

9 best practices for 'remote' witness interviews during internal investigations in COVID-19 era

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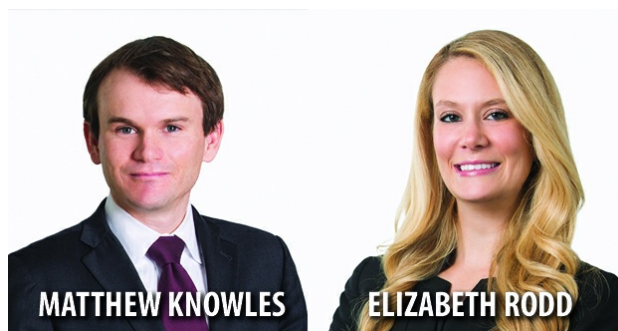
It's easy to rattle off a list of the disadvantages of conducting an important meeting, interview, deposition or even court hearing using Zoom or other videoconferencing tools. There are technical issues, security concerns, challenges in dealing with documents and exhibits, difficulties in assessing demeanor and credibility, and many more.

These are all fair and important concerns. But the reality of practicing law during the COVID-19 pandemic is that important conversations and meetings — even arbitrations and trials — happen routinely over videoconferencing.

It is essential to be skilled with videoconferencing and remote presentation tools. “I’m not good with Zoom” is not a good answer, as your potential clients will be selecting counsel from a pool of candidates who are both excellent lawyers and proficient with these tools of modern practice.

If you use screen-sharing for documents, be sure to instruct the witness not to take any screen-shots during the interview.

In fact, platforms such as Zoom, despite their drawbacks, also offer important advantages that (when used skillfully and in the right circumstances) allow lawyers and investigators to do things that they could not before, to move faster, and to reduce clients' legal expenses.



For example, remote interviews provide efficiency gains by allowing attorneys to move more quickly in setting up and conducting interviews without having to worry about travel and related logistics.

Likewise, there is a real advantage to investigators in speaking with some witnesses in locations that are more comfortable for them (a dining room table at home rather than a cramped conference room in an unfamiliar hotel). This can often lead a witness to be more at ease and forthcoming.

A central part of our practice is leading internal investigations and helping our clients respond to government inquiries. The heart of this work is interviewing witnesses. For example, during our recent work on investigations during the COVID-19 pandemic, we conducted over 100 witness interviews in the span of several weeks, including a number of witnesses who were in the throes of COVID-19 infections. This would have been impossible (or at least highly impractical) without videoconferencing tools.

All of the downsides of Zoom interviews are real, and we've experienced many of them. But the focus of this article is to share best practices and tips for doing remote interviews well — either when there is no option to conduct them in person, or when you determine that remote interviews are the best fit for the circumstances of your case or investigation. **1. Be prepared to move fast.** A key benefit of remote interviews is that they allow attorneys to move quickly in scheduling and conducting interviews, without having to worry about travel and logistics.

Witnesses may indicate that they are available to speak immediately, and you can then connect with them before they change their mind or communicate with other witnesses. There is a big difference between “let’s speak this afternoon” and “we’ll send you some dates for a meeting three weeks down the road.”

You should have your interview outline and exhibits ready before reaching out to any witness for a remote interview. If the interview is taking place early in the investigation, you can include an explanation at the start that it is a preliminary conversation and you may have additional questions as your work progresses.

- 2. Know (and test) your technology.** Before reaching out to any witness, ensure that you have up-to-date videoconferencing software and that all security updates are installed. Some security risks are outside of our control, but we owe it to our clients to take every available step (extra passwords, software updates, etc.) to mitigate them.

We recommend that you conduct a “dry-run” of the platform with your team to test the technology and ensure that you are comfortable with the audio, video and screen-sharing functions (as well as more advanced options such as virtual breakout rooms, back-up dial-in numbers, etc.).

Witnesses (and your clients, who may also attend in appropriate circumstances) draw impressions from all aspects of the interview experience, and a polished technological approach sends the message that your investigation is sophisticated and professional.

- 3. Choose video over audio-only, when possible.** In our experience, videoconferencing provides many of the benefits of in-person interviews, such as being able to observe the witness’s demeanor and better establishing a rapport with the witness.

It also helps to reduce (but certainly not eliminate) the risk that other unannounced parties are listening in to the interview. Video screen-sharing tools also make it easier to share documents.

Of course, if the witness is appearing voluntarily and doesn't want to participate by video, you might need to bow to the witness's preference and stick with a telephone interview.

4. **Provide the witness with clear instructions about how to use the conferencing technology.** When setting up the interview, send the witness clear written instructions on the remote interview logistics. It also helps to exchange phone numbers so that you can troubleshoot any problems that might crop up during the interview.

Working through these technical steps is an important part of the process of building rapport and reducing the witness's anxiety before the substantive conversation begins.

5. **Stress the importance of a private and quiet setting.** In your initial instructions to the witness, explain that the witness should find a quiet and private setting for the interview. This will ensure that the witness is free from distractions during the interview and, importantly, will help preserve privilege (where it is otherwise applicable).
6. **Set the ground rules and establish the formality of the interview.** Although the perceived informality of a remote interview can be a benefit because the witness is more comfortable and might be more forthright, be sure the witness understands that she or he is to treat the remote interview just as seriously as an in-person meeting.

Draw on your experience and judgment as an investigator to calibrate the tone. Some witnesses who are very nervous would benefit from an introduction that somewhat relaxes the tone of the discussion, while others might need a more stern reminder of its importance if they appear flip or disinterested.

Of course, despite the different format of the conversation, make sure that you provide the usual instructions (including the *Upjohn* explanation, when applicable) and reminders about the importance of providing truthful information. Indeed, you may want to ask the witness to confirm that she or he understood each part of your introduction, so that nothing important is missed because of a bad connection or sound from a lawnmower outside.

7. **Tell the witness that you don't consent to being recorded — but assume you might be anyway.** At the beginning of the interview, inform the witness that you are not recording the interview and that you do not consent to having the witness record the interview.

That said (as with an in-person interview), it is impossible to prevent a witness from covertly recording the conversation in violation of your request and instructions.

Especially in a remote interview, it is healthy and cautious to assume that your questions and the witness's answers could be recorded and disclosed later without your permission.

8. **Have a plan for sharing documents.** There are several different approaches to sharing documents, and you will have to gauge the best option given the nature of the documents and the witness being interviewed.

For some witnesses (e.g., senior executives) who are reviewing only their own documents and emails, it may be acceptable to simply email PDF copies in advance. In other cases, you will want more control over the documents.

One option is to send the witness printed copies in sealed envelopes and instruct the witness not to open the envelopes until instructed during the interview. Another option is to email the witness a password-protected file of the documents and provide the password during the interview.

However, these approaches leave the witness with copies of the documents after the interview. Perhaps the most secure way of using and sharing documents during the interview is to use the screen-share function to display them live. Treat this as you would trial graphics and highlight or call out the key passages to save time.

If you use screen-sharing for documents, be sure to instruct the witness not to take any screen-shots during the interview.

9. **Avoid the Brady Bunch effect.** Before the interview, determine how many attorneys need to be present and avoid crowding the meeting with a gaggle of new names and faces.

It is easy and convenient for many attorneys to join a remote interview, but having too many people attend is a mistake. It may intimidate the witness, just as it would in person. Some inexperienced witnesses might assume from the fact that seven or eight lawyers are present that they must have done something wrong or that they are the focus of the investigation.

Likewise, be sure to also introduce each person in attendance before the interview begins, and (when appropriate) give a quick explanation of each person's role.

With adequate planning, remote interviews offer a cost-effective, efficient and safe way to conduct interviews during the COVID-19 pandemic, and beyond.

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