

Skype™ Depositions:

Why Use a Lamborghini When a Hyundai Will Do Quite Well?

by Robert B. Fitzpatrick¹

SUMMARY

The below memorandum is meant to summarize the attitude of courts towards the use of Skype™ as an effective means of taking depositions. It is also intended to provide a basic introduction to the use of Skype™ for this purpose, as well as how to address common technical and practical issues which might arise. It is not intended to allow an individual with little or no knowledge of computers to take a Skype™ deposition unassisted, and even experienced users would be well advised to consider arranging for professional technical support to provide advice and assistance in setting up a Skype™ Deposition.

DISCUSSION

a. Use of Skype™ for Depositions has been Permitted and Even Encouraged

The D.C. Court of Appeals, on July 2010 issued a decision that contains a strong nudge from the Court to the practicing bar to begin to use Skype™ for depositions rather than video conferencing, which is extremely expensive. In its opinion, the Court said the following:

In denying an award of costs for videoconferencing services, the D.C. Court of Appeals explained:

“[A]ppellees did nothing to explain why it was necessary for them to use the Lamborghini videoconferencing method they chose to take the witness’s deposition when a Hyundai might have been just as effective. At the time of the deposition, methods of conducting online videoconferencing without charge were available. For example, we take judicial notice of Skype™, a popular service that allows people to make unlimited video calls over the Internet for free using just a web camera, many of which cost under \$100, and a computer.”

Mody v. Ctr. for Women’s Health, P.C., 998 A.2d 327 (D.C. 2010). Other courts have similarly encouraged or sanctioned the use of Skype™ for taking depositions. See *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985); *Guillen v. Bank of Am.*, 2011 U.S. Dist. LEXIS 148405 at *3-*4, n.3 (N.D. Cal. Dec. 27, 2011); *Degenhart v. Arthur State Bank*, 411-cv-041, 2011 U.S. Dist. LEXIS 104839

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(S.D. Ga. Sept 15, 2011); *Balu v. Costa Crociere S.P.A.*, No. 11-cv-60031, 2011 U.S. Dist. LEXIS 85299 (S.D. Fla. Aug. 3, 2011); *Garcia v. Resurgent Capital Servs., Inc.*, 11-cv-01253-EMC (N.D. Cal. 2011) (Doc. No. 57); *Sloniger v. Deja*, 09-cv-858s, 2010 U.S. Dist. LEXIS 134414 (W.D.N.Y. Dec. 20, 2010); *Gaia v. Smith*, No. 09-cv-212, 2010 U.S. Dist. LEXIS 28545 (S.D. Tex. Mar. 24, 2010); *West v. City of New York*, No. 88-cv-1801, 1990 U.S. Dist. LEXIS 6613 (S.D.N.Y. 1990).

b. Traditional Videoconference Tips

Obviously some tips are universally applicable, whether you are videoconferencing using Skype™ or using more expensive videoconferencing equipment, the rental of which can often cost hundreds or thousands of dollars each day.

- *Clarity on Time* – Any notice must be perfectly clear as to the time at which the conference will take place. Preferably, you should specify the time in every time zone that participants are located in.
- *Support Personnel*
 - A notary will still be needed to swear in the witness;
 - it is preferable to have the court reporter present at the location where the witness will be located;
- *Exhibits* – To the extent possible, try to provide the witness with copies of all exhibits you plan to use prior to the date of the deposition. If you are defending a deposition, try to make sure your witness has access to copies of these documents.
- *Conduct a Dry Run* – Always test the Skype™ video conference link out at least 24 hours prior to the event using all the same locations and equipment that will be used for the actual video conference. This will provide sufficient time to address any unanticipated problems which may arise.

c. Matters to Consider for Skype™ Videoconferencing

For legal practitioners without access to in-house videoconferencing systems and support, and for matters which do not merit the expense associated with obtaining such facilities and expertise, Skype™ forms an attractive alternative. Nevertheless, arranging such a videoconference does require a certain minimum level of technical expertise. As with any such endeavor, a practitioner must be willing to devote the time needed to familiarize him- or her- self with all the technical and practical aspects of using Skype™ for legal work.

While the below list may at first appear intimidating, individuals of all ages and technical backgrounds have successfully made use of Skype™.

1. Hardware, Software & Connectivity

- a. Most modern computers, especially those that come with integrated webcams and Windows 7, can run Skype™ at the level necessary to use at a deposition. Some reporters have even had success with attorneys conducting depositions using their iPad or iPhone with sufficient (4G) connectivity. That said, it may be useful for the parties to ensure that their devices meet the following specifications:

- i. Windows XP, Windows Vista, or Windows 7. Make sure that your operating system has been properly updated and patched.
 - ii. While Skype™ can function adequately with a 1.8 GHz processor, a 2.4 GHz Intel® Core™ 2 Duo Processor or equivalent is recommended.
 - iii. While Skype™ can function with as little as 512 megabytes of ram, at least 2 GB of RAM is recommended.
 - iv. A graphics card with at least 32 megabytes of RAM – with at least twice that being recommended.
 - v. A monitor with a minimum resolution of 640x480, though a 1280 x 720 monitor resolution is recommended.
 - b. If you plan on recording the conversation, it would be advisable to have at least one terabyte of storage (a terabyte is approximately 1,000 gigabytes). It is possible to obtain 1-2 terabyte external storage for a little over \$100.
 - c. Internet Connection
 - i. All parties should have a good connection with at least 6 upload/download. High-speed broadband is always preferable when it is available. While Skype™ can function at lower speeds than these, performance may degrade. If you are connecting through a local area network, be sure that the network will allow the computer you plan to use for the deposition to achieve these speeds.
 - ii. A hardwired internet connection is preferable to a wi-fi connection and should be used whenever possible. Ideally, all participants should be in a Location where a high speed connection hardwired is available.
 - d. Webcam – you should plan on spending \$50-\$100 for a decent web cam to ensure high-quality video. Higher quality webcams may not offer much in the way of increased performance, as Skype™ will degrade the quality of the video transmission to optimize performance depending on network traffic.
 - e. Both sides of the connection must have a high-speed internet connection for Skype™ to work at an acceptable level.
 - f. There have been problems reported with Skype™'s audio transmissions. If testing reveals audio problems, an easy fix is to use some other means of transmitting audio, such using land-line speaker phones at each location to transmit audio. If you use this method, be sure to place any microphones on the Skype™-ing computers on “mute”.
2. *Software* – You should have the following software and accounts
- a. All participants will need Skype™ 4.2 (or higher) for Windows.
 - b. All participants will need DirectX 9.0c and a compatible video card (hardware).
 - c. to make a group video call, at least one of the people on the call must have a Skype™ Premium account (for personal accounts) or a Group Video Subscription (for business accounts).
3. *Practice* –

- a. Even before a test call, be sure to practice making connections with, and using the features of, Skype™. In addition to increasing your level of comfort with the service, it will also allow you more easily to identify and address potential problems which may arise. In particular, practice using and repositioning the webcam, making adjustments to the audio devices, and adding participants to calls. If you plan to record your call, you should obviously also practice doing so.
 - b. Skype™ also has a number of additional features which may prove useful during a deposition – for example, the capability to send a file to all participants in a call. To the extent you anticipate using such a feature, be sure to practice doing so beforehand.
4. *Testing in Advance* – Advance testing is even more important for Skype™ depositions than for other types of videoconferencing.
 - a. If possible you should plan to make at least one test call prior to the date of the deposition which involves as many of the same participants, hardware, and locations that will be used in the actual deposition as practical.
 - b. During this call, make sure all peripheral hardware, such as the webcam and any audio devices (land lines, microphones, speakers, etc.) are working properly and provide acceptable feedback.
 - c. If you encounter performance problems during testing, Game Booster, a free utility that helps improve your computer's processing speed, may be able to help abate them. As always, this should be tested before it is relied upon.
 - d. When setting up your connections, be sure you are talking to the correct individual(s) at the other location(s) to ensure that everything is being set up correctly.
 - e. All participants should plan to call into the deposition at least 15 minutes early to work out any final bugs.
5. *Advance Set-Up* – Even prior to testing your Skype connection, all parties involved should set up their Skype™ accounts and exchange contact requests. This will smooth the process of testing the connection and of taking the deposition. If you intend to use exhibits with the deposition, all exhibits should be marked ahead of time and provided to the parties. If you intend to make use of Skype's™ document sharing feature, all exhibits should be scanned electronically and marked up as needed ahead of time.
6. *Check the Settings* – Remember to turn off online notifications on the computer you are using for the Skype™ conference, especially if you also use Skype™ for personal purposes. You do not want testimony to be interrupted by a message informing you that one of your co-workers, friends, or family members is now online. Also disable any other software or notifications which may create a distraction during the deposition.
7. *Security*:
 - a. Skype™ encrypts communications made using its software.
 - b. However, transmissions using Skype™ (“feeds”) can be vulnerable to attacks by hackers.

- c. To enhance the security of your transmissions, all participants should ensure that Skype™ is not using their device as a “super node”. There are instructions on Skype™’s public website for making the modifications needed to achieve this.
8. *Skype™’s Group Chat Feature:*
- a. One Member must have a Skype™ Premium Account, which is \$8.99 per month.
 - b. Group chat has higher system requirements than regular video chat. As of the time of writing, the minimum requirements were a high-speed broadband connection of 512 kbps download speed and 128 kbps upload speed, and a computer with at least 1 gigahertz of processing power. Recommended system specifications are 4 Mbps down/512 kbps up and a core 2 due 1.8 gigahertz processor.

CONCLUSION

Skype™ is likely to only increase in popularity as a means of taking depositions and performing other work which previously was thought to require face-to-face interactions. Anecdotally, professional court reporting firms have already noted a substantial increase in inquiries regarding the use of Skype™ for depositions. Only a year ago such firms would receive inquiries about Skype™ several times per year, while now they field calls on the subject at least once per week. In addition to Skype’s™ ability to facilitate face-to-face interaction, newer versions contain features which allow for document sharing, which can facilitate the use of deposition exhibits. As technology improves, the remaining barriers to use of this technology will likely continue to decrease.