

Litigation Alert: Can A Court Compel A Remote Deposition? The Answer Is Yes!

As social distancing creeps into 2021, practicing law by virtual means remains important. Back in March of 2020, you probably thought that by now, you would be back to conducting in-person depositions. However, virtual depositions are still the norm in New York practice, and, according to several recent decisions, may be compelled by the courts.

One recent example of a court compelling remote depositions is *Rodriguez v. Montefiore Medical Center*, 2020 WL 7689633 (Sup. Ct. Bronx County, Dec. 23, 2020). In *Rodriguez*, the scheduling order called for depositions to be completed by January 17, 2020. The parties did not meet that deadline but agreed to set dates for depositions at the next regularly scheduled discovery conference on March 18, 2020. The conference did not occur due to the coronavirus pandemic, and no depositions were conducted over the next nine months. Defendant Montefiore refused to consent to virtual depositions because the plaintiff had allegedly failed to adequately respond to certain discovery demands.

The plaintiff moved to compel the defendants to take her deposition via remote means, arguing that even before the pandemic, courts had compelled remote depositions where a party could show undue hardship from submitting to an in-person deposition. Montefiore argued that conducting depositions remotely would allow plaintiff's counsel an opportunity to improperly coach her and hinder the defendants' ability to assess her credibility.

While the court acknowledged Montefiore's concerns, it nonetheless ordered that the depositions proceed by videoconference, holding that the public health dangers associated with the pandemic constituted an undue hardship justifying an order directing the parties to conduct depositions remotely.

However, the court also imposed certain safeguards, ordering that:

1. No one but a court reporter and plaintiff's counsel could be physically present in the room with plaintiff during her deposition;
2. Plaintiff was prohibited from communicating with anyone in any manner during her deposition except for the individuals participating in the deposition;
3. Plaintiff's counsel's communications with her during her deposition were limited to subjects permitted under 22 NYCRR Part 221;
4. Prior to initiating any private communication with plaintiff during her deposition, her counsel was to announce that intention; and
5. At all times during her deposition, plaintiff and her counsel were to be visible on screen, whether they were in the same room or separate locations.

The court in *Rodriguez* held that while apprehension regarding the technical aspects of remote depositions and their impact on legal proceedings may be understandable and justified, such concerns

will not overshadow the corresponding rights to just, timely and efficient resolution of litigation. That is especially so in light of well-established provisions of the CPLR that can curb potential abuse, and where a court's order sets strict guidelines for such depositions. Parties to litigation that have faced delays in discovery due to the coronavirus pandemic may be wise to incorporate guidelines such as those imposed in *Rodriguez* into a preliminary conference order to head off disputes.
