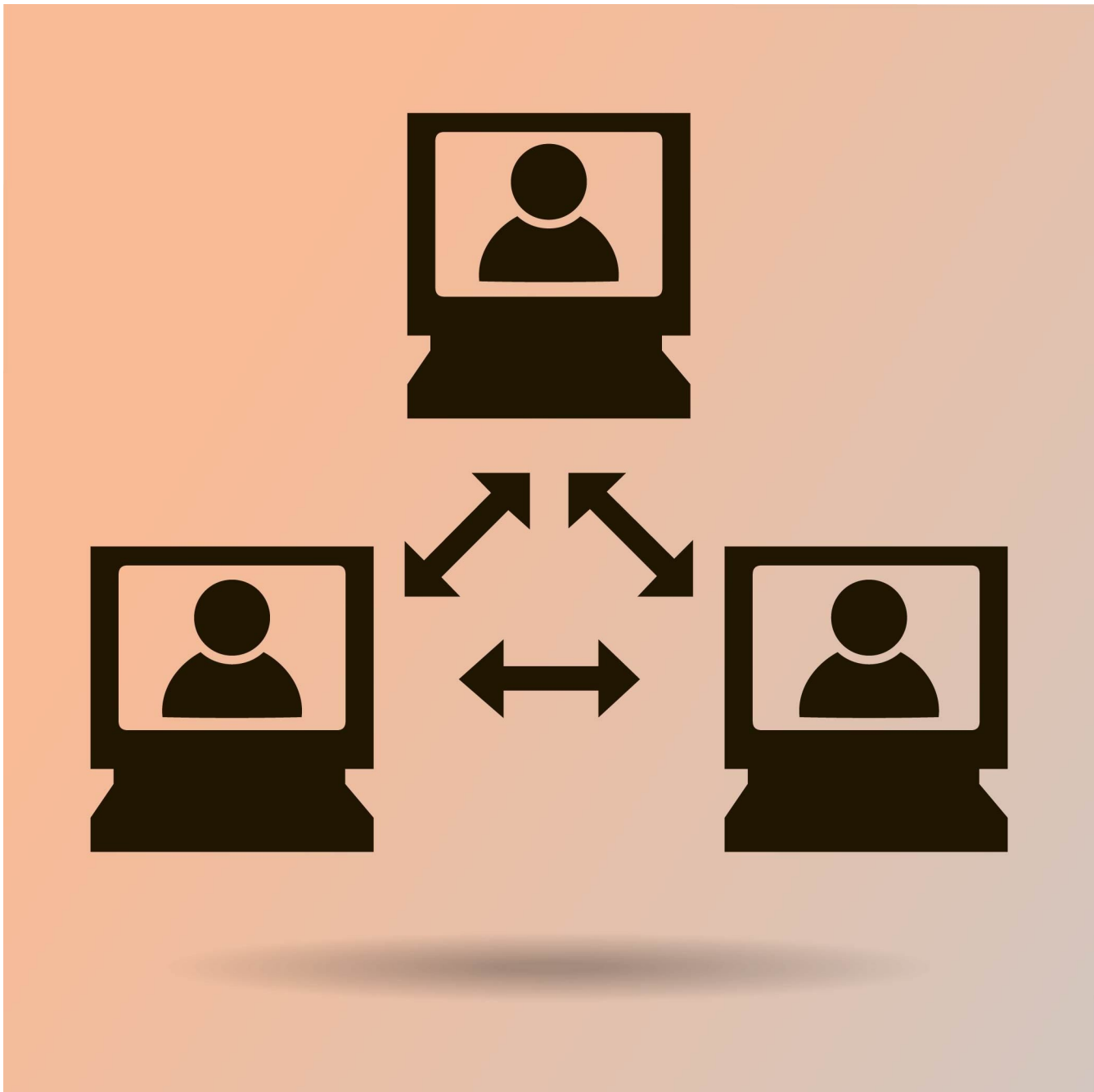


Federal Magistrate Shuts Down Socially Distanced Live Depositions

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by Benjamin Greenberg



Earlier this month, a federal magistrate judge in the Northern District of Illinois granted a defendant's request for a protective order to avoid in-person depositions of its experts, by requiring that the depositions instead be conducted remotely in light of the COVID-19 pandemic. The court's ruling is relevant to all IP litigators, as it is consistent with a growing trend during the pandemic to conduct depositions and other aspects of legal proceedings remotely to address the health concerns of all those involved, while ensuring that cases are not grinding to a halt.

Background

The underlying lawsuit was brought in 2016 by Sonrai Systems, LLC ("Sonrai"), an information technology company operating in the waste hauling industry, against its

former vice-president (Romano); Romano's new employer, The Heil Co. ("Heil"); and Sonrai's former business partner, Geotab, Inc. ("Geotab"). Sonrai alleges, among other things, that Romano engaged in a scheme with the other defendants to use Sonrai's confidential technology and information to assist Heil in launching a product first developed by Sonrai.

The case has now lasted four years, and the parties are nearing the end of discovery. Sonrai sought to take in-person depositions of Geotab's experts either in Chicago, where the case is venued, or in North Carolina, where the experts are located. Geotab's counsel, located in Boston, moved for a protective order to require that the depositions instead be conducted remotely in light of the pandemic.

The Court's Order on the Motion for a Protective Order

The Magistrate granted the motion, exercising the court's broad discretion under FRCP 26(c) to decide when a protective order is appropriate and to what degree protection is required, as well as its discretion under FRCP 30(b)(4) to order that a deposition "be taken by telephone or other remote means." Unsurprisingly, the court found that pandemic-related health concerns provide "good cause" for remote video conferencing depositions under the circumstances, and any prejudice to Sonrai was not sufficient to overcome these health risks.

In so ruling, the Magistrate began by reiterating that a national emergency has been declared due to the spread of the COVID-19 virus, and the CDC has noted that the best way to prevent illness is to minimize person-to-person contact. To protect all involved in litigation, courts around the country have authorized video teleconferencing for both criminal and civil proceeding and courts continue to advise caution when proceeding with litigation. These guidelines remain in effect and are changing rapidly as the pandemic continues to evolve around the United States. The Magistrate went on to outline certain heightened risks, and impracticability, in the present case, including: (a) Geotab's counsel, who would need to travel for the deposition, has regular contact with immediate family members in high risk categories; (b) Geotab's counsel would be required to self-quarantine for 14 days upon his return to Massachusetts from the depositions; (c) North Carolina, where the experts were located, has experienced a recent surge in COVID-19 cases and hospitalizations; and (d) Geotab's experts, upon traveling to Illinois for the depositions, would need to self-quarantine for 14 days before sitting for the depositions, making the deposition impracticable.

The Magistrate then went on to address Sonrai's prejudice arguments, which were based upon two main concerns that: (1) it would be prejudiced by the inability to meet and assess Geotab's experts and their testimony in person; and (2) remote depositions would be too cumbersome given the number of documents that will be referenced throughout the depositions. The court recognized these as valid concerns, but found they were not sufficient to overcome the good cause shown to conduct the depositions remotely.

With respect to the first concern, the Magistrate noted that many other courts have found that remote videoconferencing depositions offer the deposing party a sufficient

opportunity to evaluate a deponent's nonverbal responses, demeanor, and overall credibility. In fact, the court reasoned that Sonrai's ability to assess witness credibility might actually be impeded during an in-person deposition given the face mask mandates in place in the relevant jurisdictions; an impediment that presumably would not be present for a remote deposition.

With respect to the second concern, while indicating he was sympathetic to the logistical concerns, the Magistrate again found that this was insufficient to outweigh the health risks involved, particularly given the advancements in remote deposition technology, and Geotab's offer to make its LiveLitigation platform available to all parties during the deposition. In granting the protective order, however, the Magistrate ruled that Geotab must bear the additional costs (including those associated with the LiveLitigation platform) that are created by use of the videoconferencing format.

Practice Points

Although the court was careful to note that its holding "is not tantamount to a finding that concerns raised regarding COVID-19 will *always* suffice to support... requiring remote videoconferencing," it's apparent that remote depositions have become the new normal during the pandemic. Parties who face objections from opposing counsel to requests to proceed by video would be wise to study this decision.