

Pretrial Practice & Discovery

American Bar Association Litigation Section

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Navigating Depositions During the Pandemic: Fear of COVID-19

Is the fear of contracting COVID-19 a legitimate excuse to avoid a deposition? Two recent cases highlight the issue.

By Janet Meub

In March 2020, the world shut down to prevent the spread of the novel coronavirus. Courts closed for all but emergency matters. Touching gas pumps, elevator buttons, and doorknobs could be the kiss of death! Others feared handling mail after it was delivered! When the deposition notice arrives, a witness's fear of contracting COVID-19 is no excuse to avoid a deposition.

In *Stowe v. Alford*, No. 2:19-cv-01652 KJM AC, 2021 U.S. Dist. LEXIS 98021 (E.D. Cal, May 24, 2021), the parties were unable to agree, among other issues, as to whether the plaintiff should be required to appear without a mask at his remote Zoom deposition. The first deposition was abruptly discontinued when the plaintiff refused to remove his mask. The defendant filed a motion to compel the plaintiff's second deposition, and the plaintiff argued that the first deposition was discontinued on meritless grounds.

Federal Rule of Civil Procedure 26(b)(1) governs discovery in federal cases. Remote depositions are permissible under Fed. R. Civ. P. 30(b)(4), especially in light of the COVID-19 pandemic. It is in the court's discretion to determine whether a second deposition is warranted under the circumstances. Rule 26(b)(2)(C). However, what about the mask issue?

The U.S. District Court for the Eastern District of California ordered that the plaintiff appear on Zoom wearing either no protective face covering or a covering, such as a clear face shield, that allows his face to be seen. The court reasoned that it is the plaintiff's responsibility to ensure that his face is visible, adding "Plaintiff has several options to ensure safety protocols while still appearing unmasked at his remote deposition: he could be in a separate room, he could ensure proper ventilation, he could wear a face shield. To avoid prejudice to the defendant, plaintiff must appear on video without a mask."

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In *Nasuti v. Walmart, Inc.*, No. 5:20-CV-05023-LLP, 2021 U.S. Dist. LEXIS 107274 (D.S.D., June 8, 2021), a *pro se* plaintiff refused to sit for his deposition citing multiple excuses, including that the timing of the deposition was premature (two pending motions could render discovery moot), the deposition locale had to be Mason City, Iowa (where he moved after filing his employment case in the U.S. District Court for the District of South Dakota, Western Division) because he did not have a car to return to South Dakota, and the deposition must be conducted outdoors due to his COVID concerns.

While he disagreed that the plaintiff's pending motions stayed discovery, defense counsel attempted to accommodate the plaintiff, offering to conduct the deposition remotely to avoid travel costs, providing a computer when the plaintiff advised he did not have one, and scheduling the deposition in a hotel conference room near the plaintiff's home and large enough to permit social distancing to alleviate the plaintiff's health concerns.

Over the course of several weeks, the *pro se* plaintiff continued to refuse his deposition, reiterating his COVID fears and stating that he was not available on the scheduled date. Defense counsel invited the plaintiff to propose new dates. When no agreement could be reached, the defendant filed a motion to compel, and the plaintiff responded by filing a motion for protective order (framed as a declaration in opposition to the motion to compel) under Rule 26(c) of the Federal Rules of Civil Procedure.

Addressing the plaintiff's objection to his deposition based on his health and safety concerns due to the ongoing COVID-19 pandemic (among his other arguments), the court noted that as of August 2021, a vaccine was widely available to everyone above the age of 12; and, that as of May 2021, the Centers for Disease Control and Prevention guidelines opined that it was safe for those who are vaccinated to be within six feet of each other and to not wear facemasks. The court further stated that even if the plaintiff was unvaccinated, the defendant had proposed a plan to adequately provide for his safety. The plaintiff had proposed no alternatives despite the defendant's invitation to do so. The court held that the plaintiff's argument against conducting his deposition due to his COVID-19 concerns was without merit.

Take off that mask and sit down for your deposition.

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