

# Remote Depositions: Almost Business As Usual

The coronavirus (COVID-19) pandemic has interrupted civil and criminal justice systems, making many routine litigation activities fraught or impossible.<sup>1</sup>

Fortunately, Courts and legislators nationwide, including New York’s Governor and Supreme Court,<sup>2</sup> responded with emergency orders embracing the use of reliable remote audio and video technology for depositions and hearings.

## New York Law on Remote Depositions During COVID-19 and Beyond

On March 7, 2020, New York’s Governor, Andrew Cuomo, signed Executive Order No. 202.7, authorizing all notarial acts to be performed utilizing remote audio video technology. The order has since been extended in 30 day increments throughout the pandemic and most recently was extended through December 2, 2020.<sup>3</sup>

The Order provides that “[a]ny notarial act that is required under New York State law is authorized to be performed utilizing audio-video technology provided that the following conditions are met:

- The person seeking the Notary’s services, if not personally known to the Notary, must present a valid photo ID to the Notary during the video conference, not merely transmit it prior to or after.
- The video conference must allow for direct interaction between the person and the Notary (e.g., no pre-recorded videos of the person signing).
- The person must affirmatively represent that he or she is physically situated in the State of New York.

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<sup>1</sup> Kleiman v. Wright, 2020 WL 1472087 (S.D. Fla. Mar. 26, 2020).

<sup>2</sup><https://www.governor.ny.gov/news/no-2027-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>; <https://www.nycourts.gov/limited-filings.shtml>;  
[https://www.dos.ny.gov/licensing/notary/DOS\\_COVID19\\_RemoteNotaryGuidance.pdf](https://www.dos.ny.gov/licensing/notary/DOS_COVID19_RemoteNotaryGuidance.pdf)

<sup>3</sup><https://www.governor.ny.gov/news/no-20272-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>

New York's Chief Administrative Judge, Lawrence Marks, issued a similar Administrative Order, AO71-20, echoing the need to proceed with cases remotely.<sup>4</sup>

However, these emergency Orders are not forging new territory. They build on New York's existing laws supporting the use of remote audio and video conferencing technology for depositions.

It is well established that a deposition may be audio and video recorded. N.Y. C.P.L.R. 3113 (b) and (d); 22 NYCRR 202.15; N.Y. Ct. R. 208.12; Liebman & Charne v. Lanzoni, 164 Misc. 2d 302, 303, 624 N.Y.S.2d 752 (Civ. Ct. 1995) (holding that New York's laws "freely permit a party taking a deposition to record it on videotape. There is no requirement to show special need and videotaping may be employed over the objections of a bashful or reluctant witness.")

Even prior to the COVID related orders permitting a remote oath and affirmation, N.Y. C.P.L.R. 3113(d) authorizes

**The parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically.** The stipulation shall designate reasonable provisions to ensure that an accurate record of the deposition is generated, shall specify, if appropriate, reasonable provisions for the use of exhibits at the deposition; shall specify who must and who may physically be present at the deposition; and shall provide for any other provisions appropriate under the circumstances. **Unless otherwise stipulated to by the parties, the officer administering the oath shall be physically present at the place of the deposition** and the additional costs of conducting the deposition by telephonic or other remote electronic means, such as telephone charges, shall be borne by the party requesting that the deposition be conducted by such means (emphasis added).

The law permits the parties to stipulate that everyone can appear remotely. Id. **The same applies in the absence of a stipulation if opposing counsel does not object in a timely manner to a modified deposition procedure.** N.Y. C.P.L.R. 3113(b) and (d); 3115(b); Washington v. Montefiore Hosp., 7 A.D.3d 945, 947-948, 777 N.Y.S.2d 524, 525 (3d Dep't 2004) (finding a failure to object constituted a waiver of the physical presence rule.)

The stipulation must detail the procedures, including a method of recording the deposition that will ensure its accuracy. N.Y. C.P.L.R. 3113(b). It must also advise of provisions for the use of exhibits at the deposition. Id.; See also N.Y. C.P.L.R. 3111

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<sup>4</sup> <https://www.nycourts.gov/whatsnew/pdf/AO71-20.pdf>

(allowing party noticing deposition to require production of books, papers and other tangible things to be marked as exhibits and used at deposition).

N.Y. C.P.L.R. 3113(b) mandates that at deposition an “officer” shall put the deponent under oath. An “officer” is someone, usually a notary, authorized to administer oaths. N.Y. C.P.L.R. 3113(a); 2309<sup>5</sup>; N.Y. Exec. Law § 135. The notary can be located within New York or in another state. N.Y. C.P.L.R. 2309.

The deponent can be identified by presenting valid government issued identification, by being personally known to the officer, or in another manner agreed to by the parties. N.Y. Real Prop. Law §§ 303; 304; 4A West's McKinney's Forms Civil Practice Law and Rules § 12:143.

N.Y. C.P.L.R. 3116(b) advises the person conducting the oath must be able to swear to the accuracy of the witness's testimony. Parrot will provide the deposition reporter who will be responsible for recording the deposition as well as handling the traditional responsibilities of a court reporter (i.e. handling objections, asking the parties not to interrupt each other, certifying the deposition, etc.). After the deposition gets stenographically transcribed, the deposition officer will review the transcript and certify its accuracy.

The officer or someone acting under the officer's direction must record the testimony. N.Y. C.P.L.R. 3113(b). The recording process can be by “stenographic or other means.” N.Y. C.P.L.R. 3113(d). The “other means” can include audio and video recording. N.Y. C.P.L.R. 3113 (b) and (d); 22 NYCRR 202.15; N.Y. Ct. R. 208.12; Liebman, 164 Misc. 2d at 303; Roche v. Udell, 155 Misc. 2d 329, 335, 588 N.Y.S.2d 76 (Sup. Ct. 1992); Velasquez v. Columbia Presbyterian Med. Ctr., 137 Misc. 2d 733, 735, 522 N.Y.S.2d 416 (Sup. Ct. 1987) (“there is, of course, no stenographer but rather a tape operator...there is no prohibition in CPLR 3113 to this procedure...”)

## In Person Depositions

Although, there is not currently an end in sight for the pandemic or social distancing regulations, Parrot is also built to make in person depositions more cost effective and efficient.

Currently, we have two methods of handling in person depositions.

First, your firm should set up a laptop or other smart device with a webcam in front of the deponent. Just like for a remote deposition, there will be a link on which the

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<sup>5</sup> CPLR 3113(b) contemplates that the appellate division may have its own special rules apart from the trial court. (“The testimony shall be recorded by stenographic or other means, subject to such rules as may be adopted by the appellate division in the department where the action is pending.”)

notary and tech team will connect. This will automatically record the audio and video feed of the testimony.

You can access the live streaming transcript by connecting from your internet enabled device. This also enables collaboration with your colleagues who can attend remotely as well.

As a backup method of recording, Parrot will provide your firm with a rigorously tested digital recorder used by law enforcement agencies to record interviews. It's as simple as pressing a button to record and pressing it again to stop recording. The device has a USB drive built into it and files can be uploaded to your account on our website for transcription.

Exhibits should be scanned and sent to [exhibits@parrothq.com](mailto:exhibits@parrothq.com)

The second method we employ is to have a notary appear in person and bring a laptop with a webcam and backup digital recording device. Due to the pandemic, this second option is limited. However, we are constantly expanding our partnerships with notaries in FL, NY, TX, and CA that are willing and able to travel to attend your deposition in person.

The deposition will be audio and video recorded with live streaming transcript capabilities, and collaboration with your colleagues on your internet enabled device.

Every other aspect of the deposition will proceed as it would with a traditional court reporter.

## Conclusion

Parrot's technology provides attorneys with enhanced remote and in person deposition capabilities and a transcript that is more accurate, but less expensive than traditional court reporters.

## About Us

We are an experienced team of lawyers, entrepreneurs, and computer engineers. Our founders have tried and put away human traffickers; cultivated and sold breakthroughs in computer vision to Lyft; driven advancements in automated speech recognition with leaders in the field; and scaled companies from 0 to over 100 people.