

**UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Baltimore Division)**

IN RE: SMITH & NEPHEW
BIRMINGHAM HIP RESURFACING
(BHR) HIP IMPLANT PRODUCTS
LIABILITY LITIGATION

MDL No. 2775
Master Docket No. 1:17-md-2775

JUDGE CATHERINE C. BLAKE

**THIS DOCUMENT RELATES TO
ALL ACTIONS**

**CASE MANAGEMENT ORDER NO. 17
Remote Deposition Protocol**

In an effort to enable the parties to proceed with discovery during the ongoing COVID-19 pandemic, the Court hereby approves the following rules for conducting depositions remotely in this MDL. The Court and the parties agree that the preference is to return to in-person depositions where and when appropriate under applicable federal, state, and local orders or health guidance. The Court has separately ruled on the extent to which remote depositions can be utilized and under what conditions. Because the timing of the return to in-person depositions is uncertain, the following provisions will govern remote depositions until further Order of the Court. The Court and the parties will revisit the need for remote depositions and these procedures as conditions evolve. Accordingly, it is ORDERED that the following deposition protocol (the “Remote Deposition Protocol”) shall be followed in all depositions conducted remotely in MDL No. 2775 (“the MDL”).

The Deposition Protocol adopted in Case Management Order No. 11 continues in effect and its provisions apply to all remote depositions taken in this MDL, except that the provisions of this Remote Deposition Protocol shall control in any remote deposition to the extent there is any inconsistency between this CMO and CMO 11.

I. GENERAL PROVISIONS AND DEFINITIONS

A. The Court and counsel recognize that the COVID-19 pandemic requires the parties to be flexible in taking depositions remotely, and they appreciate the need to work cooperatively to assist in enabling deponents and participating counsel to comfortably participate, understanding the technology needs and familiarity will differ from person to person, as will their available arrangements, including physical space, dependent care and other health care needs. The parties will make all reasonable efforts to accommodate requests for continuances of depositions or other reasonable requests for accommodations due to such needs.

B. “Witness” or “Deponent” shall mean the individual whose deposition is being taken.

C. “Noticing Party” shall mean the party that noticed the deposition. All communications to the “Noticing Party” required in this CMO shall be copied to Genevieve Zimmerman (gzimmerman@meshbesh.com) and Jasper Ward (jasper@jonesward.com), lead counsel for Plaintiffs, and to Kim Moore (kmoore@irwinllc.com) and Sara Gourley (sgourley@sidley.com), lead counsel for Defendant.

D. “Deposing Counsel” means the attorney taking the deposition.

E. “Defending Counsel” means the attorney defending the deposition.

F. “Witness Counsel” means any attorney for the witness who will attend or participate in the deposition.

G. “Attending Counsel” shall mean other counsel for either party who may attend the deposition, but will not have a speaking role.

H. “Opposing Counsel” shall mean counsel for the party that did not notice the remote deposition.

I. “Opposing Party” shall mean the party that did not notice the remote deposition.

J. “Participating Counsel” shall mean all attorneys participating in a remote deposition, whether in a speaking role or otherwise.

K. For purposes of this protocol, a “Remote Deposition” shall mean a deposition taken by remote means pursuant to Fed. R. Civ. P. 30(b)(4), and shall include depositions taken by (a) telephone, or (b) video-conferencing platforms that allow for the Deponent, Participating Counsel, the court reporter, and the videographer to participate in a deposition without being located in the same physical location. For purposes of Fed. R. Civ. P. 30(b)(5), a deposition shall be deemed to have been taken “before an officer appointed or designated under Rule 28” despite the court reporter not being in the same physical location as the witness, as long as the court reporter attends the deposition by the same remote means as the other participants and is able to hear and communicate with other attendees. To the extent permitted by the law of the state in which the witness is located, the witness may be sworn in remotely with the same effect as an oath administered in person. If the court reporter is not authorized by state law to swear in the witness remotely, the deposition shall not proceed. The parties will work collaboratively prior to commencing a deposition to determine if there is a state law that would prevent the deposition from proceeding.

L. If a deposition is noticed as a Remote Deposition, and any party or the Witness objects to it proceeding remotely, they shall notify the Noticing Party of such objection (which shall be sufficient if sent by e-mail). If the parties are unable to resolve the dispute over taking of the deposition by remote means, they shall promptly notify the Court, which will resolve the dispute after formal or informal briefing or other process at the discretion of the Court.

M. The Deposing Counsel or the Defending Counsel may attend any Remote Deposition in-person, but only with the consent of the Witness, and consistent with applicable

social-distancing and other health guidelines, except that masks cannot be worn during the deposition by the Witness, or by Deposing and Defending Counsel, so as to avoid interfering with communication with the Witness and Participating Counsel, and with accurate court reporting. If either the Deposing Counsel or the Defending Counsel intends to attend a remote deposition in-person, he or she shall provide at least seven (7) business days' notice before the deposition to Deposing Counsel or Defending Counsel and the Witness and Witness Counsel, absent agreement of the parties.

N. Before the first Remote Deposition, lead counsel for the parties will confer and agree on the use of a single court reporting service with a videoconferencing platform, which shall be used for all Remote Depositions taken in this MDL unless the parties agree otherwise. The videoconferencing platform shall be secure, and the parties will verify that the court reporting service chosen will agree (i) to disable any private "chat" or similar function available on the platform, (ii) to prevent any recording of the deposition by audio or video other than by the court reporter and videographer; and (iii) to ensure that the identities of all attending counsel are visible to all participants. No party shall disseminate the log-in or connection information for a Remote Deposition to any individuals who are not authorized to participate. The videoconferencing platform chosen will allow the Witness, Deposing Counsel and Defending Counsel (at a minimum) to be visible to all Participating Counsel at all times and to be audio-recorded, but only the Witness will have his or her image recorded by the videographer.

O. A technical specialist and/or deposition "concierge" or other assistant can attend any remote deposition at the request of and at the expense of the Deposing Counsel in order to assist with technology issues and/or presentation or use of exhibits.

II. NOTICE OF DEPOSITION

A. The Notice of any Remote Deposition shall be issued at least fourteen (14) days prior to the scheduled deposition to allow time to address the technology and other needs of the Witness and Participating Counsel, and to allow time for a test of the videoconferencing platform in advance of the deposition.

B. The Notice of Deposition shall specify that the deposition will be taken remotely, shall identify the city and state in which the witness and court reporter will be located, and shall identify the agreed-upon court reporting service to be utilized, including a contact person with information about access to the remote connection. At least three business days prior to the deposition, the Noticing Party must provide, or ensure that the court reporting service provides, detailed instructions regarding how to access and participate in the videoconferencing platform to the Witness and Lead Counsel for Plaintiffs and Defendant, who shall forward it to any other Participating Counsel.

C. A copy of this Remote Deposition Protocol will be given by the Noticing Counsel, by attachment to the Notice of Deposition or otherwise, to the Witness, to Witness Counsel (if any), and to the court reporting service in advance of each remote deposition.

III. PREPARATION FOR THE DEPOSITION

A. The parties will work cooperatively to ensure that the Witness has the technology needed to participate effectively in the deposition, including a computer or tablet equipped with camera, microphone, wi-fi or other internet connection, and will work with the selected court reporting service to have any needed equipment shipped to the Witness sufficiently in advance of the deposition to allow a test run prior to the deposition. The cost of rental and shipping of any such equipment to the Witness shall be borne by the Noticing Party.

B. At least one business day prior to the deposition, and preferably sooner, Deposing Counsel, Defending Counsel, the Witness, and the court reporting service (together or individually) will conduct a test of the system, equipment and internet connection that will be used to conduct the Remote Deposition.

C. Pursuant to Fed. R. Civ. P. 30(f)(2), Deposing Counsel and Defending Counsel shall be responsible for ensuring that any exhibits they wish to use at the deposition can be shown to the Witness in a manner that enables the Witness, Deposing and Defending Counsel, as well as Witness Counsel (if any) to review the complete exhibits (*i.e.*, not a snapshot or excerpt) during the course of the deposition. Such means can include (1) sending hard copies of pre-marked exhibits to the Witness, Defending Counsel, Deposing Counsel, Witness Counsel (if applicable), and the court reporter, to arrive at least two business days prior to the deposition (such exhibits can be shipped in a sealed envelope with instructions not to open them until the beginning of the deposition); (2) e-mailing pre-marked exhibits to the Witness, Defending Counsel (or Deposing Counsel), Witness Counsel (if any), and the court reporter at least two business days prior to the deposition (to allow sufficient time for printing of exhibits if desired); (3) using videoconferencing platform technology that enables Deposing Counsel or Defending Counsel to mark and share exhibits with the Witness, Court Reporter and other Participating Counsel; or (4) any other means the parties and Witness agree on. Deposing Counsel and Defending Counsel need not use the same means of sharing exhibits.

D. To the extent any documents have been sent to the Witness by Plaintiffs' Counsel prior to the deposition, in addition to the required disclosure of *Ex Parte* Contacts, Plaintiffs' Counsel shall send to Defendant's Counsel a copy of all such documents, either in hard copy or electronic copy (in the same manner as provided to the Witness – *i.e.*, in a tabbed binder, or, if

electronic, with replication of any tabs used in a hard copy binder that was sent to the Witness) in a manner than ensures receipt at least three business days in advance of the Remote Deposition.

E. If any documents are requested in the Notice of Remote Deposition to be produced by the Witness, the Deposing Counsel and Defending Counsel shall work cooperatively with the Witness in advance of the Remote Deposition to obtain copies of such documents and to ensure that all Participating Counsel and the Court Reporter are provided with hard or electronic copies of the documents at least three business days prior to the Remote Deposition. If the witness is unable to comply with this provision, the parties shall discuss cooperatively how best to proceed, which may include rescheduling the deposition, continuing with the deposition, but leaving it open to allow an additional deposition session to complete the questioning after the documents are received, or seeking the Court's guidance if the parties cannot agree.

IV. TAKING THE DEPOSITION

A. If any technical issues arise during the Remote Deposition that interfere with accurate reporting or recording, or with the participation of all necessary parties, the Deposing and Defending Counsel will confer, and if necessary, will agree to extend the length of the deposition the same amount of time as has been lost due to the technical difficulties, even if that means it must be concluded on a different day, or to reschedule the deposition. To the extent the parties are required to split deposition time equally, any extensions of time shall preserve the division of time equally to each party. If the parties cannot agree on the handling of a deposition interrupted or delayed by technical difficulties, they will advise the Court, which will address the issue at the next scheduled conference or such other time as it may determine.

B. Any objections to the use and admissibility of the transcript or video of any Remote Deposition taken in this MDL, including at trial, based solely on the fact that it was conducted by remote means shall be deemed waived.

C. Any communications between Defending Counsel and the Witness during the deposition or during any breaks shall be consistent with Federal and Local Rules, including the Discovery Guidelines of the District of Maryland.

D. Deposing and Defending Counsel shall agree to breaks of at least five minutes each hour during the deposition, or at such other intervals as the Witness or court reporter may request.

E. All Participating Counsel and the Witness shall strive to participate while in a space free of distractions and noise to the extent possible. Participating Counsel should mute their lines when not speaking. The Witness shall not communicate by any means with Participating Counsel regarding the deposition or the subject matter of the deposition while giving testimony except for the purpose of determining whether a privilege should be asserted. The Witness may communicate with Defending Counsel or Witness Counsel if desired during breaks, consistent with Paragraph IV.C.

F. Any confidential documents marked as such pursuant to the Protective Order in this case entered on June 16, 2017 (ECF 88) that are used in any Remote Deposition shall be protected in the same manner as in an in-person deposition, and the provisions of the Protective Order regarding designation of transcribed testimony as confidential shall apply in the same manner as an in-person deposition.

V. ADDITIONAL PROVISIONS

A. If Deposing or Defending Counsel believes in good faith that any deposition has been adversely affected by the fact it was taken as a Remote Deposition, including, but not limited to, a situation in which technological difficulties were experienced, Counsel may so state on the record, and may thereafter request approval from the Court to continue or re-open the deposition at a later date, either remotely or in person. In such case, the burden shall be on the party seeking to continue or re-open the deposition to show good cause for the relief requested.

SO ORDERED, this 9th day of June, 2020.

/S/

Catherine C. Blake
United States District Judge