

Seeing is believing

Hearsay



BOND

Boston litigator **Thomas M. Bond** recently secured an audio-video deposition in a client's personal injury case under conditions defense counsel argued contravened an emergency rule adopted by the Supreme Judicial Court in response to the COVID-19 pandemic.



COWEN

The **Kaplan/Bond Group** attorney represents the family of Derek Milligan, a bricklayer who suffered catastrophic injuries in a fall that occurred while he was working at a Haverhill construction site on Feb. 8, 2018. To establish that contractors at the site failed to implement reasonable fall prevention measures, Bond sought to obtain the audio-visual depositions of three employees of defendant Contractors Risk Management.

"At trial, I may want to play portions of the audio-visual deposition in my case-in-chief," Bond says. "With an audio-visual deposition, you can hear [the witness's] voice inflection, you can see the look on their face. It's a much better way of preserving testimony than a cold, written transcript."

Defense counsel balked on the ground that appearance in the same room as the videographer posed a risk to the health of the witnesses, most notably Judson Ludeking, the 69-year-old president of CRM.

Defense attorney **Jon C. Cowen** further argued that Bond's plan to mitigate the risk of COVID infection by having the videographer record the depositions from a remote location violated the plain language of the SJC's May 26 order permitting the taking of remote depositions during the COVID-19 pandemic.

Pursuant to OE-144(10), although the court reporter may be in a remote location, the videographer "must be physically present with the witness unless otherwise agreed to by the parties" whenever an audio-visual recording of a deposition is conducted pursuant to Mass. R. Civ. P. 30A.

"My opponent argued the SJC must have done that for a reason. [He said,] 'I don't want anybody to be physically present in the room with my client, so you can't take an audio-visual deposition,'" Bond recounts.

On Aug. 3, Bond filed a motion in Essex Superior Court for leave to take audio-visual depositions with the videographer in a remote location or via Zoom videoconferencing.

Cowen filed a memorandum in opposition. The **Donovan Hagem** attorney wrote that the plaintiffs "should not be permitted to turn the COVID-19 pandemic to their tactical advantage by compelling CRM's witnesses to appear for remote audio-visual depositions without being able to meet with their counsel."

But Judge **C. William Barrett** found that defendant CRM was unable to show it would be prejudiced by the proposed remote procedures and allowed the plaintiffs' motion.

According to Bond, in ruling from the bench, the judge made the point to defense counsel that if Ludeking was in fact immunocompromised because of his age and other health factors, that was all the more reason for the plaintiffs to have the opportunity to preserve the witness's testimony through an audio-visual deposition.

But Cowen maintains that the SJC's order on remote depositions doesn't provide the latitude for the remote procedure sought by the plaintiffs. He adds that the case raises important issues concerning trial testimony.

To the extent that the SJC may have contemplated the issues raised in his client's case, Cowen says its emergency rule does not provide for the remedy ordered by the Superior Court.

"There's an express provision [in OE-144(10)] for when the parties don't agree," Cowen says. "Well, I don't agree that it's appropriate for my client to be forced to give trial testimony without us having the chance to meet and prepare for that trial testimony."

Bond and Cowen do agree that Barrett's Sept. 3 order in *Milligan v. Stateside Construction Group, Inc., et al.* appears to be the first ruling in the state on the interplay between OE-144(10) and the civil rules governing audio-visual depositions.

— PAT MURPHY