

IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No.: SC20-128

The Florida Bar File No. 2019-30,075(9B)

THE FLORIDA BAR,

Complainant,

v.

DEREK VASHON JAMES,

Respondent.

APPENDIX TO RESPONDENT'S ANSWER BRIEF

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RECEIVED, 02/23/2021 12:25:31 AM, Clerk, Supreme Court

INDEX

Tab	Document	Date	Page
A	The Florida Bar Recommended Best Practices Guide for Remote Court Proceedings	December 3, 2020	5-17

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2021, a copy of the foregoing was E- filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida with a copy provided via email to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Arial, 14-point font, in compliance with Rule 9.045(e) of the Florida Rules of Appellate Procedure.

APPENDIX A

INDEX

1. [Remote Procedures Applicable to All Proceedings](#)
2. [Remote Procedures Applicable to Non-evidentiary Hearings](#)
3. [Remote Procedures Applicable to Evidentiary Hearings](#)
4. [Remote Deposition Procedures](#)
5. [Remote Mediations](#)

1. Remote Procedures Applicable to All Proceedings

1.1. Participants must dress and otherwise present professionally, as if they are physically appearing in a courtroom. Participants should conduct remote proceedings in a quiet location, with as little ambient noise as possible, and in a location with lighting that allows all participants to clearly see each other.

1.2. Participants in video conferencing proceedings must use a device that allows them to have access to a camera, a speaker, and a microphone, and have an adequate internet connection. This includes, but is not limited to, ensuring that the witness has working audio and video, knows how to mute and unmute, and is generally familiar with appropriate virtual hearing best practices, including finding a quiet place, free from distractions, from which to provide testimony, and placing the conference on mute at any time the witness is not speaking. If any participant does not have access to a device to allow for video conferencing, that participant may attend a remote proceeding by telephone or as otherwise determined by the court.

1.3. Prior to the proceeding, participants should familiarize themselves with the requirements and other operational aspects of the virtual platform being used. Participants should display their full name (and not just a first name, nickname, or phone number). They should also be familiar with, and utilize when not speaking, the mute function. Lawyers should ensure their clients or witnesses are familiar with the virtual platform, including the mute function, and general rules of virtual courtroom decorum. This also includes ensuring that the witness has the necessary device to be able to view any shared documents on the screen of the device.

1.4. When not speaking during the proceedings, the parties, lawyers, their clients, and non-testifying witnesses should mute themselves.

1.5. For all court proceedings, the court should provide the link to the virtual platform that is being used. No participant should create either a visual or audio recording of a court proceeding without permission of the court. If a participant desires an official record of the proceeding, the participant should hire a court reporter to appear unless the official record is otherwise preserved as authorized by the court.

1.6. Requests for continuances based solely on a participant's preference to wait until the court event can be conducted in person are disfavored, and will be considered only under extraordinary circumstances. Parties and counsel should not wait until the last minute to make any such requests.

1.7. Participants should review all applicable local rules, including those specifically addressing remote proceedings, judicial preferences, and administrative orders for remote proceedings.

1.8. The court should provide for a breakout room if a lawyer needs to confer with his or her client during the proceeding, or in the event the participants need to discuss a matter off of the record.

1.9. All notices of remote proceedings must (i) indicate that the proceeding will occur by video conferencing; (ii) include, if available, the video conferencing details, including links and login information; (iii) state that no party or counsel should appear in person at the proceeding; and (iv) provide instructions for participation by telephone if a self-represented party does not have access to the video conferencing platform that is being used. For security purposes, unique links and login information is preferred.

1.10. Judges may begin all court proceedings with an explanation of the video conferencing procedures, including the process the court will use to designate participants to speak.

1.11. These procedures are supplemental and do not take precedence over existing rules of procedure.

1.12. The preferred video conferencing platform is Zoom.

2. REMOTE PROCEDURES APPLICABLE TO NON-EVIDENTIARY HEARINGS

2.1. Participants should always check the court's procedures and any local orders, but in the absence of anything to the contrary, should ensure that copies of any materials the participant intends to present to the court during the hearing are received by the court and opposing parties no later than 24 hours in advance of the hearing.

2.2. A court may allow a participant to share case law, documents, photos, or other materials via the screen-sharing mechanism on the videoconferencing platform even if not previously submitted.

3. Remote Procedures Applicable to Evidentiary Hearings

Note: These procedures apply only to the electronic use and admission of documentary, photographic, audiovisual and other evidence reasonably able to be provided and shared electronically.

PREHEARING EVIDENTIARY PROCEDURES

3.1 PREHEARING CONFERENCE

3.1.1. The court may, *sua sponte* or at the request of any party, schedule a prehearing conference in advance of any evidentiary hearings.

3.1.2. At the prehearing conference, the court may advise all parties of the procedures for the hearing. By way of example, the court's procedures may address the handling of sequestration of witnesses, document sharing, and the use of physical evidence.

3.2 DOCUMENT PROCEDURES

3.2.1. At least 7 calendar days in advance of an evidentiary hearing, the parties must exchange exhibit lists that specifically identify by Bates number potential exhibits to be used at the hearing. Within 2 days after the exchange of exhibit lists, the parties must meet and confer by telephone or videoconference to stipulate to as much as practicable regarding authenticity and admissibility and to agree on the format and manner in which evidence will be presented at the hearing.

3.2.2. During the "meet and confer" after the exchange of exhibit lists, the parties shall prepare jointly an index of all exhibits that will be used at the hearing. The movant shall be primarily responsible for preparing this index and for providing the final copy of the index to the court and clerk's office. This index shall also specifically identify what objections exist, if any, to each exhibit and which party is making the objection. The parties shall check the judge's preferences and procedures, as well as any local rules, for the form of the index. A sample index is included as **Appendix A**. The parties shall exchange copies of any proposed exhibits that have not previously been exchanged no later than this meeting, except for exhibits solely to be used for impeachment. All documents shall be pre-marked for identification, and shall be Bates stamped for ease of identification during remote testimony.

3.2.3. At least 2 calendar days before an evidentiary hearing, the parties shall file all evidence sought to be introduced pursuant to instructions provided by the court. The

parties shall comply with the judge's preferences and procedures, as well as any local rules, regarding the form for marking exhibits and the means of submitting the exhibits to the court or clerk in advance of the hearing. The parties should seek to file all exhibits jointly, but in the absence of a joint filing, must file unilaterally at least 5 calendar days in advance.

3.2.4. In settings where the court must review a document that is not being admitted as evidence (for example, showing a driver's license to verify identity) the parties need not file the document in advance but may display the document by the camera for the court's review during the hearing.

3.2.5. Document uploading procedures:

A. Once all documents have been indexed and identified, attorneys must contact the judge's judicial assistant to determine the procedure that will be used for providing copies of the documents to the court, either electronically or otherwise.

B. Documents that are uploaded or provided to the court in an electronic format shall be named as follows: #___ Ex. [brief description of document]. For example, #1 Ex. contract between John Smith and Susan Jones 09.12.73.

C. Oversized documents that are not capable of being provided electronically to the court and participants will be addressed by the court on a case-by-case basis. Participants should include a description of such evidence on the exhibit index and shall advise the court of the issue in advance of the hearing.

D. Physical evidence that is not capable of being provided to the court and other parties electronically, such as an original of a document, will be addressed by the court on a case-by-case basis. Participants should include a description of such evidence on the exhibit index and shall advise the court of the issue in advance of the hearing.

3.3 WITNESS PROCEDURES

3.3.1. At least 10 business days in advance of an evidentiary hearing, the parties shall exchange witness lists that include the witnesses' names and, if known, email addresses and telephone numbers. The parties shall also identify any witness for whom an interpreter or an accommodation under the Americans with Disabilities Act will be required, and include the names of all interpreters on the witness list. Witness lists shall also be filed with the Court, without the witnesses' email addresses or phone numbers.

3.3.2. Participants should ensure that witnesses who will lay the predicate for evidence have a copy of the evidence. This can be accomplished either by sharing of the document virtually in real time or providing the evidence to the witnesses ahead of time, provided that if the document is provided ahead of time, it must be identical to, and bear the same Bates numbers as the document that is shared virtually during the hearing.

3.3.3. If a witness does not have the technology necessary to participate in the remote hearing, the participant calling that witness must specify requirements for the provision of an affidavit from the witness explaining and attesting to the inability for the witness to access such technology. The court will address how the witness may participate in the hearing on a case-by-case basis.

3.3.4. Participants should explain to witnesses that, if the rule of sequestration is invoked, the witness will not be able to observe any part of the proceeding outside of his or her testimony, and will either be placed into a waiting room or will be “on call” until it is the witness’s turn to testify. If the witness will not be placed in a virtual waiting room, he or she should be prepared to immediately participate in the proceeding upon receiving a call from the participant who is calling the witness.

3.3.5. Participants should ensure their witnesses are aware of the witness testimony protocol discussed and agreed to by counsel or ordered by the court

3.3.6. The court should provide for a breakout room if a lawyer needs to confer with his or her client during the proceeding.

3.3.7. The witness shall have the appropriate form of identification available to allow for the virtual swearing in of the witness.

3.3.8. The applicable rules of procedure shall govern when a participant intends to use a videotaped deposition at virtual evidentiary hearings.

Appendix A

Exhibit	Admissibility Status
Example- Plaintiff's Exhibit 1- Contract	Stipulated into evidence
Example- Plaintiff's Exhibit 2- Medical Records	Objection by Defendant 1 on the basis of relevancy.

4. Remote Deposition Procedures

The following procedures supplement all existing Florida rules of court and the Rules Regulating the Florida Bar, which shall be followed at all times. This includes, but is not limited to, the prohibition on speaking objections and on contact, including virtual contact, with a witness during the course of a deposition.

4.1. The court reporter may administer the oath or affirmation to the deponent remotely in accordance with the Supreme Court of Florida's AOSC20-16 issued on March 18, 2020, or as amended or updated.

4.2. Participants appearing on the record shall state their appearances clearly for the record, and shall not disable their cameras during the deposition unless there is a break or unless they are necessarily appearing by telephone.

4.3. The deponent shall comply with any request by a participant to show the environment where the deposition is taking place by using the camera on the device being used by the deponent for the deposition.

4.4. The deponent shall not use any virtual background at any time during the deposition.

4.5. The following may attend the remote deposition: (i) all Plaintiff counsel; (ii) all Defendant counsel; (iii) the witness; (iv) the witness's counsel; (v) in-house counsel for any party; (vi) the court reporter; (vii) the videographer; (viii) an interpreter, if necessary; (ix) a designated Party corporate representative; (x) a Party; (xi) any party's expert witness; and (xii) any other participant agreed upon by the Parties.

4.6. All deposition participants shall appear remotely unless the witness requests that the witness's counsel be present in the same physical location as the witness. The witness shall provide written notice to the participants no less than 5 business days prior to the deposition of the witness's intent to have his or her counsel present in the same physical location during the deposition. Upon such notice, any participant may attend the deposition in person or remotely. If the witness and the witness's counsel are in the same room, that witness and counsel must use two video cameras on two different devices and mute one of those devices to allow

only one microphone to be used at a time. One video camera shall show the witness and one video camera shall show the witness's counsel.

4.7. In the event that the witness is requested to produce documents for the deposition, such documents shall be copied and submitted to the participants at least 2 business days before the deposition.

4.8. The deposition notice for any remote deposition shall identify the court reporting service that will host and record the deposition (the "Remote Deposition Vendor"). The notice shall also contain a general description of how deposition participants may access the remote deposition.

4.9. The participant noticing the remote deposition will instruct the Remote Deposition Vendor to register deposition participants for the remote deposition in advance of the deposition, based upon a list of deposition participants to be jointly agreed to by the parties. Only deposition participants registered by the Remote Deposition Vendor will be permitted to enter the remote deposition, which entry must require a password.

4.10. Prior to the commencement of any remote deposition, the deposition witness may participate in a training with the Remote Deposition Vendor to become familiar with the remote deposition platform. Counsel for the witness may attend this training. Any deposition participant may request a separate training from the Remote Deposition Vendor prior to the commencement of a remote deposition.

4.11. Remote depositions taken in accordance with these procedures may be used at a trial or hearing to the same extent that an in-person deposition may be used at a trial or hearing, and the parties may not object to the use of the video recordings of the remote depositions on the basis that the depositions were taken remotely or through an electronic, internet-based service.

4.12. The parties will use reasonable efforts to minimize technical disruptions. Notwithstanding the foregoing, in the event that the participants, court reporter, or videographer experiences a technical malfunction that disrupts his or her audio or video during the deposition, the affected participant must raise any objection, contemporaneously on the record or as soon thereafter as reasonably possible, as to the portion of the deposition during which the affected participant's participation

was impaired. If additional time is needed to complete the deposition due to technical difficulties, the participants must agree to make the deponent whose deposition was interrupted available later that day, if possible, and if not, on another day to conclude the deposition.

4.13. No participant in the deposition shall engage in a private communication, including but not limited to text messages, electronic mail, or the chat feature in the videoconferencing system, with any deponent while on the record, whether or not a question is pending. Nothing in this paragraph prohibits counsel for the deponent from conferring with the deponent during a break in the deposition, in a “breakout room” or otherwise, nor does it prohibit counsel from communicating with each other by any means during the deposition, or otherwise prevent counsel for the deponent from conferring with the deponent as permitted by the applicable rules of court.

4.14. The deponent must not turn off his or her microphone while on the record. While on the record, each deponent shall close all documents, emails, browsers, programs and applications other than the service provider’s deposition feed on his or her computer or other device. While on the record, and unless the deponent’s cell phone is the device being used to attend the deposition, the deponent shall also silence his or her cell phone and move it and any other electronic communication device out of reach and out of view.

4.15. As the host of the video conference, the court reporter shall video record the witness using the recording function of the videoconferencing platform. Alternatively, if a videographer is provided by the court reporting service, such videographer may control the recording function of the platform. The court reporter or videographer, as the case may be, shall also announce each time he/she has activated and deactivated the record function on the videoconferencing platform. In addition, any party may at its discretion arrange for an independent videographer to video record the deposition by means other than the video-recording function of the platform. The party hiring any such independent videographer is responsible for the costs of doing so and must make copies of the video recording available to all other parties at their expense.

4.16. The video recording of the deposition created by use of the recording function of the videoconferencing platform shall be deemed the equivalent of a

video recording made by a videographer, shall be provided to all parties upon request at no additional charge, and shall be available for use in trial as though prepared by a videographer.

4.17. The videographer recording the deposition by means other than the video-recording function of the platform will record the image of the deponent's screen only and will not record the screens of any other participants.

4.18. During breaks in the deposition, the participants may use the breakout room feature provided by the service provider, which simulates a live breakout room through videoconference. The breakout rooms shall be established by the service provider and controlled by the service provider. A conversation in a breakout room shall not be recorded, transcribed, or observed by anyone not specifically authorized by the participants in the specific breakout room.

4.19. Exhibits used during the deposition need not be presented to the deponent and participants in hard copy and may instead be presented electronically, and no participant may object to the admissibility of any material on the grounds that the material was presented in electronic form.

4.20. Participants may introduce exhibits electronically during the deposition by using the service provider's document-sharing technology, by using the screen-sharing technology within the videoconferencing platform, or by sending the exhibit to the deponent and all participants via email. In the event that the service provider's videographer or exhibit technician is charged with introducing exhibits through the service provider's document-sharing or screen-sharing technology within the videoconferencing platform, such person is prohibited from sharing any exhibit with anyone else unless and until the deposing participant asks that the exhibit be published to the witness and other participants. This may be addressed by the court on a case-by-case basis.

5. Remote Mediation Procedures

5.1. All confidentiality protections that apply to mediation shall also apply to any mediation conducted virtually.

5.2. All appearance requirements that apply to mediation shall also apply to any mediation done virtually.

5.3. In order to make sure all parties, counsel, representatives, and other participants are in compliance, all video cameras shall be turned on and all participants, regardless of their location, shall be visible at all times, unless excused by the mediator or by agreement of all of the parties.

5.4. No one, regardless of location, shall record any portion of the mediation or download or save any contents of any chat function of the conferencing platform.