintendents, private schools, colleges, and private sector employers before federal and state courts, and federal and state civil rights agencies on a variety of matters, including employment discrimination litigation, teacher and student discipline, collective bargaining, and sexual harassment. Mr. Konstas also advises schools on the design and implementation of policies and procedures regarding student and employee relations, and system-wide policy issues including the use of online instructional tools and cloud computing, student data privacy, anti-discrimination, and website accessibility.

Mr. Konstas is an adjunct professor of school law at McDaniel College, where he completed a class on "Best Practices for Online Teaching and Learning" and is currently teaching an online school law class. He has also lectured on employment law at the University of Baltimore School of Law. Mr. Konstas can be reached at 410-339-5786 or akonstas@pklaw.com.

Cases Are Resolving Online. So Why Are Lawyers Reluctant To Try It?

Jeff Trueman

Although social media feeds are full of reports that mediators are settling cases online, many lawyers are not interested — not yet, at least. Few have experienced online mediation, although many are willing to keep the option open. There seems to be a consensus that online mediation is not as good as mediating in person. Before I conducted online mediations, I was inclined to agree. Nonetheless, I was willing to learn about the technology. I spent time studying different platforms, practicing on them, talking to others who use them, etc. But many lawyers (including myself) maintain the opinion that people need to see each other in order for the process to be effective — although there is a strong irony to this since most civil lawyers want to bypass joint sessions, with some who intensely dislike their opponents. Still, as a mediator, I told myself that I need to "read the room" in order to be effective. But having conducted a number of successful online mediations where cases resolved, and hearing similar results from colleagues all over the country, I think more attorneys and institutions will want to mediate online.

For sure, there are some shortcomings. Although computers, tablets and smartphones are ubiquitous, not everyone has access to a strong and secure Internet connection. Not everyone is proficient with technology. Some people are not ready to change the way in which they do business. Moreover, there are security concerns. "Zoom," one of the most popular online video conferencing platforms for mediation, recently suffered a barrage of criticism, along with a number of investigations and lawsuits over their security and privacy practices. Zoom responded immediately and has improved the security of its platform with more developments to come. Stay tuned.

It is important to point out that no platform is 100% secure. Most security breaches are due to user error. I believe that Zoom — while not perfect — is safe enough to use in most civil mediations. It all depends on how "the host" — the mediator — adjusts the platform settings and manages the mediation. Participants should use the latest version of the software and keep their meeting invitations and passwords private and secure. Public internet networks must be avoided. The mediator should screen who gets into the mediation and lock the session so that no one else can be admitted. The engagement agreement must include issues relevant to online mediation so that participants understand and can follow online protocols. Critically, the mediator must have a comfortable command over the technology so that he or she is able to focus on the mediating the dispute.

Many video conferencing platforms are very easy to use. Once engaged in the process of mediating a case online, participants experience the same things they did at in-person mediations. They can see and hear each other. They can share and edit documents. They can caucus at any time with as many or as few people as they want. Virtually anything can happen with online mediation as it does in person, except shake hands (and get sick).

In some ways, online mediation may be better than in-person mediation. People can't talk over each other. No one has to leave early to catch a plane or beat traffic. With the assistance of other communication media, deals get done more efficiently. Drafting and editing settlement documents is easy by virtually sharing screens or through email. Quick ideas can be shared via text. Confusion or frustration can be ironed out the old fashioned way — by cell phone. At mid-day, everyone makes their own lunch so dietary issues are better managed as well. Overall, settlement rates mediation remain high with online mediation.

Despite the economic and practical efficiencies of online mediation, when trial dates are delayed, the pressure to settle diminishes. But this may change. To make room for new legal challenges that the pandemic will prompt, current matters will have to get resolved. The personal and business needs of clients will likely induce them and counsel to come to the virtual table.

From a broader perspective, I believe technological advancements in dispute resolution will become more prevalent in the future, even after we defeat the virus. Of course, online mediation will not be appropriate in every case. Indeed, mediators should not offer "cookie-cutter" approaches to their management of the process. Whenever travel and social restriction ease, some disputes will justify in-person meetings and negotiations. There is a lot to be said in favor of taking the time and expense to "show up" in person and investing the time and energy into mediation.

But don't discount the power of technology to change institutions and the ways in which we conduct the business of law and mediation. No one thought the Internet would impact brick and mortar retailers, or journalism, or the music industry, or taxicabs, etc., until it did. Increasingly, people don't have to reorder their lives around the directives and time frames chosen by courts, incur travel expenses and frustrations with airports, traffic and parking, take time off of work or other important matters, wait years for resolution, etc. The tools that help people solve their legal problems outside of courts will only get better.

Someday, we may look back on these times and notice the similarities between our reactions to online mediation and how people responded to new technologies in the past. For example, the chief engineer of the British Post Office affirmed that his country didn't need the telephone since they had "plenty of messenger boys" and the president of Western Telegraph in America predicted the telephone "has too many shortcomings to be seriously considered as a means of communication."

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Lunch & Learn — April 23, 2020

"Advocacy in Mediation and Suggested Practices in Remote Mediation"

Speaker: Hon. Martin P. Welch (Ret.)

Sponsored by The McCammon Group

MDC would like to thank **Judge Welch** and **The McCammon Group** for conducting a wonderful lunch and learn presentation on April 23, 2020, entitled "Advocacy in Mediation and Suggested Practices in Remote Mediation." The webinar was highly informative and especially pertinent as many proceedings continue to be conducted remotely due to COVID-19. Special thanks also to **Planet Depos** for providing the technology and support to offer this event as a webinar! For those who missed the presentation, The McCammon Group and Planet Depos provided the articles below for tips on conducting remote sessions.

THE MCCAMMON GROUP

Remote Mediation Suggested Practices for Lawyers

The McCammon Group • April 6, 2020

I. Introduction

A. The Covid-19 Pandemic is altering the world at a rapid pace. Until such time as 1) the governments of VA, MD, and DC lift their Orders to "Stay Home" and 2) it is safe to convene mediations in person, it will be the policy of The McCammon Group to handle mediations only by remote methods.

B. "Remote" in this memorandum refers to communications among the mediator, lawyers, parties, and other participants in the mediation process using electronic methods such as desktop computers, laptops, iPads, smart phones or other electronic devices in circumstances where the mediator is in a location separate from the other participants.

C. Remote mediation provides parties and their lawyers with the opportunity, throughout these troubled times, to resolve disputes without endangering the health of any participants with both time and cost savings.

II. Pre-Mediation Activities

A. Background — Most of the activities leading up to a mediation session have traditionally been handled remotely, most often by phone. Thus, there will be little change in the methods of communication during this phase of the mediation process. However, the substance of what takes place during this phase will be altered.

B. Joint Pre-Mediation Conference Call

1. The call will be handled by phone, as usual.

2. Creating a Technology Plan for the Mediation Session

   a. There are numerous digital platforms, services, and devices that can be used separately or in combination to support remote mediation. "Technology plan" refers to such configurations.

   b. Among the items on the agenda of the Pre-Mediation Conference Call, the mediator will moderate a conversation among the lawyers to develop a technology plan to support the remote mediation session.

   c. Generally, lawyers want to retain control in deciding what technology plan will be developed and in hosting and implementing the plan.

   d. It is the mediator's role to effectively participate in the chosen plan and, in so doing, to perform the traditional duties of a mediator.

   e. If the lawyers need help in implementing the technology plan at the mediation session, they can rely on resources inside their respective firms. Alternatively, they can hire outside vendors. Many court reporting and IT companies offer these services to host meetings on digital platforms and to manage the implementation of the technology plan.

3. Additional details regarding the Technology Plan

   a. The mediator will work with the lawyers to determine

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whether there will be a plenary session (opening session including the mediator, all parties, their lawyers, and all other participants, as well as case presentations). If so, the mediator will assist the lawyers in shaping the technology plan to cover this activity and in determining which lawyer(s) will be responsible for the execution (hosting) of that portion of the technology plan.

b. The lawyers should know how the individuals on their respective teams will participate and what the technology needs of each team member are.

c. When documents will be utilized, the moving lawyers should either master the available techniques to display them through whatever remote technology is being utilized or email copies or mail hard copies to the mediator and all other lawyers in advance of the mediation session.

d. The lawyers should ensure in advance that any video conference site utilized does not have any time limitations. (Free subscriptions are often time-limited whereas, for a relatively small fee, these services are available with no time limitations.)

4. Development of Plan to Submit Written Materials

a. The Mediator should coordinate the development of a plan for the submission of written materials to the mediator in advance of the mediation session.

b. An agreement should be reached as to what materials (the actual documents which constitute an integral part of the dispute) will be submitted by which lawyers.

c. In addition, the lawyers may agree to submit mediation statements (their view of the case) to the mediator in advance of the mediation session, preferably with copies being provided to opposing lawyers.

d. A schedule should be established.

e. Agreement should be reached on the method by which the identified materials will be submitted to the mediator.

5. Individual Calls between the Mediator and the Lawyer(s) of each Party

a. It is important that the mediator have private calls with the lawyer(s) for each party in advance of the mediation session.

b. Ideally, the scheduling of these calls can be accomplished during the Pre-Mediation Conference Call.

c. If these calls cannot be scheduled during the Pre-Mediation Conference Call, the case manager can subsequently schedule these calls.

6. Execution of the Agreement to Mediate

a. **It is the responsibility of the lawyers to sign the Agreement to Mediate and to procure the signatures of their respective clients and all other team members who will be participating in the mediation session. It is extremely important for the lawyers to fulfill these requirements before the mediation session in order to save time and avoid confusion.**

b. There are several alternative ways to meet this requirement.

c. Before the Mediation Session (traditional method), each lawyer should:

1. Sign a copy of the Agreement to Mediate which has been sent to them by The McCammon Group's case manager as an attachment to the Confirmation Memorandum. (Alternatively, the Agreement to Mediate can be downloaded from the website of The McCammon Group.)

2. Arrange for their clients and all other participants on their team to, separately, do the same.

3. Arrange for all these people to email to the lawyer their executed counterparts of the Agreement to Mediate; and then,

4. Each lawyer should email these executed counterparts to the mediator.

d. Before the Mediation Session (electronic method) each lawyer can:

1. Utilize available sites (e.g., DocuSign) to obtain the electronic signatures of everyone on that lawyer's team who will be participating in the mediation session; and then,

2. Arrange for these executed Agreements to Mediate (in counterpart) to be emailed to the mediator.

e. During the Mediation Session, when participants who have not signed are **co-located** with their lawyer:

1. The lawyer can, at the outset of the mediation session, download a copy of the Agreement to Mediate from The McCammon Group's website and procure signatures from all such team members, including the lawyer.

2. The lawyer should then email the executed Agreement to Mediate to the mediator.

f. During the Mediation Session when participants who have not signed are **not co-located** with their lawyer, the lawyer can:

1. Download a copy of the Agreement to Mediate.

2. Print on the Agreement to Mediate the name of each remote team member who has not signed it.

3. Obtain authority, in the moment, to sign on behalf of all team members; and

4. Sign on behalf of all such team member, "by, Sara Jones, Lawyer."

5. (Alternatively, the lawyer can instruct the remote team member to download the Agreement to Mediate, sign it, and email it to the lawyer during the mediation session.)

6. Subsequently, on behalf of the team, the lawyer should send to the mediator the executed Agreement to Mediate (in counterparts, if necessary).

7. Protocol for Caucuses

a. One approach is to deal with each caucus as a separate "silo" with no electronic connections with other caucuses.

1. This approach assumes that the video conference convened in the opening plenary session has been terminated.

2. This approach allows each caucus to create its own method of communicating with its team members and with the mediator. For example, a caucus could create

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(REMOTE MEDIATION) *Continued from page 18*

its own separate video conference using any platform of its choosing; or that caucus may choose to communicate with the mediator, more simply, even by smart phone.

3. The lawyer managing each caucus will invite the mediator to join the meeting. The mediator can then enter and leave a caucus, as would be appropriate.

4. This approach would provide ultimate protection against any inadvertent electronic disclosure of confidential information because there would not be any electronic connections with other caucuses.

b. In other situations (e.g., substantial number of parties, etc.) the lawyers may want the caucuses to be "hosted" as part of a single video-conference platform.

1. Generally, the mediator is not responsible for this hosting function.

2. Third party vendors (some court reporters, IT vendors) offer services by which they would host the video-conference session convened for the plenary session and then host the caucus sessions by electronically setting up "breakout rooms" which would house each caucus.

3. In this configuration, all the caucuses would have an electronic connection since they are all a part of the same video-conference session. However, if the management of these breakout rooms is performed properly, the risk of confidential information being electronically disclosed by mistake is low.

C. Final Preparations

1. Experience demonstrates that it is extremely useful to arrange a trial run of the chosen technology plan sometime before the day of the mediation session. This will give the lawyers and the mediator a chance to tweak any glitches in the technology plan.

2. This trial run can also be used to ensure that all other substantive or procedural matters have been addressed.

III. Mediation Session

A. Opening Presentations

1. Whether opening presentations will be made should have been addressed in the Joint Pre-Mediation Conference Call or perhaps in other conversations among the mediator and the lawyers leading up to the mediation session.

2. Likewise, and as discussed above, any technological arrangements needed to support the opening presentations should have been discussed and adopted in the Pre-Mediation Conference Call (or in other preparatory calls).

3. These technological arrangements are the responsibility of the lawyers.

4. It is the role of the mediator to fit into the chosen technology plan and to participate professionally and effectively.

B. Caucuses

1. The caucuses would proceed according to the plan adopted by the lawyers with the assistance of the mediator.

2. The mediator would enter and depart each caucus, as appropriate.

Expert Information Inquiries

The next time you receive an e-mail from our Executive Director containing an inquiry from one of our members about an expert, please respond both to the person sending the inquiry and Mary Malloy Dimaio (mmd@cls-law.com). She is compiling a list of experts discussed by MDC members which will be indexed by name and area of expertise and will be posted on our website. Thanks for your cooperation.

3. When working with one party in caucus, the other parties will be standing by, as they normally would.

4. As would be the case in traditional mediation sessions, the mediator will go back and forth among caucuses to complete the negotiations.

C. Memorializing a Settlement Agreement

1. As in traditional mediations, the lawyers will be responsible for memorializing the settlement agreement. (Ideally, the lawyers will have prepared, and perhaps even exchanged, templates of settlement agreements before the mediation session.)

2. Lawyers can draft the settlement agreement by videoconference, phone, and/or email. It is preferable for the lawyers to stay together virtually during the drafting process, if possible. If this is the case, a new video conference meeting could be convened by one of the lawyers, to which the mediator should be invited. Presumably, each lawyer will need to maintain access to the represented party to facilitate the drafting process.

3. Whether participating in these activities or not, the mediator will remain available, as needed, to iron out any problems in the drafting process.

IV. Follow-Up

A. Traditionally, following up is a remote activity, executed by phone or email.

B. Following up in the context of a remote mediation would be handled in the same manner as in an in-person mediation.

V. Best Practices to Enhance Security in Hosting Video Conference Meetings

A. Make sure the video meeting is subject to a password.

B. Do not set a video meeting as a "public" meeting.

C. Share the meeting link only with invitees.

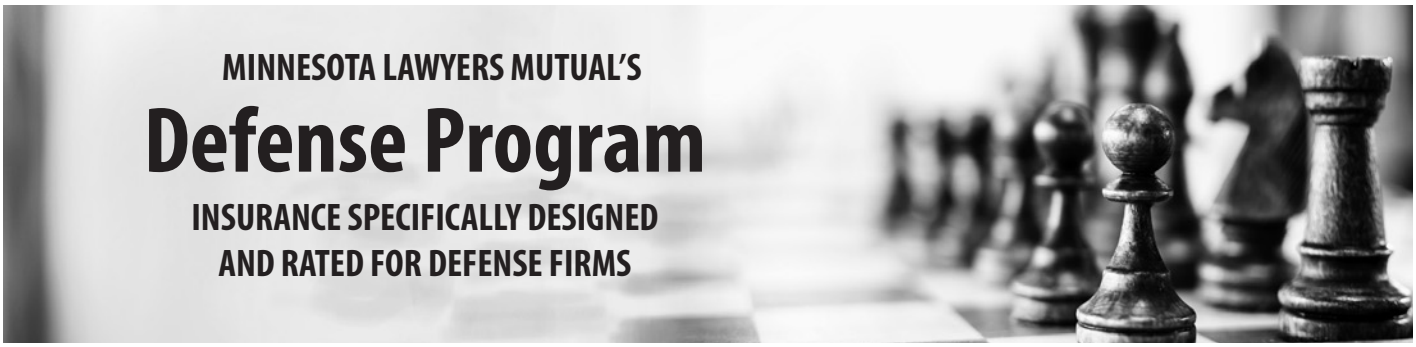
D. Setup a waiting room (lobby) for invitees.

E. Admit to the video meeting only invitees in the waiting room (lobby).

F. Set the screen share so that it is available to only the host.

G. Absent written permission from all participants, audio and/or visual recordings of the proceedings should be prohibited.

H. Absent written permission from all participants, private chats should be prohibited.



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Tips for Remote Depositions

Planet Depos

While our Technicians at Planet Depos have handled thousands of remote depositions through Zoom prior to the COVID-19 pandemic, it may be the first time for many attorneys. As we become accustomed to the "new normal," as the news calls it, which involves finding alternatives to in-person depositions, our team has a few tips for handling your depositions remotely.

First, with recent news about Zoom's security, let's address why we at Planet Depos prefer to use Zoom over competitors like WebEx and what steps we take to keep it secure. Having tested all of the major videoconference solutions, we have found the audio and video through Zoom to be the best and most reliable, which is especially important for every deposition.

To maintain the best security for remote depositions, we enable all relevant security features, including SSL encryption, unique links for every meeting, a required password to join the meeting, and utilizing waiting rooms to monitor access. Additionally, Planet Depos provides a dedicated Technician for every deposition. The Planet Depos technician ensures only approved participants are in attendance.

That's what's happening on our side of the webcam, here are our tips for your side:

Take A Zoom 101 Webinar

If you have never used Zoom before (or would like a refresher), we highly recommend checking out the Zoom 101 webinar series [https://zoom.us/events] put on by the team at Zoom themselves. These webinars are running multiple times a day, every day, and they cover the "1, 2, 3s and A, B, Cs of Zoom." You'll learn the basics for scheduling, hosting and joining Zoom meetings.

Check Your Internet Speeds

You may not have considered your home internet speeds prior to this pandemic, but having a strong broadband connection is extra important these days. While Zoom can work on speeds as low as 600Kbps, they recommend a minimum of 1.5Mbps, though the higher the better when it comes to online videoconferencing. The slower your connection, the more likely you are to experience buffering (where the video pauses to catch up) or dropped words in conversation. You can check your internet speeds on sites such as SpeedTest.net [https://www.speedtest.net/].

Use a Hardwired Connection

While it isn't always possible, if you can connect your computer to your router by an ethernet cable, you can avoid potential WiFi issues. If you're unable to run an ethernet cable from your router to your device, make sure you check your signal strength prior to joining. The stronger the connection, the less likely any data will be dropped.

Always Run a Test Call

Seriously. It's easily the most overlooked tip we can give you. When you're working with multiple participants across multiple locations and every type of device under the sun, it's important that everyone understands the basics of the platform, can connect their mics and webcams, and know how to mute and unmute themselves (if you're running it yourself.) If you retain a PD Technician for your remote deposition, we will run the test call for you and problem-solve any issues that may arise.

For The Best Audio, Use A Phone

While we believe in Zoom enough to use it as the backbone of our mobile videoconference deposition services, the digital nature of Zoom can still cause issues with audio compression. It is also a great backup should your internet slow down during your deposition (your kids may have just fired up Netflix). To ensure you hear the best possible audio, you should always use a phone to access the audio. Every remote deposition we hold through Zoom gives you the option to connect via your computer audio or through a phone. If you aren't planning to connect to the video portion, you can just call in, but if you plan to be on video, be sure to connect first, as you'll be given a Meeting ID and Participant ID to connect your phone audio.

Use A Headset If Available

Your device likely has a mic and speakers built in that make it easy to get started, and while the noise cancellation technology is dramatically better today than even a couple of years ago, you may still find you're echoing to everyone else on the call. This can cause problems for not just the witness trying to hear you, but the court reporter trying to keep the record. If you have a headset available, we recommend you plug that in (and test it on the test call!) and use it throughout the proceeding to ensure the best possible audio.

Send Your Exhibits in Advance

Without the ability to physically share an exhibit in person, it's important that exhibits are sent ahead of time to all participants (including your court reporter!). Whether you plan to mark and share the exhibits yourself or have the PD Technician do so for you during the proceeding, be sure you're sending everything you plan to show.

Speak Slowly and Articulately

As everyone's goal is to have an accurate record, it's important to focus on your speech (and the speech of others). When the court reporter is not in the presence of the participants, he/she is subject to the same technological challenges as everyone else. If you speak loudly or talk over others, the nature of the technology is such that what was said by the other person is lost and is not captured by the backup audio through Zoom. This means the court reporter will need to interrupt more often. We suggest you speak clearly into your mic (hopefully you're using a headset so you can't move away from it accidentally) and wait for others to finish speaking before you continue.

Taking all these steps will ensure your remote deposition goes off without a hitch.

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