

Double Masking is Good, but Still Make Sure You Can Be Heard in a Deposition

Article By:

William G. Fassuliotis

As the legal profession continues to adjust to the COVID-19 pandemic, even something as normal and regular as a deposition has often become an adventure. Even after accounting for the immediately obvious questions (is in-person too dangerous or not allowed? If conducting a remote deposition, what vendor should I use?) and all-too-common glitches like connectivity issues, new problems continue to pop up, even when seemingly doing the right thing. Take, for example, a deposition in *Webber v. Dash*, a libel and copyright case in S.D.N.Y. Plaintiffs attempted to depose the defendant, Damon Dash, best known as a cofounder of the hip hop label Roc-A-Fella Records with Jay-Z and Kareem “Biggs” Burke. According to the Plaintiffs, there was a big problem: Dash’s testimony could not be clearly heard. In seeking termination sanctions, the plaintiffs accused Dash of purposefully speaking in a low voice behind the two masks he was wearing. (Dash may have been ahead of the curve, as shortly after the order came down, the [CDC](#) started to recommend “double masking”—wearing a cloth mask over a disposable mask—though the court’s order is unclear as to the nature of his two masks.)

Though clearly annoyed, Magistrate Judge Lehrburger denied the motion for sanctions without prejudice. In his [order](#), the Judge explained that though Dash being “the only person involved in the deposition who could not be clearly heard is highly suspect,” “the Court [could not] conclude from the transcript submitted, the videographer’s affidavit (which is not notarized) and Plaintiff’s affidavit (also not notarized), that the problems with Dash’s audibility were intentionally caused by Dash.” The court pointed to several mitigating factors, including that the “transcript reflects several instances where Dash’s testimony is recorded, where Dash directly answered the question asked, and where Dash apparently brought the microphone in closer proximity to his face,” and that there “also are no recorded instances where Dash expressed his desire to be elsewhere or that he did not have time to be at the deposition.”

The case thus presents a unique problem and ways to both avoid sanctions or better frame your cause for relief. To begin, a history of frustrating depositions from being completed, as Dash has had in this litigation, may not endear you to the Judge, but also may not be determinative. This is not to say a deponent should act poorly, but that some judges will look only at the behavior in the particular deposition about which a party is complaining, unless the witness (or the parties) had already been warned. Next, consider the evidence submitted. Here, the movants filed the transcript and two affidavits. The Court noted that neither affidavit was notarized, something that can easily be fixed. But

even so, the Court could not find intentionality from these pieces of evidence. Video and audio may have helped show why the testimony could be recorded in one instance but not another. Practitioners making a motion should also highlight any behavior or words that indicate that the deponent does not want to be at the deposition or is otherwise denigrating the process.

Even if a motion for sanctions fails, it could still be useful to pursue by ensuring better behavior going forward, whether or not the witness's frustration was intentional. Though the *Webber v. Dash* court denied the motion, it did put the burden on Dash going forward "to make sure that the deposition is completed without incident," and "[f]ailure to comply with this order may result in sanctions, including termination sanctions."

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