

Rhode Island Superior Court Establishes a Formal Protocol for Remote Depositions

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Covid-19 has impacted all phases of American life, and the nation's legal system has certainly not been immune. However, after an initial period of uncertainty, lawyers and court systems across the country have adapted to the situation in order to keep the wheels of justice moving, albeit slower than prior to the global pandemic. One crucial aspect of civil litigation that has been impacted is witness depositions.

On August 18, 2020, Judge Alice B. Gibney, the Presiding Justice of the Rhode Island Superior Court, ordered that remote depositions of lay witnesses should proceed, despite defense objections based on "the complexity of the depositions and high volume of documents." Judge Gibney issued the order in the context of the state's opioid litigation against several pharmaceutical drug manufacturers. The State argued that "the uncertain nature of the pandemic, combined with the extensive fact and expert discovery required for the present litigation, mandates remote depositions moving forward." As a result, the State filed a motion with the Court requesting a protocol be established for remote deposition practices.

In response to the State's motion, the defendants argued that remote depositions are not suitable given the number and length of depositions involved, the heavy reliance on documents, and the potential for technical problems. The defendants also cited due process concerns if travel restrictions prohibited deponents from being represented by counsel in-person at their depositions.

Judge Gibney, in recognizing the Court's power to order that depositions be taken by telephone "or other remote electronic means," ordered that the State's requested depositions will go forward remotely pursuant to an established protocol with certain conditions. She held that all essential participants must have adequate technology to attend the depositions and that hard copies of exhibits must be provided to the deponent and other participants at least 48 hours prior to commencement of the deposition. She further held that although deponents have the right to have counsel present with them at their depositions, the possibility that travel restrictions could prevent counsel from traveling to a deponent is not a sufficient basis to preclude remote depositions from proceeding; rather, certain issues can be addressed on a deposition-by-deposition basis. Finally, Judge Gibney noted that although technical problems can arise during remote depositions, they can also just as easily arise during in-person depositions.

Although Judge Gibney's ruling was issued in the context of Rhode Island's opioid litigation, the broad nature of the language included therein lends itself to being utilized by parties in other cases seeking similar orders. However, even without formal remote deposition protocols in place, there have been cases in which the parties have agreed to proceed with remote depositions. While some remote depositions have gone smoothly, others have presented challenges, particularly when the witness is elderly. In those instances, the witness may lack the technological savvy to operate the equipment required for remote depositions, have trouble viewing documents on their computer screen, have difficulty reviewing hard copies of exhibits if they are voluminous and hard to keep track of, or be distracted as a result of being in their home rather than in a conference room. Given these challenges, the remote deposition model may work for some, but not all, depositions in the future.

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