

MEMORANDUM FROM THE SUPREME JUDICIAL COURT
STANDING ADVISORY COMMITTEE ON THE
MASSACHUSETTS RULES OF CIVIL PROCEDURE REGARDING
REMOTE DEPOSITIONS

October 2023

In the early days of the COVID-19 pandemic, the Supreme Judicial Court issued various Orders dealing with the impact of the pandemic on the practice of law. One Order authorized “remote attendance at depositions in civil cases without stipulation or court order” in light of the “continuing challenges of conducting in-person depositions during the COVID-19 pandemic.” Supreme Judicial Court Updated Order Regarding Remote Depositions, effective October 23, 2020 (replacing Order Regarding Remote Depositions, effective May 26, 2020). Even though the federal and Massachusetts COVID-19 states of emergency have ended and in-person depositions have resumed, the Order regarding remote depositions remains in effect.

Recognizing the advantages attendant upon remote depositions while also recognizing the advantages of in-person depositions (as well as the disadvantages of both), the Standing Advisory Committee on the Rules of Civil Procedure began a review of the deposition rules in 2022 to determine whether, and how, to revise the Massachusetts Rules of Civil Procedure to accommodate remote deposition practice.

In 2022, the Standing Advisory Committee published draft changes to Mass. R. Civ. P. 30 that addressed remote depositions and solicited comments from the bar on the proposal. A Memorandum from the Standing Advisory Committee that accompanied the proposed amendments noted that the Supreme Judicial Court pandemic-related order “permitted litigants to take remote depositions as a matter of right and provided the basic rules for doing so.” The Memorandum explained that the Standing Advisory Committee was recommending a change to the practice allowing remote depositions as a matter of right as had been authorized by the pandemic-related Order. The 2022 proposal recommended that in-person depositions should be the default rule, but parties could agree to a remote deposition in lieu of an in-person deposition or a court could order a remote deposition upon motion absent agreement.

The Standing Advisory Committee received many comments from the bar on its proposal that in-person depositions be the default rule. The comments broke down into three general categories. Category one supported the Committee’s recommendation of in-person depositions as the default rule. Category two supported remote depositions as the default rule. Category three supported a “noticer’s choice” approach. Noticer’s choice would allow the party noticing

the deposition to determine in the first instance whether the deposition would be held in person or remotely.

After reviewing the comments and after further deliberation, the Standing Advisory Committee has reconsidered its early recommendation that in-person depositions should be the default rule and that remote depositions would be permissible only upon agreement of the parties or upon court order. The Standing Advisory Committee now recommends the adoption of a noticer's choice procedure that enables the party seeking the deposition to decide in the first instance whether the deposition will be taken in person or remotely. The Committee once again solicits public comments on the revised proposal of noticer's choice.

Proposed Rule 30(b)(4) deals with two types of remote depositions, video-conferencing depositions and telephone depositions. The term video-conferencing deposition refers to a deposition taken remotely utilizing a video-conferencing platform (such as Zoom).

Video-Conferencing Depositions. Rule 30(b)(4)(A) adopts noticer's choice in connection with a video-conferencing deposition. The rule allows the party who notices a deposition to elect to conduct a video-conferencing deposition by providing appropriate notice and specified information to all parties and to the deponent. Any other party or the deponent who has received a notice of a video-conferencing deposition then has the right to move in court for an order requiring the deposition to be taken in person or by a combination of in-person or video-conferencing methods. The motion would be filed in the court where the underlying action is pending or "in the court in the county or judicial district where the deponent is located."

As was stated in the 2022 Memorandum concerning the earlier proposal, this revised proposal involving noticer's choice does not include detailed requirements regarding video-conferencing depositions, but rather sets "the basic ground rules." These include "who may attend the remote deposition and where participants may be situated with respect to the deponent." The parties are free to agree to any other arrangement they may deem appropriate.

Cooperation among all parties in planning and conducting a video-conferencing deposition, including how exhibits will be handled, is particularly important, given the technical issues involved. Accordingly, the proposed rule states: "Parties and deponents must confer and cooperate to the fullest extent possible to attempt to resolve all issues related to remote depositions" and they "must cooperate with each other, the court reporter, and the operator/videographer, if any, in planning for and conducting remote depositions." Proposed Rule 30(b)(4)(D).

Telephone Depositions. Proposed Rule 30(b)(4)(B) allows a deposition to be taken by telephone by leave of court or by written stipulation. This provision is taken from the first sentence of existing Rule 30(b)(7), with minor changes. The other provision in existing Rule 30(b)(7) regarding the location of a telephone deposition has been moved to proposed Rule 30(b)(4)(E), which now is applicable to both types of remote depositions, video-conferencing depositions and telephone depositions.