AMERICAN BANKRUPTCY INSTITUTE

2021 Bankruptcy Battleground West

Technology Issues: Crash Course

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CONCURRENT SESSION

2021

Technology Issues: Crash Course

This session will address how COVID-19 and stay-at-home orders prompted the rapid adoption of technology by the courts, the lessons learned along the way, and where technology can be used to further improve the efficiency, efficacy and safety of the bankruptcy process.

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Covid-19

On Wednesday, March 11, 2020, the World Health Organization declared the Coronavirus (COVID-19) a global pandemic. The Centers for Disease Control and Prevention and other public health authorities recommended social distancing as a means of limiting further community spread of COVID-19.

On March 19, 2020, Gavin Newsom, Governor of the State of California, declared a public health emergency and signed Executive Order N-33-20, effectively a "shelter-in-place" or "stay home" order, directing residents to limit movements outside of their homes beyond essential needs in an attempt to reduce the spread of COVID-19.

Courts are Always Open: Judiciary's Rapid Response to Covid-19

While the use of technology has increased in courtrooms over the years, that has largely been a slow march forward. The public health crisis, for which there is no definitive end point, spurred immediate use of videoconferencing and other technology that was not largely present in litigation or in the courtrooms.

Urgent steps were taken to employ processes and technology to ensure that the wheels of justice continued to turn where possible and alternate arrangements were made in compliance with state and federal COVID-19 directives. In-person attendances and services have been substituted with technology. Mediations, hearings and trials have been, and continue to be where practicable, conducted wholly online via the virtual courtroom.

Worldwide, courts are grappling with the use of technology and the changing face of trials in light of social distancing, stay-at-home orders, and ongoing spikes of COVID-19 that could be exacerbated by the confines of the courtroom. A variety of challenges and opportunities have arisen as attorneys, litigants, and judicial officers adapt to the "new normal." Issues have arisen as the legal system works to strike a balance between its role in protecting public health and the administration of justice.

For over two centuries, the federal courts have always remained open—through wartime, natural disasters, and even previous pandemics. It remains true now, because of the dedication of judges, court staff, attorneys, and members of the public, whether as witnesses or those who continue to serve as jurors.

Rule 5001 of the Federal Rules of Bankruptcy Procedure (FRBP), provides in pertinent part as follows:

- The courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules.
- All trials and hearings shall be conducted in open court and so far as convenient in a regular court room; and
- All other acts or proceedings may be done or conducted by a judge in chambers and at any place within the district parties.

See, FRBP 5001(a), (b).

Taking into account guidance and safety measures from local, national and international health organizations, courts across the country took proactive measures to implement special interim rules, procedures and protocols regarding court operations, with the purpose of providing safe uninterrupted public access to the Courts. See, for example, extensive listing of general orders and public notices, from many courts across the country, at https://www.donlinrecano.com/home/pages/covid19-orders.

On March 19, 2020, the first General Order (20-02) was issued in the United States Bankruptcy Court for the Central District of California ("Central District") regarding procedures for public emergency related to the COVID-19 outbreak.

General Order 20-02 provided, in part:

1. **NO physical access to the court unless otherwise ordered by the court** due to unusual circumstances
2. **Telephonic appearances mandatory except for trials and other evidentiary hearings** unless otherwise ordered by the court
3. Wet signature requirement under LBR 9011-1(d) temporarily suspended

On April 1, 2020, or within two (2) weeks of issuance of General Order 20-02, Amended General Order 20-02, provided in part further restrictions:

1. **NO physical access to the Bankruptcy Court for any hearings**
2. **Only telephonic appearances** were permitted in all matters

On April 14, 2020, or within one (1) month of issuance of General Order 20-02, Second Amended General Order 20-02, provided in part, further restrictions and made clear that there shall be no physical access to the Central District courts, and only remote appearances will be permitted:

1. NO physical access to the Bankruptcy Court for any hearings
2. Only **telephonic or video appearances** were permitted in all matters

Since issuance of General Order 20-02, sixteen (16) additional orders were issued in the Central District (as of February 8, 2021), extending or amending prior general orders, that collectively provided special interim rules, procedures and protocols regarding court operations and safe uninterrupted public access to the Central District Courts. To get the latest information about COVID-19 and Central District Court Operations, see, https://www.cacb.uscourts.gov/coronavirus-covid-19-and-court-operations

Since the issuance of the General Orders, the Central District added the ZoomGov platform for participants and attendees to appear remotely at hearings and conferences. ZoomGov has both telephone and video capability. Zoom provides many guides and tutorial videos with helpful information on using the Zoom platform, which has an almost identical layout as ZoomGov. Counsel and clients are encouraged to review the Zoom materials below to familiarize themselves with the video/audio basics of using ZoomGov.

- Video: https://support.zoom.us/hc/en-us/sections/200521865-Video
- Audio: https://support.zoom.us/hc/en-us/sections/200319096-Audio
- How to easy mute/unmute with Push-to-Talk: https://support.zoom.us/hc/enus/articles/360000510003-Push-to-Talk
- Hot Keys and Keyboard Shortcuts to start/stop video, mute, etc.: https://support.zoom.us/hc/en-us/articles/205683899-Hot-Keys-and-Keyboard-Shortcutsfor

ZoomGov reminders and connection links are usually posted at the beginning of the judge's daily court calendars.

In addition to Central District wide policies and procedures all judges in the Central District have updated their different policies, procedures and protocols to account for the need to handle all matters remotely. See, for example, policies and procedures for Judge Saltzman found here: https://www.cacb.uscourts.gov/judges/honorable-deborah-j-saltzman; see also, Video/Remote Trial Procedures, which includes a sample order in Microsoft Word[1] and a sample of an order entered in a specific case then pending before Judge Bason. https://www.cacb.uscourts.gov/judges/honorable-neil-w-bason

The Effectiveness of the Virtual Courtroom

On all accounts, the courts' response to the COVID-19 pandemic has changed the way hearings and trials are being conducted and has accelerated the courts' utilization of technology. Most hearings have been conducted online using remote technology – sometimes dubbed the "virtual courtroom" or "e-court" – where new practices and procedures have been applied, but

[1] Note that the Microsoft Word sample Order Establishing Remote Trial Procedures has not been prepared by Judge Bason, and is not endorsed by him, but is being provided to parties as a sample of the type of order that might be appropriate in connection with evidentiary hearings/trials that are not conducted in person.

parties can still make oral submissions and witnesses can give evidence and be cross-examined via videoconferencing or teleconferencing facilities.

The courts have strongly encouraged practitioners to cooperate more than ever with their colleagues and court personnel to ensure the efficient conduct and integrity of any proceeding in the virtual courtroom.

Courts have emphasized that proceedings are to continue to operate on a "business as usual" basis. Just because one cannot have a hearing conducted in accordance with traditional practices and procedures, does not mean that the court's judicial function cannot be performed effectively where it is necessary to do so. **One must ensure the perfect does not become the enemy of the good.**

While the COVID-19 pandemic has presented unusual circumstances for parties, the courts and practitioners have endeavored to carry out court functions and services remotely via the virtual courtroom – but what are the procedural, logistical and other challenges and how effective have the processes been?

Procedural Challenges for Remote Witness Testimony: Compliance with Federal Rule of Civil Procedure 43 and Federal Rule of Bankruptcy Procedure 9017

Pre COVID-19 most bankruptcy courts were using technology usually comprised of telephonic remote appearances primarily for oral argument in the context of non-evidentiary matters. At times, circumstances would arise where parties would seek court permission to offer testimony from witnesses in a remote location.

The proper location of witness testimony is governed by Rule 43(a) of the Federal Rules of Civil Procedure ("FRCP"), the primary purpose of which is to "ensure that the accuracy of witness statements may be tested by cross-examination and to allow the trier of fact to observe the appearance and demeanor of the witnesses." In re Adair, 965 F.2d 777, 780 (9th Cir. 1992).

Prior to 1996, FRCP 43 contemplated only testimony provided in open court. In 1996, FRCP 43 was amended to include a provision to allow contemporaneous transmission of testimony into court from a remote location. The rule, which applies in cases under the Bankruptcy Code pursuant to Rule 9017 of the Federal Rules of Bankruptcy Procedure ("FRBP"), provides, in part:

> (a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

Even before the 1996 amendment, federal district courts had taken telephonic and closed-circuit television testimony in civil cases. United States v. Gigante, 971 F. Supp. 755, 758 (E.D.N.Y.

1997), aff'd, 166 F.3d 75 (2d Cir. 1999); see, e.g., In re San Juan Dupont Plaza Hotel Fire Litigation, 129 F.R.D. 424 (D. Puerto Rico 1989).

The 1996 amendment, however, established a standard for when contemporaneous transmission is proper and provided guidance on interpreting and applying that standard in the accompanying advisory committee note.

The lengthy advisory committee note underscores the importance of live testimony in the court, noting that the solemnity of the trial in the actual presence of the fact finder may promote truthfulness by the witness and that face-to-face communication is invaluable for judging the demeanor of a witness. The advisory committee note supports the preference for in-person testimony, stating that contemporaneous transmission "cannot be justified merely by showing that it is inconvenient for the witness to attend the trial." The party must establish "**good cause in compelling circumstances**" **and** show that "**appropriate safeguards**" are in place. The advisory committee note then discusses what constitutes "good cause" and "appropriate safeguards."

A sample of cases determining whether COVID-19 constitutes "good cause in compelling circumstances"

ResCap Liquidating Trust v. Primary Mortgage, Inc. (In re RFC & ResCap Liquidating Trust Action), 444 F.Supp.3d 967 (D. Minn., March 13, 2020) (finding COVID-19 to be compelling circumstances and denying request to reschedule final two days of trial).

Centripetal Networks v. Cisco Systems, 2020 WL 3411385, 2020 U.S. Dist. LEXIS 110665 (E.D. Va., April 23, 2020) (denying motion opposing trial by video conference).

Guerra v. Rodas, 2020 WL 2858534, 2020 U.S. Dist. LEXIS 96559 (W.D. Okla., June 2, 2020) (finding COVID-19 constituted compelling circumstances).

Argonaut Insurance Company v. Manetta Enterprises, Inc., 2020 WL 3104033, 2020 U.S. Dist. LEXIS 103625 (E.D.N.Y., June 11, 2020) (overruling objection to conducting trial via videoconference and finding that COVID-19 constitutes good cause in compelling circumstances).

Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC, 2020 WL 3428136, 2020 U.S. Dist. LEXIS 110254 (S.D.N.Y., June 23, 2020) (COVID-19 found to constitute compelling circumstances on consent of both parties).

Vitamins Online, Inc. v. Heartwise, Inc., 2020 WL 3452872, 2020 U.S. Dist. LEXIS 111709 (D. Utah, June 24, 2020) (ordering that trial proceed by video conference over party's objection).

Graham v. Sunil Kumar Dhar, 2020 WL 3470507, 2020 U.S. Dist. LEXIS 111141 (S.D. W.Va., June 25, 2020) (denying motion to permit trial testimony via videoconference, finding that travel difficulties and backlog of surgical cases for doctor/witness caused by COVID-19 did not constitute compelling circumstances).

Gould Electronics. Inc. v. Livingston County Road Commission, 470 F.Supp.3d 735 (E.D Mich., June 30, 2020) (overruling objection to trial by videoconference and finding COVID-19 constitutes compelling circumstances).

Barrett v. Rogers (In re Lawrence), 2020 WL 6875947, 2020 Bankr. LEXIS 1795 (Bankr. E.D. Va., July 8, 2020) (denying motion to continue trial and finding COVID-19 constitutes good cause).

Wood v. Paccar, Inc., 2020 WL 6387374 (N.D. Iowa, October 8, 2020) (granting motion to permit trial testimony via videoconference, finding that physician witnesses travel would expose them and others to COVID-19 and constituted good cause in compelling circumstances).

What are "appropriate safeguards?"

The judge must be able to identify, communicate with, and evaluate the demeanor of a witness. See, 1996 Advisory Committee Note to FRCP 43 ("The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.").

"No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used. Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured." 1996 Advisory Committee Note to FRCP 43. See, In re Rand Int'l Leisure Products, LLC, 2010 WL 2507634, 2010 Bankr. LEXIS 1986 (Bankr. E.D.N.Y. June 16, 2010) (listing safeguards for video conference witnesses); Barrett v. Rogers (In re Lawrence), 2020 WL 6875947, 2020 Bankr. LEXIS 1795 (Bankr. E.D. Va. July 8, 2020) (finding protocol established by court for remote witness testimony constituted appropriate safeguards); Guerra v. Rodas, 2020 WL 2858534, 2020 U.S. Dist. LEXIS 96559 (W.D. Okla. June 2, 2020) (finding appropriate safeguards in place).

The presentation of evidence must also comply with Rule 611 of the Federal Rules of Evidence ("FRE"), which rule provides that **t**he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- make those procedures effective for determining the truth;
- avoid wasting time; and
- protect witnesses from harassment or undue embarrassment.

The trial court has wide latitude under FRE 611 in controlling the presentation of evidence. SR International Business Insurance Co. Ltd. v. World Trade Center Properties, LLC, 467 F.3d 107 (2d Cir. 2006); Santos v. Posadas De Puerto Rico Associates, 452 F.3d 59 (1st Cir. 2006); In re Adair, 965 F.2d 777, 780 (9th Cir. 1992) (presenting direct testimony by written declaration a permissible "mode"); Jane Doe v. Chang, 2012 WL 13093874, 2012 U.S. Dist LEXIS 206452 (N.D. Tex., March 7, 2012) (witnesses allowed to testify at trial via telephone or live video

pursuant to FRCP 43(a) and FRE 611); Saverson v. Levitt, 162 F.R.D. 407 (D. D.C. 1995) (Rule 611 removes all doubt that court could order direct testimony via affidavit or declaration).

To the extent there is any inconsistency between FRCP 43 and FRE 611 the Federal Rules of Evidence control. Lawrence R. Ahern III and Nancy Fraas MacLean, Bankruptcy Procedure Manual § 9017.2 (2016 ed.).

Video Proceedings as a Substitute for Live Proceedings

Courts have acknowledged that videoconferencing is not a perfect substitute for live hearings. See, United States v. Lawrence, 248 F.3d 300, 304 (4th Cir. 2001) ("watching an event on the screen remains less than the complete equivalent of actually attending it."). While not a perfect substitute, pre-pandemic courts recognized and embraced the benefits of videoconferencing under less than ordinary circumstances. See, e.g., Horn v. Quarterman, 508 F.3d 306, 317 (5th Cir. 2007) (upholding use of two-way closed circuit television for testimony of terminally ill witness); Harrell v. Butterworth, 251 F.3d 926, 931 (11th Cir. 2001) (upholding remote testimony because "the witnesses lived beyond the subpoena power of the court"; it was in the state's interest "to expeditiously and justly resolve criminal matters that are pending in the state court system"; "one of the witnesses was in poor health and could not travel" to the United States; and the witnesses were "absolutely essential" to the case).

In light of COVID-19, courts have allowed remote testimony, but there are divergent views among the courts with opinions and holdings that seem to imply that technology for contested matters should be the exception, and not the rule. See, e.g., Lopez v. NTI, LLC, 748 F. Supp. 2d 471, 479 (D. Md. 2010); In re RFC & ResCap Liquidating Trust Action (ResCap Liquidating Trust v. Primary Residential Mortgage, Inc.), No. 0:13-cv-3451(SRN/HB), 444 F. Supp 3d 967 (D. Minn. 2020) (for trial testimony in light of COVID-19, the court held "Given the speed and clarity of modern videoconference technology, **where good cause and compelling circumstances are shown**, such testimony satisfies the goals of live, in-person testimony and avoids the short-comings of deposition testimony) (emphasis in bold); Argonaut Insurance Company v. Manetta Enterprises, Inc., No. 19-CV-00482(PKC)(RLM), 2020 WL 3104033, at *3 (E.D.N.Y. June 11, 2020) (court rejected challenge to video testimony in a civil bench trial but granted a two-month continuance to allow the objecting party time to prepare.).

Other than the obvious pressing benefit of protecting participants from possible public health concerns, proponents for the use of remote technology in trial cite a variety of other reasons for the use of video testimony. For example, it can cut costs of securing witness attendance, thereby leveling the playing field between unequally funded parties. See, Cathleen J. Cinella, Note, "Compromising the Sixth Amendment Right to Confrontation—United States v. Gigante," 32 *Suffolk U. L. Rev.* 135, 143 (1998) (citing Michael G. Clarke, Comment, "Illinois' Confrontation with the Use of Closed Circuit Testimony in Child Sexual Abuse Cases: A Legislative Approach to the Supreme Court Decision of *People v. Fitzpatrick*," 15 *N. Ill. U. L. Rev.* 719, 722–23 (1995)); Hadley Perry, "Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony," 13 *Roger Williams U.L. Rev.* 565 (2008). It can also secure the attendance of witnesses who would otherwise be unavailable or outside the

jurisdiction of the court. See, United States v. Gigante, 166 F.3d 75 (2d Cir. 1999) (allowing a witness with end-stage cancer in witness protection to remotely testify); but see United States v. Yates, 438 F.3d 1307, 1309 (11th Cir. 2006) (video testimony violates Confrontation Clause).

A key component of testimony for a finder of fact is being able to perceive the witness and his or her nonverbal cues, behaviors, and reactions upon being asked questions. Live witnesses may be viewed as more honest than video witnesses. A criticism of the use of technology for remote testimony is that it may affect a finder of fact's ability to assess witness credibility, as well as how the witness is perceived. Even the camera angle and range of the camera can influence perception. So, "staging" a video presentation or testimony will likely influence the finder of fact's perception.

Another criticism is that it denies the adverse party the ability to engage in "confrontation" via cross-examination of the witness. Confrontation, in the form of cross-examination and impeachment, is central to trial practice. See, e.g., Morrissey v. Brewer, 408 U.S. 471, 488–89 (1972); Greene v. McElroy, 360 U.S. 474, 496 (1959) (right of confrontation is critical "where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.").

There is certainly something to be said for being able to physically confront a witness in the same room. A prevaricating witness may be deterred knowing that they will be subject to facing their opponent in person. See, Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (Justice Scalia wrote: "The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." quoting Zechariah Chafee, Jr., The Blessings of Liberty 35 (1956)).

Overcoming Challenges and Lessons Learned Along the Way

As a legal community, we are in uncharted territory. While there is over 20 years of case law allowing us to examine the slow advancement of technology in litigation and in the courtroom, the legal system has not previously faced the sudden, unexpected, and wide-reaching circumstances brought on by COVID-19.

Even the U.S. Supreme Court, long hostile to technology, broadcast oral argument on May 4, 2020 via a live audio stream for the first time in 230 years. Given the limited number of seats that are reserved for the public, this change, brought on by the COVID public health crisis, provided unprecedented real-time access to the highest court, an opportunity relished by many.

Advances in technology would normally be examined incrementally as precedent developed across the country. COVID-19 has forced the system to adapt not incrementally, but with an incredible leap forward.

Virtual Courtroom Challenges

The virtual courtroom is a new experience for many courts and practitioners, and it is certainly not a seamless operation just yet. Despite its intended purpose, issues do arise with the use of technology and practices which have frustrated the progression of some proceedings.

- How should witnesses testify and be cross-examined?
- How does counsel mark exhibits for identification?
- What happens when one or more of the parties is dropped from the proceeding, necessitating a communication between them and Court staff advising of the steps they should take to reconnect.? Reconnection may be successful, although not without interruption to the proceedings.
- At times counsel is difficult to hear and at others their statements are muffled, fractured or time-delayed.
- Despite the best efforts of court reporters, the integrity of the transcript suffers as a result.
- What steps can the judge take to ensure witnesses are not providing coached, or scripted testimony?
- How can a fact-finder duplicate the opportunity to judge the credibility of a witness who is testifying in person?

Competency Challenges of Remote Work and Virtual Advocacy

Before the COVID-19 pandemic and the existence of the virtual courtroom, many advocates had little to no experience in conducting a hearing, making submissions and cross-examining a witness via video, and the challenges that arise in doing so. As the COVID-19 pandemic spread across the United States, legal professionals were compelled to transition—often with only a few days' notice—to a work-from-home model. Without plans and protocols at the ready, law firms and corporate legal departments have had to create new models on the fly, all the while keeping in mind the ethical responsibilities borne by lawyers and the teams they supervise. See, Maureen O'Neill, Esq., The Ethical Challenges of Remote Work: Four Critical Duties Lawyers Must Uphold (https://www.consilio.com/resource/the-ethical-challenges-of-remote-work-four-critical-duties-lawyers-must-uphold/) (providing summary of the key ABA Model Rules of Professional Conduct ("Model Rule") that are implicated by remote work - the duties of competence, diligence, confidentiality and supervision - and practical suggestions and strategies to fulfill them).

There is an obligation on practitioners to familiarize themselves with e-court technology and to adequately prepare for any challenges that may arise, including dealing with technological issues, determining how and when to provide materials to the court before a hearing, tendering evidence electronically during a hearing, and how to handle confidential material.

Model Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

While full-time remote work may be a new paradigm for many attorneys, they must nonetheless carry out that work competently - and perhaps the biggest challenge is gaining competence with the technology that enables their work. To meet the strictures of Rule 1.1, lawyers aren't expected to be perfect - the applicable standard is reasonableness. What is reasonable competence for lawyers using technology to work from home under the unprecedented circumstances of COVID-19?

According to Comment 8 to Rule 1.1c, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." To maximize the benefits and simultaneously reduce the risks for clients, lawyers should take the following steps to ensure that they are exercising technological competence:

• **Follow your organization's policies and procedures**. If your organization has developed new protocols in the wake of COVID-19, be sure to adhere to them.

• **Follow cybersecurity best practices**. ABA Formal Opinion 477R (https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_477.pdf) obligates lawyers to understand and use electronic security measures to safeguard client communications and information. These best practices include using strong passwords, with a unique password for each system, device, and account; enabling multifactor authentication; securing your home Wi-Fi network with passwords and encryption; updating your software regularly; and enabling antivirus software and firewalls.

• **Evaluate your home technology infrastructure**. Confirm whether you can work effectively and securely from home. Do you have enough devices and the right devices? Do you have the software and computing power you need to work remotely, including making remote appearances? Do you have a router with sufficient speed and coverage throughout the remote location, and do you have enough bandwidth (especially if you are sharing Wi-Fi with a working spouse, roommate, or children)? If you answered no to any of these questions, an upgrade is in order.

• **Ensure you have secure access to all systems and software that you need**. If your organization does not specify a login protocol, use a virtual private network to ensure a private, secure connection.

• **Familiarize yourself with videoconferencing tools**. Know how to use these tools effectively, as well as how to reduce their risks. Implement security measures such as setting passwords, requiring people to log in to join a meeting, restricting attendees' ability to share their screen, and blocking new attendees from joining after the meeting has started. While recording a videoconference call may seem like a convenience, keep in mind that any recordings might be discoverable.

• **Learn how to use your organization's collaboration platforms and tools**. Secure client portals and tools to facilitate remote work.

• **Store data in approved locations; back up data regularly**. Data (and hard copy files!) should only be stored in locations approved by your organization. To the extent it's permissible to store information on local devices or in personal cloud repositories, be sure those locations are backed up regularly to ensure that your client and practice information is recoverable if you are hacked or experience some other data loss incident.

• **Be aware of cyberthreats**. Scammers are using phishing emails and texts that prey on your concerns and fears around COVID-19 to install malware on your systems or steal your information. Do not disclose or send personal or financial information in email or other online messages. Look for phishing tipoffs in messages such as misspellings, incorrect grammar and awkward syntax. And never open an attachment from an unknown sender or click on a link in an unsolicited email without first investigating its legitimacy.

Ethical Challenges of Virtual Advocacy

A lawyer may discuss the case with witnesses before they testify. A lawyer has an ethical and legal duty to investigate the facts of the case, including by talking to witnesses. A lawyer is allowed to prepare witnesses so that they can deliver their testimony efficiently and persuasively. A lawyer, however, can be disciplined for counselling or assisting a witness to testify falsely or for knowingly offering testimony that the lawyer knows is false.

When a lawyer discusses the case with a witness, the lawyer must not try to put words in the witness's mouth. In re Eldridge, 82 N.Y. 161 (N.Y. 1880) ("While a discreet and prudent attorney may properly ascertain from witnesses in advance of the trial what they in fact do know, and the extent and limitations of their memory, as a guide to his own examinations, he has no right, legal or moral, to go further. His duty is to extract the facts from the witness, not pour them into him; to learn what the witness does know, not to teach him what he ought to know."); Perry v. Leek, 488 U.S. 272 (1989) (upholding prohibition on client/witness from conferring with counsel during 15-minute recess to prevent, inter alia, unethical witness coaching).

However, attorneys should be able to speak to a client or non-client witnesses during a recess about matters other than testimony (i.e., questions regarding general procedure, Rules of Evidence, how the trial is proceeding); Geders v. United States, 425 U.S. 80 (1976) (overturning order preventing client/witness from consulting counsel "about anything" during seventeen (17) hour overnight recess between direct and cross examination, held to deprive client witness of right to assistance of counsel—discussing other ways to deal with possible improper coaching).

- In the context of video trials, what mechanisms does a court put in place to prevent improper coaching?

- How do you prevent an attorney to speak or communicate with a witness via e-mail, text or other electronic communication while the witness is testifying?

- Should the court require a roll call asking that all in the room introduce themselves and appear on camera?

- Should there be affirmative representations from counsel on the record identifying all persons in the room or in any adjoining rooms?

- Should the court require that live video be taken and streamed of all in the room, and the surrounding doors and accessways?

Confidentiality Challenges of Remote Work and Virtual Advocacy

Model Rule 1.6:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

....

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. ABA Formal Opinion 477

- With respect to sensitive information and video trials, there is an obligation to consider and potentially address who information will be available to, the level of security of technology, availability, cost and efficacy of additional safeguards, the effect that disclosure might have on the client, and the likelihood of disclosure.
- Counsel must communicate with their client about all of the foregoing so that the client may properly assess risks and make an educated decision.
- The duty of competence is implicated yet again as counsel must have at least a basic comprehension of videoconferencing technology.

Tips to Achieve Smooth and Effective Oral Advocacy in Virtual Court Hearings

With respect to practice and procedure in the courtroom, access to remote technology and the general prevalence of 'working from home' has given practitioners, litigants and court staff the flexibility to attend court from the office or home office, which is a significant departure from the formality of a courtroom.

As hearings by video have become standard practice in response to the pandemic a degree of informality has crept into the processes followed by the Court and it has become easier for witnesses to overlook the fact they are still giving evidence in Court proceedings. Nonetheless, a degree of formality remains important. It is one mechanism by which all participants are reminded of the importance of the proceedings both to the community as a whole as a manifestation of the rule of law and to the individual litigants and witnesses, for whom the outcome of the proceedings can have major financial and reputational ramifications.

While the virtual courtroom may be a more relaxed environment for some, it is important to maintain a suitable degree of formality in Court processes, and professionalism in presentation to uphold the prescribed procedural framework as it applies to court proceedings generally.

Picking the Best "Venue" for a Virtual Court Hearing

If you can't physically appear in court, then from where should you appear?
For virtual trials and other court proceedings, it is paramount that you consider where you and your team will be when you make your case. Fortunately, there are several common options, each with its own unique set of benefits and challenges.

The Home Office:

It may be feasible for you and your team to litigate a contested matter, virtual trial or other proceeding separately from each other in your own respective home offices. Unlike a traditional court proceeding, at a virtual proceeding you may not need to be visually present at all times.

There are obvious benefits to being in the comfort of your own home office when you are not on screen. For example, if you are more productive working in casual clothing, working from home allows you to do that while also having more formal clothing nearby, if needed.

And while your office may have had everything you needed to be productive pre-COVID-19, that may no longer be the case, as many offices have removed shared coffee machines, water coolers and other conveniences to reduce COVID-19 transmission and promote social distancing. These conveniences are maintained if you participate from your home office.

One important consideration for all venues is whether you have sufficient internet capabilities to handle the rigors of a court proceeding. Running a constant video stream using Zoom or WebEx while also downloading documents and sending and receiving emails can tax even good Wi-Fi systems.

Even if you have exceptional internet speed, your virtual private network (VPN) connection may prohibit you from achieving your network's peak speed. The same is true if you're sharing your internet with others, particularly those at home who may have their own Zoom session or who may decide to stream a movie in another room.

One way to determine whether this will be an issue is to test your internet speed under different scenarios. A quick search for "internet speed tests" will present many online tools available to test your internet speed. Internet speed can be critical when trying to cross-examine a witness on the stand. If your internet speed is not sufficiently fast while connected to a VPN, however, that does not mean you cannot litigate from home. One workaround is to download all the files you need ahead of time, obviating the need to be connected to a VPN, for example, to download documents during trial from your firm's file system.

The Shared Office:

You may decide to bring your team and witnesses to a shared office. If it is safe to do so, then there are also benefits for being in direct contact with your team and witnesses.

For example, working from a single location permits your team to create a courtroom façade that may normalize and create more formality to the process. This could include setting up a podium and stand for the talking attorney and witness, which is especially beneficial for those that feel more comfortable presenting an examination with direct witness contact.

Direct witness contact may give a slight advantage to the attorney in the same room with the witness, as the witness and attorney may be better able to read each other's verbal and nonverbal cues than the attorney and witness who are remotely connected via video.

Another potential advantage of this option is that your team is physically together and can easily communicate as they normally would, through passing notes, using whispers and hand gestures. If someone's examination is running too long, or venturing into dangerous territory, it is easy to communicate this to the talking attorney, where this might be more difficult if each attorney is located remotely.

If you decide to use this approach, there are several things you should consider to ensure effective communication of your case while minimizing disruption.

In virtual courtrooms, attorneys and witnesses are identified as being present via a participant list and screen label, which shows each individual who enters and exits the virtual hearing. But in a shared-office environment, a single camera and connection may be used for multiple attorneys and witnesses. Thus, it is imperative that you establish a clear way of identifying who is in front of the camera.

If you have the technological capability, a graphic overlay on your visual feed with the name of the current participant is an effective way of communicating who is participating at any given time. If that is not an option, a physical placard may also be used, but may be harder to read on camera.

If you pursue the shared-office option, it is more critical to test out the setup ahead of time to assess how witnesses and attorneys will look on camera and confirm they can be seen along with their identifying information. Depending on the view settings, the judge may only see you as a small box on his or her screen. If the camera is too far away, then you or your witness may be difficult to see.

Another thing to consider is how using this approach is affected by normal courtroom activities. If using paper documents, be cautious as to how your microphone may be picking up ambient sound such as the sound of shuffling papers.

Unlike a courtroom, where the microphone is just one source of sound the judge is hearing from you, in a virtual setup, the microphone provides the only sounds the judge hears from you. And your sound is competing with all other sounds on the virtual feed. So, if your microphone picks up ambient sound, it can be very distracting and can make it hard to hear you, the witness or opposing counsel.

Also, if you plan to communicate with your team like you may do in a traditional courtroom, you should be extra cautious because your microphone may be picking up your conversations and whispers. There are various types of microphones that you could use to minimize distracting ambient noise. But whatever you decide to use, the key is to test out your technology setup ahead of time to minimize any problems or distractions.

The Individual Office:

Another option is having your team present in office, but having each person use their own respective offices. This is similar to working from home, but has several distinct advantages.

One advantage is that you can benefit from more in-person interaction with your colleagues to get things done quickly and efficiently, while maintaining the ability for active participants to be in their own room with an active camera and microphone at any given time. Another advantage is your proximity to information technology and logistical support, as unforeseen technical issues are always possible.

If you choose this approach, it is important to communicate with your office administrator and others to confirm the precise capabilities of your office environment and the availability of support staff to meet your needs. Like the home office option, you will need to determine the right equipment for each individual office, a plan for how to communicate between the attorneys in their individual offices, as well as how to communicate with those located remotely from the office, including witnesses. The availability of this option, of course, is often guided by your organization's policies and procedures in place during the pandemic.

Picking the Right Hardware and Software Tools for a Virtual Court Hearing

Choosing the right technology is essential to virtual courtroom success. Primary considerations are clear audio and video. A clear audio feed is necessary to effectively communicate your case virtually. While microphones built into computers may be sufficient for small-scale virtual meetings, they can often pick up unwanted ambient noise, which makes it difficult for the judge, court reporter or others to clearly understand what you are saying.

To ensure that your audio is as clear as possible, use of a directional external microphone is recommended. Directional microphones hear best what happens in front of them - i.e., someone speaking into the microphone - while rejecting unwanted sounds from the sides and rear, which helps avoid transmitting other sounds in the room or creating distracting feedback from your speakers. The microphone situation may be more complex if you have multiple microphones in a single room, and will require extensive testing to avoid problems and issues.

In addition to crisp sound, it is important to have a crisp image and smooth video as well. In lieu of the camera built into your laptop, consider an external webcam that can offer better resolution and video quality. A high-quality camera will ensure that the judge can see you and read your facial expressions. The ideal camera may vary depending on the office setup you select.

For example, a high-quality webcam is likely sufficient for the home office or the individual office setups mentioned above, where you are sitting at a single computer. But in a shared-venue setting, you will likely want cameras of sufficiently high quality and with zoom capabilities to show the witnesses and attorneys in sufficient detail that the judge can see and read facial expressions, even if they are seated further from the camera.

Proper lighting is something that you do not have to consider during traditional court proceedings, but is important in a virtual proceeding. Judges want to be able to see the attorneys and witnesses, read facial expressions and, where possible, judge credibility. This is not possible if the person speaking is not sufficiently visible.

Proper lighting may vary depending on the setup you select for your virtual proceeding. For example, if you are in the home office or individual office setting, an individual ring light can significantly improve your appearance on screen. In a shared office setting, you may need additional lighting — similar to a television studio — to sufficiently illuminate those speaking.

Additionally, if you choose a setup where people will be located remotely, it is important to set up the right tools for your team to communicate with each other. You may want different tools for different tasks, so that you can get important messages to and from the various individuals - e.g., the questioning attorney, paralegals, witnesses, etc. - in an efficient manner that does not overwhelm the communications channels.

For example, Facebook's WhatsApp, Cisco's Jabber, Microsoft Teams, Slack, or another chat or messaging application may be useful for communications with different teams. Importantly, using a third-party application will help avoid the possible catastrophe of accidentally communicating something publicly via the chat function on the virtual courtroom platform. Mostly, it is important to think through how you want to communicate with each other ahead of time, because the eve of trial is too late to work out some of these issues.

External computer monitors can also improve productivity during virtual proceedings. Additional screen space can be used for your outline if you are questioning a witness, searching through a document in real time for potential cross-examination or redirect questions, or pulling up a document that is raised during an argument with the judge. Additionally, extra screen space can be important for things such as a live transcript feed, chats with teammates and document review.

Finally, it is critical to ensure you have a good internet connection. Although we mention it last, this really is the most important tool, because without it, none of the other tools matter.

It is best to have a hard-wired connection rather than a wireless connection. Although Wi-Fi is generally great for most applications, at times it can introduce additional delay and just cannot match the performance of a hard-wired connection. This can be an issue for some remote witnesses who may not have access to hard-wired connections, as such connections can be hard to find these days.

Lights . . . Camera . . . Action!

After selecting the appropriate remote venue, and the hardware and software necessary to maximize your virtual presentation, now it's mission critical to focus on best practices to master the virtual presentation.

Check the Camera Angle and Audio Feed:

Many attorneys choose to be seated, which is usually appropriate for a virtual hearing, but beware of your camera angle. You may need to raise your computer so that the camera is at eye level or higher. You don't want judges literally looking up your nose.

If seated, your ability to gesture will be limited. One possible solution is to sit a foot or more away from your computer so that judges can see your hands and torso. Moving away from the camera diminishes your profile, so you will need to spend time experimenting to see what works best for you.

You cannot hear how your own voice sounds to others in a virtual presentation. Touching a microphone will make a noise as will shuffling papers. Practice wearing over the ear or in ear headphones to see which one you prefer. You may improve your ability to hear with such devices, but some people find them restricting or aren't comfortable with them. Also realize that wireless headphones will need to be charged. So, check on battery power well in advance of the hearing, and consider wired headphones for lengthy hearings and trials. Indeed, headphones are the modern-day eyeglasses, where having several with differing levels of style and features lying around "just in case" is the norm.

If you are working from an isolated setting, consider setting up for co-counsel or a paralegal to monitor the proceedings and to contact you in case something is not working well in either your camera or audio feed.

Speak to the Camera, Not the Screen:

It is critical to look at the camera rather than looking at yourself or the judge on the computer screen, though this takes much practice. Otherwise, the judge may think you are looking away.

Staring at the camera, though, can be stressful and distracting, because you also need to be able to see the judge's reactions on your screen. You will need to practice looking at the camera eye while also managing what is going on with the judge. In other words, you will need to look down the barrel of the camera, so that it appears to the judge that you are looking at her or him.

It is best to approach online argument as if you are a news anchor. It is important to look directly at the camera - or have the camera positioned in such a way so that it appears that you are - so that you can make a connection with the judge.

Once you are comfortable using your computer for a virtual courtroom session, you may find it offers some advantages. Using the Zoom platform, for example, you can customize your view of the participants, including pinning the judge to have a dedicated view of her or him. This way, you will have a good view of the judge because the camera is close to the judge's face. With this

feature, you can watch the judge without seeming to stare at her or him, especially when you are not speaking.

Practice, Practice, Practice:

Dedicate time and energy into preparing your virtual presentation. You are going to need to test your system and the platform you are using, as well as practice the presentation and any screen sharing you plan to do. Well in advance, schedule times to practice both the hearing or argument using the same technology that will be used for your court appearance.

If you master the materials, you will be able to deliver your presentation in a conversational way - that is, with spontaneity, authenticity and passion. As with casual conversation, each sentence will be formed on the spot; you will be selecting the words that form the structure of the sentence as you speak them.

Most attorneys realize that when doing in-person oral argument, it is a bad idea to read a prepared argument. But when you are at home by yourself, the temptation to read may be greater. You think to yourself that no one will notice. You've found a way to easily shift your gaze to your notes, and you really do want to get it perfect. But we can always tell when people are reading. When you read, your eyes drop down, your voice modulation decreases and inflection disappears, and you can sound monotonous and boring.

Ideally, your presentation will not sound rehearsed but rather like persuasive casual conversation. This is especially important when you have to think on the fly, either in answering questions from the judge or responding to a witness during questioning.

Get to the Point:

Judges are trained listeners, but online fatigue is real even for them. Get to the point. Tightly constructed arguments and questions are always important in advocacy, but more so when you are appearing on a computer screen.

What is the most important point that you want to get across to the judge? For an argument, start and end with your key point. First decide how you want to end. Then, write out an outline choosing the essential information that seems to lead naturally and obviously to the conclusion. What can you leave out that is not essential? Slim it down so that what remains as your final presentation is what really matters. Shakespeare said it best: Brevity is the soul of wit.

Communicate sparingly, but effectively, with team members:

As with an in-person appearance, with an online trial or hearing, you need to think about whether and how you want to communicate with others on your team during an examination or argument. Do you want people sending you notes during the hearing?

One way to minimize distractions is to mute or turn off your phone and shut down your email during the argument or questioning so that you won't be interrupted. That's a good way of

blocking distractions, but what if you need help from co-counsel or you need to be made aware of a technical issue?

Some attorneys have opted to confer with co-counsel using the text function on their cell phones, or a chat or messaging application. But if you do this, be aware you will need to maintain good courtroom demeanor even though you will likely be muted when you are not speaking, which means minimizing texting with co-counsel.

In short, your online behavior should be no different than it would be if you were in a courtroom. An online appearance may feel more casual, but deference to the court and knowing and following your judge's practices and rules will prevent embarrassment and disadvantage.

Listen Carefully:

First and foremost, listen. Listen for interruptions from the judge. It is more complicated and not as smooth as appearing in person, because when you talk over each other, the audio can break up and you will not be able to hear what the judge has said.

At the first hint of sound from a judge, be quiet. Body language cannot be read easily during virtual hearings, and it is more difficult to be deferential to judges in a virtual environment. Attorneys need to be attentive and prepared to stop talking when they receive any signal from a judge.

Checklist for Mastering the Virtual Court Hearing

Pre-Trial Logistical Considerations

- Technology - make sure all counsel and witnesses have access to a computer, tablet or smartphone with functioning camera, speaker, and microphone.
- Coordination with Court/Clerk's Office/Court IT department before hearing/trial.
    - "KYS" – Know Your Software – and because it needs to connect and be compatible with the court, know and understand the court's technical requirements, specific instructions (tentative ruling calendars, a specific court invite, etc.), and other information and instructions.
    - "KYE" – Know Your Equipment - test equipment ahead of time – at least two (2) business days in advance.
- Closely review and pay attention to Pretrial/Scheduling Order provisions regarding exchange and filing of exhibits.
- Understand the Local Rules and any judge specific rules or expectations (aka the "Local, Local Rules") regarding filing and presentation of exhibits - e.g., marking exhibits before hearing/trial.
- Confirm that all parties, including the witness, have exhibits before hearing/trial.
- Consider requesting a pretrial/status conference before an evidentiary hearing/trial to have a rehearsal/practice session. Should counsel and witnesses be required to attend?

- Understand how separate breakout rooms work for adverse parties during breaks.

Pre-Trial Preparation

- How does preparation differ for counsel?
    - Does the technique for questioning witnesses differ than in court?
- How does preparation differ for witness?
    - Does the technique for answering questions differ than in court?
    - Discuss the environment - concern about being too relaxed/conversational.
- How does preparation differ for court?
- Practice, practice, practice.
    - Practice handling and introducing exhibits.
    - Slow down, even more than in courtroom.
    - Closely monitor how you and your client appear and act (e.g., hand gestures, distance from camera, voice, background, etc.).

Trial Etiquette

- Dress as if in court.
- Identify yourself frequently.
- Identify on the screen each participant that is speaking by name.
- Speak and move slow/deliberately.
- Don't talk over people.
- Don't move around any more so than if you were in court.
- Don't look at other electronic devices, or at least don't make it look so obvious!!

Trial Presentation

- Be aware of your background.
    - Use of virtual backgrounds can safeguard privacy.
    - If you use a virtual background, avoid backgrounds that are offensive or distracting.
- Be aware of your lighting.
    - Try to avoid having a window or bright background behind you which can make you appear on video as a silhouette or shadow.
    - If you cannot avoid a bright background, try using another light source to brighten your face.
- Be in a quiet location. Eliminate all outside noises to the extent possible.
- Position the camera and onscreen video so that the speaker is looking at the camera. The camera should be positioned slightly higher than the speaker's eyes.
- Have a protocol in place – direct access via email and phone to the Court/Chambers/Court IT department/your firm IT department and firm assistants - in case of a technology glitch, which happens even with great preparation.

Technology Can Be Used to Further Improve
The Efficiency, Efficacy and Safety of The Bankruptcy Process

The COVID-19 pandemic has been a considerable impetus for the implementation of interim rules and measures by courts nationwide towards virtual conduct of litigation. While the pandemic resulted in mandatory remote appearances, discretionary remote participation in bankruptcy court proceedings has been available throughout the country for many years. Some judges have embraced the technology enthusiastically, while others use it infrequently. See, Remote Participation in Bankruptcy Court Proceedings, published by the Federal Judicial Center, https://www.fjc.gov/content/326261/remote-participation-bankruptcy-guide

Most judges use remote participation - via audio conferencing as opposed to video conferencing - primarily for routine, uncomplicated matters that do not require documentary or testimonial evidence, and that are focused exclusively on case management or matters of law. They may find remote appearances useful in such matters as status conferences, conferences to discuss case management, disclosure statement hearings, preliminary hearings on motions that may ultimately require evidence, case dispositive motions such as motions to dismiss or summary judgment motions, and pretrial conferences. COVID-19 forced the judiciary to implement with great alacrity emergency rules and procedures in order to allow remote proceedings for all matters, including hearings with live testimony and presentation of documentary evidence for emergency or "first day" motions, plan confirmation hearings, and other complex and heavily contested evidentiary hearings and trials.

A common problem with rules adopted for extraordinary times is that they often outlast them, when they shouldn't. We will have a different world at the end of the pandemic that isn't as restrictive as the one that we've grown accustomed to and accepted, even though it lacks efficiency.

The use of the virtual courtroom and remote technology brings great benefits. For example, counsel who are able to 'appear' in court from remote locations can avoid the time that was once wasted by travel or having to wait around at court for their matter to be called. Instead, they can continue to work on other matters and then be called to appear when their matter is ready, saving costs to the clients. Remote appearances can also serve as a great mentoring tool. Associates who may have limited ability to travel cross-country to court hearings because of financial constraints, now can stand in their office, watch and perhaps participate in the proceeding.

The existence of remote hearings allows clients and practitioners to more easily engage lawyers and counsel from interstate, whereas clients and practitioners may otherwise feel more restricted in engaging counsel based locally in lieu of covering travel and accommodation expenses for those from interstate. That can only be good for competition in the legal market.

Post-pandemic, perhaps focusing more on the efficiencies of remote appearances, should the judiciary actively encourage its use beyond routine non-evidentiary matters? While the world has become more dependent upon the conveniences of modern-day technology, historically trial and other evidentiary court proceedings are rarely conducted remotely.

In the push for the judiciary to adopt technology post-COVID, the courts, attorneys and litigants must be aware there is a noticeable uneven distribution of quality and quantity of access to the internet and technology based on a variety of factors including socioeconomic standing, race, disability, and age. Sound quality of the audio-visual system being used can create problems, not only during the hearing itself but for the quality of the transcript. This may then create difficulties for writing judgments and any appeal where the judges and parties may be left to ponder what was, in fact, said during the trial. Words or phrases missing from the transcript may be crucial to the outcome of the trial and any appeal.

While there are obvious benefits to remote appearances for hearings with live testimony and presentation of documentary evidence, the judiciary and practitioners recognize that there are practical and realistic concerns that still must be addressed. Local, regional and perhaps national efforts to coordinate virtual courtroom rules, regulations, protocols can be implemented to address the following critical issues so as to preserve the integrity of the court system:

- Fairness and Due Process
    - Do we have technology available for a court to provide a video trial experience that can capture non-verbal information the same as an in-person hearing?
    - Does a video hearing allow the judge to assess an attorney's or witness's credibility in the same way as an in person hearing or trial?
    - Does the judge and all other participants pay as much attention at a video hearing?
    - Would the result have been the same if the hearing had taken place in person?

- Dignity of the Court
    - How do the parties perceive the court when not surrounded by the courtroom?
    - Is the dignity of the court compromised when hearings/trials are by video?

- Digital Discrimination: Is there Equal Treatment of Parties and Attorneys
    - What is the practical effect of a disparity in internet speeds, bandwidth and other technology resources between firms, lawyers, and pro se parties?
    - Will the court need to monitor and perhaps limit or commoditize the technology resources used so as to make sure there is a level playing field?

- Technological Glitches
    - How will the court and participants handle poor sound quality or connection issues?
    - How will the court and participants handle a party that is dropped from the proceeding at some point?

- Confidentiality
    - How can the courts maintain control over who appears, and how to handle the unruly participant?
    - How will the court and all participants handle evidence that implicates sensitive or confidential information?
    - Virtual courtrooms are hosted on various platforms including Zoom, ZoomGov, AT&T Teleconference Center, Microsoft Teams, Cisco, WebEx and CourtCall which are necessary and, for the most part, relatively accessible and user friendly.

Nevertheless, the accessibility of these platforms presents various security and confidentiality risks.

Conclusion

There is a lot to be said in favor of in-person advocacy. It is arguably easier to persuasively articulate a question or argument when standing directly before a judge, jury or witness, particularly when there are no technological interruptions. The impact of video proceedings will likely be another significant factor that will need to be analyzed and considered in addition to the panoply of strategy calls that litigants and attorneys must make in preparing for trial. Practitioners can expect that continuing education service providers will provide professional development for attorneys to bolster advocacy skills in the virtual courtroom and strategies in instances where oral submissions are interrupted by faulty technology and where cross-examination is to be conducted via video.

In general, it appears that the legal profession has responded well to the COVID-19 pandemic and has endeavored to minimize disruption and delay to the just resolution of proceedings by utilizing technology. The Courts have responded well, and the virtual courtroom has largely proved to be effective in ensuring that matters continue to progress amidst the COVID-19 pandemic. It is difficult to predict what the future of the virtual courtroom will look like. While the shift to technology has been accelerated, the legal profession will continue to adapt to technological advances and platforms like the virtual courtroom. These platforms should be, and can be, effective and beneficial in ensuring an efficient and just resolution of proceedings.


Remote Participation in
Bankruptcy Court Proceedings
Federal Judicial Center

Remote Participation in Bankruptcy Court Proceedings

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Preface

Elizabeth C. Wiggins prepared this guide with significant input and direction from Judge Christopher F. Droney (U.S. Court of Appeals for the Second Circuit), chair of the Technology Subcommittee of the Judicial Conference of the United States Committee on the Administration of the Bankruptcy System. Numerous other people provided information for, and feedback on, the guide, including other members of the Bankruptcy Committee and its Technology Subcommittee, judges and court employees in districts that use distance participation technology, and staff in the Administrative Office of the United States Courts (AO) Judicial Services Office, Court Services Office, Technology Solutions Office, and Office of the General Counsel—Rules Support. Helpful suggestions were also provided by the Federal Judicial Center's Bankruptcy Judges Education Committee and the AO's Bankruptcy Judges Advisory Group, Bankruptcy Clerks Advisory Group, and Bankruptcy Best Practices (Technology) Working Group. Matthew R. Hindman of the AO provided a careful review of the guide and substantially prepared Appendix E; Matthew J. Wright of the AO spearheaded the review of technical information; and Shaun S. Stuart, formerly of the AO, provided guidance at the project's inception.

I. Introduction

At a traditional trial or hearing, the judge, parties, attorneys, witnesses, and observers are physically present in the same courtroom. Developments in distance participation (DP) technology, primarily teleconferencing and videoconferencing, however, allow people in different places to participate in or observe the proceedings. Some judges have embraced DP technology enthusiastically, while others use it infrequently. In deciding whether to permit attorneys and parties to appear remotely or whether to preside remotely themselves, judges have considered a number of factors, such as

- the travel time and distance required of attorneys, parties, or witnesses to appear in person;
- the time, costs, and safety associated with the judge and court staff traveling to remote locations;
- whether the use of teleconference or videoconference technology makes the court more accessible to litigants;
- whether its use promotes or interferes with a fair and full hearing;
- whether its use facilitates a speedy resolution of the matter; and
- the type of proceeding.

In the end, the decision to allow remote appearances seems to depend on how judges balance the drawbacks of not having an in-person interaction and the benefits of remote appearance. Proponents contend that remote participation reduces costs and saves time for the court, litigants, and attorneys; allows parties' participation from distant venues, particularly parties with limited claims and interests; and speeds the adjudication of disputes. Critics are concerned that a proceeding held by teleconference or videoconference lacks fundamental aspects of a courtroom proceeding and reduces the dignity and solemnity of the judicial process.

The Judicial Conference of the United States (JCUS) Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) asked the Federal Judicial Center to prepare this guide on the use of DP technologies to conduct bankruptcy hearings and trials. The guide's goal is to encourage the use of such technologies so as to promote access to

the courts, make the best use of existing judicial resources, and contain costs while maintaining the quality of court proceedings and compliance with the Federal Rules of Bankruptcy Procedure, the Federal Rules of Evidence, and other legal authority. The guide builds on a 2005 Roundtable and Report sponsored by the Bankruptcy Committee[1] and reflects technological advances and the courts' increased experience with DP technology. Its suggestions are based on the varied experiences of bankruptcy judges and clerks of court around the country. The FJC chronicled these experiences by

- reviewing the local rules, standing orders, and court and chambers procedures regarding the use of teleconferencing and videoconferencing in all bankruptcy courts;
- obtaining input from the members of the JCUS Committee on the Administration of the Bankruptcy System and its Technology Subcommittee; the FJC's Bankruptcy Judges Education Committee; and the Administrative Office's Bankruptcy Judges Advisory Group, Bankruptcy Clerks Advisory Group, and Bankruptcy Best Practices (Technology) Working Group; and
- interviewing and consulting with many judges and court employees in districts that use the technologies.

Part II of this guide provides an overview of general considerations that apply to both audio and video technologies, ranging from philosophical to practical. Parts III and IV examine more specifically the use of teleconferencing and videoconferencing. The guide is accompanied by online appendices, available on the FJC's intranet site (fjc.dcn) and its Internet site (fjc.gov). Appendix A is a compilation of related local rules,

1. In August 2005, the Federal Judicial Center (FJC), at the request of and with assistance from the Technology Subcommittee of the Bankruptcy Committee, held a program at which bankruptcy judges with varying levels of exposure to and attitudes toward using DP technology met in a roundtable format to discuss the use of such technology in bankruptcy proceedings (the "Roundtable"). The goals of the Roundtable included identifying the important issues relating to the use of DP technology in bankruptcy proceedings, sharing participants' experiences in working through these issues with other courts that might be considering using the technology, and identifying best practices and possibly model local rules. It resulted in the publication *Roundtable on the Use of Technology to Facilitate Appearances in Bankruptcy Proceedings,* August 11–12, 2005 (Federal Judicial Center 2006).

standing orders, and court and chambers procedures, including those referenced in this guide. Other appendices present sample orders related to particularized issues; information about Judicial Conference policy regarding the broadcast of court proceedings; a review of case law related to witness testimony by remote transmission under Federal Rule of Civil Procedure 43 and Federal Rule of Bankruptcy Procedure 9017; and an annotated list of other resources for courts considering the use of DP technology.

Each district, and indeed each judge, must decide whether to use DP technology, and if so, how to use it. We hope this guide provides useful guidance in making those decisions.

II. General Considerations for the Use of Distance Participation Technology

Several factors place the bankruptcy courts in the vanguard of the movement toward use of distance participation (DP) technology for court appearances. Bankruptcy courts are federal courts with which members of the general public have significant contact, and they often involve parties who are insolvent or facing a less than full recovery on their claims. Thus, it is especially important that parties to bankruptcy proceedings, including debtors in consumer cases and small creditors, not only have justice served, but also have the perception that they have had their day in court. It can be argued that this goal is best met with an in-person proceeding. On the other hand, because of the nature of bankruptcy, parties need timely resolution of their disputes, and emergency hearings are not uncommon. Moreover, it may impose significant burdens on individual debtors and creditors to appear in person. In addition, many districts are so large that judges must travel significant distances to outlying divisions. Proceedings presided over by judges in distant divisions can be infrequent and expensive if technology is not used to supplement visits by the judge to the distant division.

Finally, large Chapter 11 debtors often file their cases in urban courts such as the Southern District of New York or the District of Delaware, but parties in interest are spread across the country. Many participants might want to monitor or participate in the proceedings but do not have the financial resources to attend them. Or a large company considering its options to file a Chapter 11 case might choose a larger city over the venue of its home office if travel to the smaller venue would be expensive for many parties in interest and their counsel. Implementing standing procedures for attendance by teleconference or videoconference (at least in routine, less significant hearings) or allowing parties to monitor the proceedings by teleconference or videoconference may enable parties with limited resources to participate. For example, Delaware implemented Local Bankruptcy Rule 3007-1(g), which allows any claimant to participate pro se and telephonically in a hearing on an objection to his or her claim by following the court's telephonic appearance procedures.

A. Roles of judges and court staff in implementing DP technology

In some districts, all judges use the same technology and have uniform practices for the use of teleconferencing and videoconferencing. In other districts, judges differ in the circumstances in which teleconferencing and videoconferencing are allowed, as well as the technology used and procedures followed. The better practice would be to have uniform technology and practices for the district to the extent possible. However, decisions about technology often depend on individual judges' views about access to the courts and about proper case and hearing management, which may differ; thus, some judge-specific policies and practices may be unavoidable.

Variations in policies and practices notwithstanding, it is critical for judges to coordinate with information technology staff to analyze and compare DP systems and to ensure that the equipment and software meet the judge's needs. Judges who have implemented DP technologies have emphasized this point: judges and their clerks of court need to be involved in the system design phase of a DP project, in order to avoid later discovering that it does not meet the needs of the court. In addition, familiarity with the systems and equipment enables judges to have realistic expectations, to realize the full potential of the systems and equipment, and to be able to use them if IT staff is not available.

Courts also must consider the qualifications and training of staff who will help implement and operate DP technology. Such staff may include courtroom deputies, law clerks, and judicial assistants, in addition to IT staff, depending on the particular technology to be used.

B. "Intangibles" related to using DP technology

Judges emphasize that the mere availability of audio and video technology should not be the only factor driving its use—as one judge said in the 2005 Roundtable, "Don't let the tail wag the dog." In determining whether proceedings should be held using DP technology, judges should consider such factors as the dignity of the court, the benefit of attorneys' consulting with each other in person while waiting for a hearing to begin, the importance of a judge's making in-person visits to outlying divisions, and the local legal culture. For example, in some districts the local bar may advocate greater use of technology for remote appearances, while in others the bar may be more comfortable with in-person appearances. Be-

cause every district has a different legal culture, different geographical considerations, and different caseload mixes, no one solution will work for all courts.

The rest of this guide, including the appendices, gives more detail about how courts have used teleconferencing and videoconferencing. A court considering the use of such technology could use some of these ideas, modify some, and design some of its own solutions according to its particular needs and those of its constituents.

C. DP technology and the court record

An official record of proceedings held by teleconference or videoconference must be made, just as it is for in-court proceedings. The functionality of the technology allows judges to follow the same basic procedure for keeping the record in telephonic and video proceedings as they do for in-person proceedings.

The incoming audio from either a telephonic or video proceeding is processed by the audiovisual system and distributed throughout the courtroom's speaker, recording, teleconference, videoconference, audio, and video streaming systems. The court's audio sources (microphones, evidence audio, teleconference and videoconference audio) are distributed to the outgoing teleconference, videoconference, audio, and video systems so that the remote participants hear everything as if they were in the courtroom. The video sources are also routed from the videoconferencing system to the appropriate monitors in the courtroom, whereas the court's videoconferencing cameras and video evidence are routed either individually, or by a window-in-window or split-window display. This technological setup allows the remote participants to view the judge and court staff, case participants, and evidence as the court provides.

The court also may establish additional procedures to ensure that a quality record is made, such as the following:

- prohibiting or limiting the use of mobile phones, speakerphones, and phones in public places to minimize ambient noise and maximize the transmission quality;
- instructing each remote attendee to state his or her name each time he or she is speaking, to speak clearly and slowly, and to place the telephone on mute when not talking;

- using a conference call service to monitor calls and mute or disconnect lines that are causing disruption, and bring remote attendees into the call when their particular case is called;
- limiting the participation of counsel who appear by telephone to a short statement or argument in support of, or in opposition to, the relief requested, and not allowing them to engage in extended argument, introduce evidence, or examine witnesses;
- providing that attorneys or parties appearing remotely waive the right to challenge deficiencies in the record that are due to the remote appearance; and
- suspending remote appearance privileges or imposing other sanctions on attorneys for consistently failing to follow local guidelines or for disruptive conduct.

D. DP technology and dissemination of recordings of court proceedings

Reports indicate that, in some cases, members of large creditor groups who are authorized to monitor court proceedings by telephone may have impermissibly recorded proceedings and disseminated the recordings to others. Although broadening access to the courts is a commendable goal, making and distributing recordings in this manner violates Judicial Conference policy. For this reason, and because of the ease with which a party or attorney could produce and disseminate an unauthorized recording of a court proceeding, some courts reiterate their general prohibition against private recording or broadcasting of court proceedings in their local rules and procedures. See, for example, the procedures of the District of New Hampshire, the Northern District of New York, the Eastern District of Louisiana, and the Southern District of Florida in Appendix A. Judges may also want to consider making a special announcement regarding unauthorized recordings prior to conducting proceedings with DP technology. Appendix C provides information about Judicial Conference policy regarding the broadcast of court proceedings.

The JCUS Committee on Court Administration and Case Management (CACM) has discussed whether access to CourtCall (and similar services) by the media and the general public, rather than just case participants, implicates the judiciary's broadcasting ban, as summarized in

that committee's report to the September 2014 Judicial Conference.[2] In particular, the committee examined one of the exceptions to the general broadcasting prohibition, which permits broadcasting "for other purposes of judicial administration." Conference-adopted commentary to the broadcasting policy notes that this exception "is intended to provide the necessary flexibility for experimentation with new uses of technology, so long as those uses directly assist the judge and other judicial personnel in the performance of their official responsibilities." One frequent example of the use of this exception is the closed-circuit transmission of proceedings to overflow courtrooms in high-profile cases. After discussing the issue, the CACM Committee acknowledged that CourtCall has become, for many courts, an essential case-management tool, and it concluded that the use of CourtCall by case participants, attorneys with a role in the case, and parties to a case fell within the judicial administration exception. The committee also concluded that use of CourtCall by non-participants, particularly members of the media or the general public, fell outside the exception, because it neither assisted judges or court staff in the performance of their official duties nor improved case management.

A useful approach to discouraging unauthorized recordings is for the court itself to disseminate an official recording shortly after the hearing or trial through PACER. Many courts use the software program CourtSpeak for this purpose. In September 1999, the Judicial Conference approved the use of digital audio recording technology as a means of taking the official record, and currently almost every federal court in the country makes such recordings of their court proceedings.[3] CourtSpeak accesses the court's digital audio recording software to extract previously recorded hearings, converts them to the common MP3 audio format, and dockets them to CM/ECF for public access via PACER. The public, as well as judges and court staff, can then easily access the digital audio recordings of hearings. Judges have complete discretion in determining whether to use the program and, if so, which hearings are uploaded. For

2. Report of the Judicial Conference Committee on Court Administration and Case Management to the Chief Justice of the United States and Members of the Judicial Conference of the United States, September 2014, at 8–10.

3. Report of the Proceedings of the Judicial Conference of the United States [hereinafter JCUS Proceedings], Sept. 1999, at 57.

example, judges may decide not to upload files for hearings involving sensitive or personal information. Additional information about CourtSpeak is available on the JNet and at http://cs.nceb.circ4.dcn/. It is important to note that the Judicial Conference has approved the use of CourtSpeak only for district and bankruptcy courts that use digital audio recording as the official means of taking the record.[4]

E. Remote witness testimony under Federal Rule of Civil Procedure 43 and Federal Rule of Bankruptcy Procedure 9017

Most bankruptcy courts use DP technology primarily for non-evidentiary matters, but sometimes parties seek to offer testimony from witnesses in a remote location. The proper location of witness testimony is governed by Civil Rule 43(a), the aim of which is to "ensure that the accuracy of witness statements may be tested by cross-examination and to allow the trier of fact to observe the appearance and demeanor of the witnesses."[5] Until 1996, this rule contemplated only testimony provided in open court.

In 1996, Civil Rule 43 was amended to include a provision to allow contemporaneous transmission of testimony into court from a remote location. The rule, which applies in cases under the Bankruptcy Code pursuant to Bankruptcy Rule 9017, states, in part:

> (a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

Even before the 1996 amendment, federal district courts had taken telephonic and closed-circuit television testimony in civil cases.[6] The 1996 amendment, however, established a standard for when contempor-

4. JCUS Proceedings, Mar. 2010, at 9–10.

5. *In re* Adair, 965 F.2d 777, 780 (9th Cir. 1992); *see also In re* Lyon & Lyon, LLP, 2005 WL 6960226 (B.A.P. 9th Cir. June 30, 2005).

6. United States v. Gigante, 971 F. Supp. 755, 758 (E.D.N.Y. 1997), *aff'd,* 166 F.3d 75 (2d Cir. 1999); *see, e.g., In re* San Juan Dupont Plaza Hotel Fire Litig., 129 F.R.D. 424 (D.P.R. 1989).

aneous transmission is proper and provided guidance on interpreting and applying that standard in the accompanying advisory committee note.

The lengthy advisory committee note underscores the importance of live testimony in the court, noting that the solemnity of the trial in the actual presence of the fact finder may promote truthfulness by the witness and that face-to-face communication is invaluable for judging the demeanor of a witness. The advisory committee note supports the preference for in-person testimony, stating that contemporaneous transmission "cannot be justified merely by showing that it is inconvenient for the witness to attend the trial." The party must establish "good cause in compelling circumstances" and show that "appropriate safeguards" are in place. The advisory committee note then discusses what constitutes "good cause" and "appropriate safeguards."

A witness's inability to attend trial for unexpected reasons is typically the most persuasive basis for a party to seek the use of contemporaneous transmission. In addition, new issues arising during trial may establish "good cause in compelling circumstances" if the issues give rise to a previously unanticipated need for testimony. Courts should approach any other justifications for remote transmission "cautiously" and should grant the requested relief only on an appropriate showing.

Unanimous consent of the parties may establish a justification for contemporaneous transmission "with relative ease," although a court is not bound by party stipulation, and may insist on live testimony, particularly if the testimony is critical.

The advisory committee note also suggests that courts look more favorably on parties' requests for remote transmission that are made as soon as the party knows it will need it; "good cause" mandates that parties address foreseeable issues before the last minute. Advance notice to the court and the parties enables advance rulings on the request and may also allow time to schedule ordinary depositions, both of which help secure the testimony from key witnesses.

If circumstances demonstrate that remote transmission is warranted, the moving party must show that appropriate safeguards for the remote transmission will be in place. These safeguards include reliable means for accurate identification of the witness, protection from undue influence over the witness, and accurate transmission of the testimony.

Civil Rule 43(e) itself does not offer guidance as to the particular type of DP technology that should be used for remote transmission of testimony, but the advisory committee note fills in some of this gap. It indicates that, although the decision is case-specific, the technology must produce more than the equivalent of a written statement and that "[v]ideo transmission ordinarily should be preferred [over teleconferencing] when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission."

Appendix E summarizes federal case law that further elucidates what constitutes "good cause in compelling circumstances" and "appropriate safeguards."

F. Security in the use of DP technology

As DP technologies become more readily available it is important for judges to consider whether these technologies or the way in which they are used could compromise court security. For example, the private recording of proceedings, discussed earlier, could result in breaches of confidential information or inaccurate or incomplete transcriptions of court proceedings.

As another example, in September 2005, the Judicial Conference prohibited the use of Internet peer-to-peer communication technologies, such as Skype on the DCN, because they require that network security operations be bypassed. This reduced security jeopardizes the privacy and security of the entire DCN by potentially opening DCN access to anyone on the Internet. Therefore, judges should not use these technologies to conduct hearings and law clerk interviews, as some have reportedly done. A suitable alternative might be Video Teleconferencing (VTC) Guest Services, which uses the software Cisco® Jabber Guest™ to allow external participants to connect to the judiciary bridge system. See the discussion in Part IV.A, *infra*.

III. Teleconferencing

The practice of permitting attorneys and litigants to take part in or monitor hearings by telephone is widespread in bankruptcy courts, and the particular practices vary greatly among judges and districts. Many courts and judges have adopted rules, procedures, and guidelines for telephonic hearings. See Appendix A for a compilation of these authorities, and Appendix B for case-management orders regarding teleconferencing. Matters covered in local rules and general orders include the following:

- the substantive matters in which telephonic participation is encouraged or permitted, and, conversely, the matters in which it is discouraged or prohibited;
- the type of argument or evidence that is allowed or prohibited to be presented telephonically;
- circumstances under which certain types of attorneys or participants (e.g., local versus out-of-town attorneys or parties, witnesses, pro se parties, pro bono attorneys) may participate telephonically;
- whether a telephonic appearance must be requested or noticed in advance, and whether good cause must be shown and leave of court granted;
- the technical and logistical requirements for scheduling a telephonic participation, including whether it must be accomplished via a designated service provider, whether the call is initiated by the lawyer or party or by the court, and how scheduling continuances are managed;
- provisions for requesting and scheduling emergency telephonic hearings;
- instructions for joining a proceeding by telephone;
- a code of conduct for participating by telephone;
- how the record will be made and special provisions for ensuring its quality;
- prohibitions against private recording and broadcasting of the court proceedings; and
- the consequences of failing to follow the permitted procedures.

In the sections that follow, we summarize how courts have dealt with some of these issues based on our review of local authority and on interviews with bankruptcy judges and court employees.

A. Means of telephonic connections

The choice of hardware and service vendors affects the cost of making each telephonic connection, the source of payment of that cost, the number of connections available at a given hearing, and the amount of assistance that the court requires from outside vendors. Two basic models that vary on these factors have developed in recent years—one in which the parties pay the costs for a third-party service provider, and the other in which the court provides a dedicated line for teleconferencing and the cost is borne by the local court or the Administrative Office. Some courts use both of these approaches, depending on the type of hearing, the type and number of parties, and the number of matters scheduled for a particular time. For some matters, a court might use neither, and instead rely on simple conferencing capabilities on a non-dedicated courthouse phone or an attorney's office phone. Each of these approaches is discussed below.

1. Third-party providers of teleconferencing services

Many bankruptcy courts hold most of their telephonic hearings using a commercial intermediary that arranges the conference call and charges each participant a fee, while providing the service to the courts without charge. The primary advantage of such services is that neither court staff nor lawyers are required to coordinate the time or logistics of the appearance. The teleconferencing services provided by two leading third-party providers, CourtCall, LLC and CourtSolutions, are described below to show the features providers may offer.[7]

Attorneys or parties make arrangements with the third-party service ahead of time to call into a scheduled hearing or proceeding using a designated telephone number. Before the scheduled hearing, CourtCall provides the court with a list of people who signed up for the teleconference, including each person's law firm and telephone number and an indica-

7. For more information, see the websites for CourtCall, LLC, https://courtcall.com/, and CourtSolutions, https://www.court-solutions.com/ (last visited May 16, 2017).

tion of whether the person intends to participate or simply monitor the proceeding. The court can download the CourtSolutions teleconference list from the provider's "Home Page." The printable PDF includes a photograph of the person, the person's name, the name of the law firm, the case number, and a designation of live or listen-only participation.

CourtCall's operators monitor each call. The operator can disconnect anyone whose environment or telephone equipment is distracting. Court personnel can contact the operator by e-mail to report noise problems, which may arise if an attorney is using a speakerphone or is making the call from a location with much ambient sound, such as in traffic or an airport.

CourtSolutions has a visual interface that allows the court to see who is on the line and who is speaking and that gives the court control over the teleconference (e.g., by adding participants to the conference or removing them, determining who can speak and when, and determining who can be in listen-only mode). If a party is creating a noise problem, someone in the courtroom can mute the party's line. Parties can see that their lines have been muted, correct the problem, and unmute the lines themselves. If necessary, CourtSolutions staff can join the conference to assist with the problem. CourtSolutions also offers document sharing, which allows uploading of documents that participants can download while on the line. Any Word, PowerPoint, PDF, or Excel document can be shared with the court and everyone else on the line.

The primary disadvantage of third-party services is their expense. Some judges and courts require the use of specific conference call providers (e.g., CourtCall or CourtSolutions), but may make exceptions for certain types of parties and situations (e.g., specially set matters in which one of the parties assumes responsibility for organizing the teleconference). Other judges reject the use of such third-party services because of their expense to the parties.

Some courts' policies regarding the use of third-party services assume that requiring the use of such services would unfairly deny access to the courts or to attorney representation for some types of litigants. Accordingly, some courts explicitly waive the third-party services' fees for debtors whose filing fee has been waived and for attorneys who are appearing pro bono. See, for example, the telephonic appearance procedures in the Middle District of Pennsylvania, the Northern District of Florida, and the Southern District of Florida. Also, see the websites of

CourtCall, LLC and CourtSolutions for more information.[8] Other courts do not require pro se debtors appearing telephonically to use the third-party service in certain types of hearings, and the court initiates the call through a court line instead. See the provisions in the Southern District of Florida regarding telephonic appearance by pro se debtors at reaffirmation hearings.

2. Dedicated teleconferencing lines funded by the Administrative Office or the local court

Some courts use so-called meet-me lines, the expense of which is borne by the judiciary. A "meet-me" line is a hardware switch or software device that functions much like a party line in which many callers can participate at one time. Once the courtroom deputy clerk has opened the line, callers dial the conference number, which is posted on the court's website, and are immediately connected to the hearing without being announced. The court pays a set fee per month for each "meet-me" line. As appropriate for the matters to be heard, the court may schedule all the matters for the beginning of a court session ("deep set" them) or may set them individually. In either case, attorneys are advised to call the conference number just prior to their assigned hearing time. If multiple matters are set for the same time, the attorneys and parties must wait until their case is called. The court, rather than a third-party operator, must determine who is on the line and monitor the calls for quality and compliance with court procedures.

The Administrative Office offers a similar product—the AT&T Tele-Conference Center—free of charge to all bankruptcy courts. It operates in the same basic way as the commercial "meet me" lines, and it has the same advantages without taxing the court's local budget. As it does with the commercial lines, the court must administer its use, which has both advantages and disadvantages. For more information, see the online resources in Appendix D. Also see the procedures of one of the judges in the Central District of Illinois concerning the use of the AT&T Tele-Conference Center.

8. *Id.*

3. Conference calls initiated by the court or a party on non-dedicated lines

Some courts connect one or more participants using conference call features on the court's regular telephone system. Similarly, some courts permit parties to set up a conference call and join the court and other parties into the call. This may be an efficient way to hold a hearing or status conference involving only a few participants that must be scheduled quickly. The number of participants that can be accommodated using such conference call procedures is more limited than the number accommodated with dedicated conference lines or third-party teleconference services, and if one of the parties is organizing the call, the court is subject to the reliability of that party's teleconferencing equipment.

All teleconferencing calls, whether initiated via a third-party service, a dedicated line, or a court or party non-dedicated line, can be distributed through the courtroom's audiovisual system. This allows the judge and all court participants to hear one another and the court to record the proceeding.

B. Obtaining permission to participate telephonically

Some courts require that attorneys and parties obtain prior permission from the court to appear telephonically. Others require attorneys and parties to provide notice that they plan to do so, and still others merely require attorneys and parties to make arrangements with the third-party teleconferencing service. Courts typically set a timeframe before the hearing within which attorneys and parties must obtain permission or provide notice. Attorneys request such permission or provide such notice in some courts by e-mail and in others by telephoning the courtroom deputy clerk.

Requiring attorneys to provide notice or obtain permission to appear by telephone allows the court to control the number of participants, as well as to document their identities and the matters on which they will appear. This control is critical to a court's ability to manage the docket, particularly when a large number of matters are all set for the beginning of a court session (i.e., "deep-set"). As mentioned earlier, third-party teleconference services make available a list of participants to the court prior to the hearing.

Some judges or courts have different requirements or standards for participants who regularly practice in the district and those who practice outside the district. For example, some judges will not allow local attorneys to appear telephonically, because with the exception of emergencies, it is not unreasonable for such attorneys to appear in court. The same judges may routinely allow the use of teleconferencing for out-of-state attorneys.

C. Types of proceedings in which courts allow telephonic appearances

Most judges use teleconferencing primarily for routine, uncomplicated matters, and most are more comfortable allowing telephonic appearances for hearing legal argument than for presentation of evidence. Although most do not use it for appearances in evidentiary hearings, particularly hearings with extensive documents or witnesses, they might permit attorneys and parties to *monitor* evidentiary hearings by telephone. They may find telephonic appearances useful in such matters as pretrial conferences, status conferences, preliminary hearings on motions that may ultimately require evidence, motions to dismiss, summary judgment motions, and conferences to discuss case management.

1. Competing views about pretrial conferences

Some judges view in-person initial pretrial conferences as an opportunity for the attorneys and litigants to meet and either settle the matter in its entirety or at least make inroads in resolving disputes. Such judges may discourage the use of teleconferencing for such conferences or allow it only under limited circumstances. Other judges, perhaps focusing more on the efficiencies of teleconferencing, actively encourage its use for pretrial conferences and for routine, status conferences.

2. Evidentiary versus non-evidentiary hearings

As stated earlier, most judges use teleconferencing primarily for proceedings and hearings that do not require documentary or testimonial evidence and that are focused exclusively on case management or matters of law. Some judges allow its use when documentary evidence is necessary, but they require that evidence to be shared in advance. This is typically accomplished by requiring the parties to file the documents electronically by a date certain prior to the hearing so that all participants can access them via CM/ECF. See, for example, Nebraska L.B.R. 9017-1,

which requires exhibits to be electronically filed by the deadline set by the court or at least three days prior to the hearing. The local rules also prescribe the format in which the exhibits are to be filed to facilitate their accessibility by all parties and their introduction into evidence. See Appendix J to the Nebraska local rules, and see also Wyoming L.B.R. 9070-1.

Some judges will permit testimony by telephone, particularly if the testimony does not require the court to determine the credibility of the witness, such as when the subject matter is uncontested or is not expected to evoke questions from the court or cross-examination by opposing counsel. In these instances, judges may require the consent of both parties for the witness to appear remotely or may require that a notary public swear in the witness with lawyer-provided identification.

Some judges will allow testimony by telephone even in more complex matters, in emergency situations, and when out-of-town attorneys or parties are involved. Judges may allow the use of teleconferencing when hearings involve distant creditors for whom travel is expensive or time-consuming. With the consent of all parties involved, a judge may allow remote witness testimony when the costs of an in-person appearance are disproportionate to the value in dispute. See the discussion related to witness testimony by remote transmission under Federal Rule of Civil Procedure 43 and Federal Rule of Bankruptcy Procedure 9017 in *supra* Part II.E and in Appendix E.

D. Pro se parties

Courts take varying positions regarding the telephonic appearance of pro se parties. Some courts do not explicitly indicate whether pro se parties may participate by phone, but some courts routinely include pro se parties in teleconferencing policies by using phrases such as "any attorney or pro se party" or "counsel and pro se parties" (e.g., Middle District of Pennsylvania, District of New Hampshire, Southern District of New York). The procedures of other courts implicitly assume that pro se litigants may participate telephonically in some types of matters by explicitly prohibiting them from doing so in other types of matters. See, for example, those for the Southern District of New York, in which "counsel and pro se parties are not permitted to participate telephonically for any hearing of an evidentiary nature."

Other courts, however, explicitly prohibit pro se debtors from participating by telephone (e.g., the District of Maine), and some indicate that telephonic appearances by pro se parties are rarely permitted (e.g., individual judge procedure in the Central District of Illinois). Other courts indirectly prohibit pro se debtors from participating by telephone by disallowing certain types of hearings, such as reaffirmation hearings, to be held telephonically (e.g., the District of New Hampshire).

E. Telephone courtesy and the control of ambient noise

Many courts, by either local rule or general order, set forth procedures for teleconferencing, including consequences for violations. These courts view teleconferencing as a privilege for the convenience of the parties and may therefore suspend telephonic appearance privileges or impose other sanctions on attorneys for repeated failure to mute the line when not speaking, or for otherwise disruptive or discourteous telephone conduct. Some judges do not allow certain attorneys to appear telephonically if experience shows they have difficulty communicating effectively over the phone.

The use of cell phones and speakerphones is often addressed in the court's procedures. The quality of the call is critical in ensuring that the court proceeding runs smoothly and that a high-quality record can be made. Recognizing that the use of cell phones and speakerphones can affect the quality of call transmission and that cell calls are more likely than landline calls to lose the connection, some courts prohibit their use. To minimize ambient noise, some courts also prohibit the use of phones in public places, which may contribute too much background noise. If cell phones are allowed either routinely or in an emergency, the court may provide particular guidance about their use.

Sometimes both a party and that party's attorney want to participate by phone from the same location to facilitate their own communications. Because some courts do not allow the use of speakerphones, in such instances, the attorney and party must make arrangements to call in separately or be on two separate receivers for the same line.

Courts generally also advise participants to mute their telephones except when speaking, and if a third-party service is used, this is often accomplished through that service.

Rather than having prohibitions against certain types of phone connections, some courts take a goal-oriented approach that requires parties to minimize extraneous noise and phone static at the risk of having their line muted or disconnected or their teleconference privileges suspended.

IV. Videoconferencing

Videoconferencing is the process by which the court and the parties at separate locations appear and participate in hearings by means of video technology. This part describes how some courts are using videoconferencing for trials and hearings, identifies the advantages and disadvantages of videoconferencing, discusses the technological and other requirements for its use, and describes certain other issues that arise with its use.

At this time, courts are using videoconferencing far less than they are using teleconferencing. Nevertheless, in some locations videoconferencing is used extensively. Videoconferencing requires more resources than teleconferencing, both to set up the basic infrastructure and to maintain and use the technology, but the ability to transmit live visual images can be useful.

The main consideration for using videoconferencing appears to be geographical distance in its various forms: distance measured in miles between sites or distance measured in time needed to travel. Accordingly, many of the courts that use videoconferencing extensively are in geographically large but sparsely populated districts, such as Montana, the Eastern District of Washington, and New Mexico.

However, bankruptcy courts in more urban areas also make significant use of the technology. The judges in the District of Delaware, for example, use videoconferencing for a variety of purposes, including, for example, to conduct hearings in the Virgin Islands when travel is not feasible and to hold joint hearings with the Canadian Bankruptcy Court. In special circumstances, the Delaware judges also will permit a witness or attorney who is unable to travel to participate by videoconference. And because attendees at hearings in some of the district's larger cases may not fit in one courtroom, the district may also use videoconferencing to broadcast the proceedings in one courtroom to an overflow courtroom.

A. Videoconferencing technology

In recent years, the costs associated with videoconferencing technology have decreased, and the quality of the technology has improved.

About ten years ago, videoconferencing in the federal courts was predominately accomplished using dedicated ISDN lines (Integrated Ser-

vices Digital Network lines). Dedicated ISDN lines are essentially "grouped or ganged" telephone lines, the number of which affects the speed with which audio and video can be transmitted. The use of such lines entails a monthly cost per line, and typically at least three lines at each location are needed to provide sufficient speed and bandwidth. If a district wanted to have videoconference capabilities among four court locations, for example, the district would pay a monthly charge for twelve lines. In addition, a per-minute usage fee is associated with each videoconference. Direct point-to-point connections require compatibility of systems, even as to the speed of the ISDN lines, for smooth transmission of audio and video. See below for a discussion of a "bridge." T1 or T3 lines are similar in concept to ISDN lines but typically provide greater functionality.

About eight years ago, some courts began using public IP (Internet Protocol) rather than dedicated ISDN lines for videoconferencing, which saved costs because the use of public IP connections eliminated the per-line monthly cost and per-minute usage fee associated with the ISDN lines. At the same time, a cost, although more limited, was associated with the public IP connections.

Then about five years ago, the capabilities of the Judiciary's DCN were enhanced so that videoconferencing could be accomplished using DCN IP connections, thus reducing the associated costs even more. The speed of IP connections, whether public or private (DCN), is much greater per dollar cost. Currently, some courts are using ISDN lines, others are using public IP connections, and others are using DCN IP connections.

Technology within the courtroom itself is either a fixed or mobile videoconferencing system that uses a coder-decoder (CODEC). A mobile system is generally combined with one camera, and a fixed system, typically, with three cameras. The CODEC combines all video signals and audio from the courtroom and sends them to the remote side of the call. The CODEC also receives video and audio from the remote side, and transmits the signal for distribution through the courtroom video and audio systems. The Courtroom Technology Guidelines currently provide for a mobile videoconferencing system, and local courts are able to pro-

cure a fixed videoconferencing system if it is deemed to meet local requirements.[9]

A "bridge" is necessary if multiple systems are to be connected, or if the systems' protocols are different—for example, one system uses ISDN lines and the other uses Internet Protocol—or if the Internet Protocol connections being used are public (system 1) and private (system 2). Thus, an additional cost of videoconferencing can be the cost of a video bridge or the use of a third-party bridging service.

The AO has now implemented a video bridging system that is available at no cost to the individual courts (National Video Teleconferencing Service, or NVTCS). That is, courts can use the NVTCS in lieu of purchasing their own video bridge or using an outside provider. The NVTCS supports multiple IP-based endpoints across the DCN and over the Internet, as well as any standards-based CODEC. Court CODECs can register to the national system, thereby eliminating the need for courts to maintain local ISDN circuits.

Video Teleconferencing (VTC) Guest Services is an extension of the NVTCS. The implementation of VTC Guest Services provides NVTCS courts with the ability to connect external participants to their videoconferences via a web browser on the participant's computer or an application on the participant's mobile device. The VTC Guest Services uses the software Cisco® Jabber Guest™ to allow external participants to connect to the judiciary's video bridging system.

Therefore, courts currently can minimize costs by using DCN IP (Internet Protocol) and the video bridging system (NVTS) available from the AO. However, equipping the courtrooms with the necessary audio and visual systems still poses significant costs.

The technology used for videoconferencing will continue to develop, and indications are that this development will continue to lower the technology's cost and reduce the difficulty of its use.

9. The Courtroom Technology Guidelines were developed by the AO's Department of Technology Services to establish a baseline configuration for audiovisual systems in courtrooms. The guidelines are available at http://jnet.ao.dcn/information-technology/courtroom-technology (last visited Aug. 8, 2017).

B. How bankruptcy courts have implemented videoconferencing

Courts use videoconferencing in different ways and for different reasons. The following examples are illustrative.

1. District of Montana

The U.S. Bankruptcy Court for the District of Montana uses videoconferencing extensively. The court first conducted video hearings in 1998 when winter weather made traveling through the geographically vast district hazardous. Within a few years, the court was using videoconferencing routinely for a wide range of matters, including uncontested matters, contested matters, and trials in adversary proceedings. The increased reliance on videoconferencing largely supplanted teleconferencing, which Montana now typically uses only for preliminary hearings on motions to modify the stay, pretrial conferences, and reaffirmations, and for people who merely want to listen in to the proceedings.

The judges report that their experience with videoconferencing has been very positive. Because videoconferencing has been used so extensively for so long, Montana attorneys are comfortable with and appreciate its use; it broadens their practice area without additional expense to the client.

Logistically, the Montana court takes a flexible approach to videoconferencing. The judge may be in the courtroom where the hearing is scheduled or may appear remotely from another court location. Attorneys, parties, and witnesses may appear in person in the court location where a hearing is scheduled or may appear remotely from a non-court videoconferencing facility. The court does not require that the attorney and client be in the same place and will call a recess for them to confer by phone, if necessary.

Originally, attorneys appearing remotely did so from another courtroom in the District of Montana or another district. However, as caseloads grew it became increasingly difficult for litigants to find an available courtroom, and the court grew concerned about any appearance of preferring some attorneys and parties over others, most notably in-state attorneys and parties over those from out-of-state. The court thus opted to require attorneys to appear from private or third-party videoconferencing facilities. The court provides an alphabetical list of frequently used videoconference providers.

The use of videoconferencing has dramatically reduced the travel required of chambers and court staff. Because audio from hearings in all court locations is transmitted to Butte, the law clerk and the courtroom deputy almost always stay in Butte, and the court record is digitally recorded in Butte for the official record.

2. District of New Mexico

The District of New Mexico uses videoconferencing to allow judges to preside remotely from the Albuquerque courthouse for hearings in four other locations in the state (Roswell, Farmington, Las Cruces, and Santa Fe). The court selected these locations because the U.S. trustee holds section 341 meetings there, which provides convenience and cost savings to the attorneys, debtors, creditors, and trustees. In three of the four locations, the bankruptcy court uses videoconferencing equipment belonging to the probation office. In the fourth and most frequently used remote location (Las Cruces), the bankruptcy court has its own dedicated hearing room and videoconferencing equipment. The bankruptcy court and probation office each has its own videoconferencing equipment in Albuquerque. In contrast to the District of Montana Bankruptcy Court, the court rarely allows appearances from private locations.

The hearing room in Las Cruces, which is about a 4-hour drive from Albuquerque, looks like a mini-courtroom with a bench, attorney tables, and a witness stand. It also has a high-definition videoconferencing system with three cameras. The room can be used with the judge in attendance or with the judge appearing remotely, almost always from the Albuquerque courthouse. For remote hearings, the monitor raises up out of the bench so that the attorneys and parties are facing the judge who appears on the monitor. The court has full control over all equipment from the Albuquerque courthouse. The cameras are preset, but the court can adjust the camera angle or zoom from Albuquerque. In court locations other than Las Cruces, the camera is static—neither the court in Albuquerque nor the remote location can adjust the camera angle or zoom. Owing to cost and lack of need, the hearing room does not have an evidence camera, so parties exchange any necessary exhibits ahead of time by e-mail.

Generally, the court tends to use teleconferencing for scheduling conferences and videoconferencing for matters involving pro se parties, evidence, and Chapter 13 issues. The judges will permit witness testi-

mony by videoconferencing, especially from Las Cruces. For significant evidentiary trials and hearings, however, the judge will either travel to the outlying location or have attorneys and parties come to Albuquerque. In locations other than Las Cruces, the judges typically use videoconferencing to handle routine matters in which assessing credibility is not as critical, such as reaffirmation hearings with pro se debtors. For example, the judges will schedule pro se debtors who want to reaffirm debt in time blocks. This allows the judge to explain the basic considerations in reaffirming debt to all the debtors at the same time and then speak with them individually about their personal situations.

3. Other districts

Some courts schedule routine video hearing days and provide connections between two courtrooms or between a courtroom and an alternate site. For example, until the loss of state funding for remote non-court sites, the District of Vermont routinely set certain hearing dates on which attorneys, represented parties, and pro se parties could appear by videoconference at four specified non-court sites. They could appear at sites other than the four court-specified sites by making independent arrangements and paying the associated cost. Video appearance on these days was limited to these situations: (1) for observation of, rather than participation in, the court proceeding; (2) to place on the record a consent or scheduling agreement; and (3) when the length of combined attorney argument was not reasonably expected to be more than 15 minutes. It was explicitly not to be used for (1) Chapter 12 and 13 confirmation hearings; (2) most Chapter 11 confirmation hearings; (3) trials and evidentiary matters; (4) hearings requiring extensive legal argument; and (5) hearings for which the court had specified in the hearing notice, or otherwise, that parties must appear at the court location. It could be allowed in other circumstances upon order of the court.

Similarly, some judges in the District of Arizona hold routine video calendars with all court locations, reasoning that video calendars save money for both the court and counsel, and allow the court to hear more matters each month. Other judges in the district set matters by videoconference on request. Videoconferencing systems are available at all court locations and can interconnect, via ISDN lines, with video systems external to the court. The court can also accommodate IP-based calls

through a bridging service, typically at the expense of the requesting party.

Some bankruptcy courts separately schedule specific matters to be heard via videoconference. Some bankruptcy courts use the technology for bulk dockets, such as a Chapter 13 motion calendar that requires the participation of a number of people. Still others use videoconferencing in both ways.

Courts have also used videoconferencing for both non-evidentiary and evidentiary hearings when the debtor is incarcerated in a correctional facility. To help reduce the cost and security risk of transporting inmates to state and federal court proceedings, correctional facilities may have secure, high-quality, and federal-court-compatible videoconferencing systems for such hearings, along with knowledgeable staff for managing the remote side of the proceeding.

C. Advantages and disadvantages of videoconferencing

As it is with teleconferencing, bridging geographical distances is the most obvious advantage of videoconferencing. The resulting reduction in travel time can create significant cost savings for the parties and the courts while enhancing access to the judicial system. But videoconferencing has a range of expenses and technical challenges associated with its implementation. Depending on the court's needs or requirements, some implementations are cost-effective while others may be cost prohibitive. Some judges think the shortcomings of the technology—which may be intangible—may well outweigh the benefits.

1. Advantages

In comparison with in-person hearings, videoconferencing can save travel time for judges, law clerks, deputy clerks of court, and security personnel. Although videoconferencing reduces travel costs, those travel costs are paid by the Administrative Office, whereas the cost of installing and using videoconferencing comes out of the court's local budget or may be procured via the Electronic Public Access (EPA) funds provided annually. Thus, there are competing interests at play for courts evaluating the use of videoconferencing. With the introduction of the National Video Teleconferencing Service (NVTCS) and the Video Teleconferencing (VTC) Guest Services, however, the Administrative Office has taken

measures to absorb some videoconferencing costs that the local courts have borne in the past.

Saving travel time and expense may be just as important to the parties as it is to the court. To the extent that videoconferencing reduces the cost of litigation, it allows more participation in the judicial process by parties with limited means, another positive outcome.

Videoconferencing also presents certain advantages over teleconferencing. Videoconferencing allows participants to observe the demeanor and reactions of the other persons participating in the hearing, a factor that is a determinant for many attorneys in deciding to attend hearings in person rather than appear only by telephone. A judge also can more easily signal that he or she wants to ask a question or stop a discussion. These advantages make videoconferencing a better method for conducting evidentiary hearings remotely. Judges disagree, however, about the extent to which videoconferencing permits adequate witness observation.

2. Disadvantages

Telephone technology is ubiquitous, system compatible, cheap, and easy to use. To conduct a telephonic hearing, a judge need only pick up the phone and use its conference capability to connect with one or more parties, whether the parties are expecting it or not. And the system works from almost any location, without installation of new equipment. Comparatively, video technology is more costly and complex to use, even with the developments described in *supra* Part IV.A.

The Technology Solutions Office of the Administrative Office establishes the baseline technology guidelines for courtroom audiovisual (AV) configurations throughout the judiciary. The baseline technology guidelines provide for videoconferencing in the bankruptcy courts in the form of portable solutions; whether this meets the needs of the bankruptcy courts is under debate. Many courts have procured portable units, although not all make full use of them in their courtroom proceedings.

Monies are dedicated for audiovisual and videoconferencing systems during new construction projects. Funding for annual maintenance of the audiovisual and videoconferencing equipment is provided for within the annual EPA funds and distributed within the courtroom technology allotments, and it is included in the court's annual budget. Because of tight budgets, only a small amount of funding is available to retrofit existing courthouses. Associated costs include not only the front-end ex-

pense of obtaining adequate equipment, but also the continuing expense of maintaining and operating the equipment.

Until recently, videoconferencing presented certain logistical difficulties in comparison with teleconferencing. Courts have usually required that the parties participating remotely go to a location where they can be linked to the court video system. (Of course, in the paradigm of "appearing in court," parties are usually required to appear wherever the judge decides to sit, so parties may not see this as a disadvantage.) This location might be another court location, a commercial location or the offices of a law firm large enough to have its own video facility. Now software that allows parties to appear from their own computer desktops, laptops, or mobile devices is available, and its use might be appropriate in some situations, such as those amenable to teleconferencing.

Historically, in comparison with voice transmissions, videoconferencing required substantial bandwidth. Therefore, the number of locations at which parties were able to participate in a videoconference might have been limited when compared with the number of locations possible for teleconferencing. In addition, the number of remote locations might have been limited so that all locations could be visible on the monitors at one time. Newer technologies address these issues and allow the court to determine the best practices for remote connections and locations.

D. Advance planning for videoconferencing

A court that wants to implement a videoconferencing system should first consult with its IT department to help determine the court's present and future needs. It is particularly important to have sufficient capacity to make the images as clear as possible if judges want to conduct evidentiary hearings in which they can closely observe the demeanor of the witnesses. The court should also consult with the Administrative Office regarding equipment specifications. See Appendix D for Administrative Office resources and contacts.

Judges must work with not only the IT experts to assess what equipment they need; they must also work with the clerk of court to determine what their court can afford. Some court units share budgets for and use of video equipment. Judges who have experience with this technology agree that, if a court is building infrastructure, it should build more than

it presently thinks it needs—for example, more and bigger wiring and more drops. Judges and court staff should spend time doing research about what equipment will best meet the needs identified, now and into the future.

It also is critical for IT and chambers staff to be familiar with how to run the equipment. Vendors of the technology, as well as Administrative Office staff, will generally spend much time making sure court staff understand the products and how to operate them. Administrative Office staff are available to assist with the available national teleconferencing and videoconferencing services, but the court will still need court-based personnel for day-to-day operations and troubleshooting. Additionally, training services may be procured through the national installation contracts. The national contractors may provide training, or obtain a subcontractor's service to provide training, to meet the court-specific needs of IT staff, administrative staff, or court staff.

Finally, the judge will need to become capable of conducting a video hearing. Although there are not many management differences between video hearings and in-person hearings (assuming high-quality video equipment and transmission facilities), the details can be distracting at first for both the judge and the parties. The next section discusses operating a videoconferencing program and conducting hearings. For a thorough post hoc analysis of a remote hearing, see *Perotti v. Quinones*,[10] which concluded that the district court's decision to require the jailed plaintiff to appear remotely was not an abuse of discretion and described not only the conduct of the hearing but also the various safeguards implemented.

E. Operating a videoconferencing program and conducting hearings

Although no two courts implement a videoconferencing program exactly the same way, districts that use this technology the most share some operational similarities and requirements.

First, even though some of these courts may conduct most hearings by videoconference, judges still travel to outlying divisions when appropriate. This is the case in Montana, where the judge still frequently travels to outlying divisions, even if someone has not requested an in-person

10. 790 F.3d 712 (7th Cir. 2013).

hearing. But the videoconferencing capability allows the judge to travel without law clerks and courtroom deputies because the audio from the videoconferencing CODEC can be routed to the audiovisual and digital recording systems in the location where the courtroom deputy and the law clerk are working. Similarly, in New Mexico, the court regularly schedules videoconferences to allow judges to appear remotely from the Albuquerque courthouse for hearings in four other court locations in the district. However, when a matter so warrants, the parties or the judges will travel to hold an in-person hearing.

Second, if a bankruptcy court and a district court or other court unit share the videoconferencing equipment, they must coordinate with each other to schedule its use. It is important to have a single "video" scheduling calendar that is shared by all units so that everyone can determine its availability. For example, in the District of New Mexico, where the bankruptcy court uses the probation office's videoconferencing equipment in three remote locations, the bankruptcy court and the probation office use an internal calendar to schedule videoconferencing equipment and space.

Third, the court must determine the locations from which parties and witnesses may appear. Other court sites within the district are the simplest potential location, provided they have the requisite equipment. But in some circumstances, witnesses or parties will be outside the district and unable to travel. In these situations, judges often seek the use of out-of-district court facilities near the location of the witness or party. There are many commercial video facilities, and businesses and law firms commonly have facilities. In appropriate circumstances the court might authorize or require a law firm to host a videoconference, and might preside over that hearing in the law firm's conference room. The use of private facilities raises the issue of who pays for the videoconferencing. But this issue should not stand in the way of the practice; expenses associated with traveling to the physical courthouse will generally exceed the videoconferencing costs. Alternatively, the court may allow an administrative reimbursement under certain circumstances.

Fourth, the judge needs to ensure that everyone can see him or her and the other parties. This may require that prior to the hearing the judge and IT staff work on the positioning of the cameras, both where the judge will preside and where any witnesses or parties may appear, to the extent the court has control. Ideally, the system should have sufficient camera

capacity so that the judge can view not only the witness and the attorney, but also counsel tables and any observers.

Fifth, the judge needs to ensure that the audio component of the videoconferencing equipment is working properly. This is particularly important given the need for a proper record of proceedings. Unfortunately, audio is frequently a problem with video equipment. Some equipment attempts to use a single microphone located at the camera, which is rarely adequate. Integrating the CODEC's audio into the courtroom PA system provides much better audio transmission. Judges and their staff should test equipment before hearings and confirm that all participants can hear the broadcast.

Sixth, prior to the hearing, the judge needs to ensure that adequate arrangements are in place for documentary evidence. For example, the following questions should be addressed:

- Is everyone going to be working with identical sets of paper exhibits?
- Will there be electronic transmission and use of images as exhibits, which may necessitate another set of monitors available for all the parties to view?
- Does the party controlling the evidence monitor, such as an attorney at the podium with a laptop computer and a CD of exhibits, also control what the judge is able to observe during the hearing?
- Does the display at the remote sites adequately display the evidence images? If the evidence is a document, can the party easily read the document on the monitor at the distance the party must stand or sit from the monitor?

Judges indicate that document cameras work well, as do the CD-ROM, DVD, and other projection-type equipment used to produce evidence in non–paper-copy format.

Finally, to reiterate a point made above, the judge needs to ensure that everyone in the case knows at what site they are supposed to be present, at what time, and with whom (for example, does the judge require the attorney and the party represented by the attorney to be at the same physical site?). The court staff also need to know that information so that they can help get the hearing started; therefore, it might be helpful for staff at each location to consult a district-wide calendar daily.

F. Considerations for local rules and procedures for videoconferencing

Some courts have local rules, forms, and established procedures for videoconferencing, and others do not (see Appendix A). This section discusses some considerations for local rules and procedures for videoconferences.

1. Does the court need a local rule?

Although the short answer to the question "Does the court need a local rule?" is "no," the longer answer is that rules and procedures have proven helpful in those jurisdictions that frequently use videoconferencing. Appendix A shows that many districts have local rules for telephonic hearings but far fewer districts have local rules or district-wide procedures for video hearings. Some of those rules and procedures are comprehensive. Rhode Island Local Bankruptcy Rule 9074-1, for example, sets forth information about making a request for a video hearing, handling of written submissions and exhibits, swearing in witnesses, minimum technological and practical requirements, and other matters. See also the Southern District of Alabama Interim Video Teleconference Bankruptcy Rule, and the District of Montana Policy for Remote Appearance at a Bankruptcy Hearing and Trial. Other districts have a local rule that is supplemented by individual judges' procedures. See, for example, the Eastern District of Pennsylvania Local Bankruptcy Rule 9074-1 and judge-specific procedures that vary on matters such as the presentation of evidence and taking of testimony.

In some districts, bankruptcy judges individually set out policies in chambers procedures or orders. Standing orders in the Northern District of Mississippi and in the Southern District of Mississippi provide an interesting example. These orders enable one judge to hold video hearings in both the Northern and Southern Districts of Mississippi and another judge to hold video hearings in outlying locations in the Southern District of Mississippi. The orders further provide that the court may set for hearing by videoconference any matter in a bankruptcy case, including contested matters and adversary proceedings, and they include provisions regarding the exchange and introduction of exhibits and the taking of witness testimony.

2. Bases for conducting video hearings

Local rules and procedures commonly allow for video hearings for the "convenience of the court and the convenience of the parties." Convenience is usually measured by the distance from the courthouse where the judge presides or by the cost of travel, and may take into account not only counsel and parties but also witnesses. Some rules also reference the cost associated with the videoconference itself, which may fall to the parties, particularly when they are using a non-governmental site for the hearing. (In those jurisdictions, the rules generally specify who is responsible for certain costs.) The government typically absorbs the cost when the parties are all at a court site.

Some courts do not conduct video hearings unless there is a specific request for them. Other courts, such as those in the Districts of Montana, Wyoming, and New Mexico, schedule videoconferences routinely as part of managing their caseloads. In fact, because videoconferencing is used so routinely in Montana, the court has a procedure through which attorneys and parties may request that the judge appear in person rather than remotely. The court tries to identify cases that need the judge's physical presence because of the nature of case and the attorneys involved, so this procedure has been used only a few times.

3. Preparing for a video evidentiary hearing

A key consideration that could be addressed by local rule is how to ensure that everyone is utilizing the same set of exhibits. This can be accomplished if the exhibits are part of the case management (CM) record and CM monitors are available at all the sites. If the court has an evidence presentation system such that a document or other tangible piece of evidence can be displayed on a screen and thereby made available to everyone on evidence monitors, that would also ensure that everyone is considering the same evidence and provide the judge with control over what everyone sees. However, the problem with evidence presentation systems that allow counsel or a witness to control what everyone sees, such as documents that are on CDs, is precisely that: someone other than the judge controls what everyone (including the judge) sees, and the judge cannot page forward or backward within a document while the witness is testifying. For that reason, a number of the rules require that exhibits be

electronically filed or exchanged via e-mail or postal service a certain number of days before the hearing takes place.

The rules or a pretrial order also might specify whether a witness will be allowed to testify from a remote location (see the discussion in Part II.E, *supra*).

4. Conducting a video evidentiary hearing

Some courts set forth the procedures that control the conduct of the video evidentiary hearings. For example, orders in the Southern and Northern Districts of Mississippi provide the following:

1. Decorum: The formalities of a courtroom must be observed. When called, the parties are to approach the video conference table and situate themselves so that they are able to view the video screen and be seen by the Court.
2. Identification: All parties in attendance must identify themselves and state their interest in the proceeding.
3. Witnesses: Any witness called will be sworn in for the video conference by the courtroom deputy or other authorized court personnel.
4. Recording: The video conference constitutes a court proceeding, and any recording other than the official court version is prohibited. No party may record images or sounds from any location.
5. Equipment Operation: The Court will be responsible for operation of the video conferencing equipment.
6. Contact Information: Questions concerning video conferencing should be directed to Judge [Name]'s courtroom deputy.

As another example, under the procedures in the District of Montana, the judge and participants have at each site a view of the podium, the viewing section, the counsel tables, and the witness stand. A witness or attorney may appear at a non-court site, such as a commercial site, but the court directs that all persons be in the judge's view and requires that all persons in the room be identified. These requirements help considerably in controlling off-camera misbehavior (e.g., signals to witnesses). Courts may include safeguards such as these in local rules and procedures or may prefer to retain flexibility and make these decisions on a case-by-case basis.

G. Potential ramifications of videoconferencing

Some ramifications of videoconferencing, such as saving travel time and costs, are intentional, but other ramifications may be unintentional and unexpected. Some interrelated issues judges may want to consider are the following: (1) integrity of the decision; (2) dignity of the court; (3) equal treatment of parties and attorneys; and (4) consistency with the local legal culture.

1. Integrity of the decision

A judge or the parties might ask if the decision rendered would have been the same if the hearing had taken place in person rather than on video (or for that matter by telephone). Do the participants, including the judge, pay as much attention at a video hearing as they do in the courtroom? What is the impact of a commercial location and its attendant background noises and activity? How does videoconferencing affect parties' acceptance of a court's decision? What happens when a party learns of an adverse decision at a place other than the courtroom?

2. Dignity of the court

How do the parties perceive the judge when he or she is not surrounded by the furnishings of the courtroom and the other hallmarks of the office? Courts have long recognized that the bench, the seal, the judicial robes, and other symbols of the office and the court emphasize the importance of the proceedings and may lead the participants to be more truthful. Is some or all of the dignity of the court lost when someone appears by video (or by telephone)? If a judge is appearing remotely from a location that is not a courtroom, some of these concerns can be addressed by setting up what appears to be a judicial bench with the court seal behind it (e.g., in a conference room) and having the judge wear a robe.

3. Equal treatment of parties and attorneys

How does a court draw principled distinctions about who may appear remotely and who may not? For example, is permission routinely given to anyone outside a geographic area, or a jurisdiction, and if not, then how are the distinctions drawn and articulated? What about the firm with its own video equipment and conferencing facility: will it be permitted to appear by videoconference upon request? Should a court allow

parties who only want to observe the proceedings and not question witnesses, make arguments, and so forth, participate by videoconference? Will the court activate the videoconference facility at the request of a pro se party or only for counsel?

4. Consistency with the local legal culture

How does the use of videoconferencing impact the local bar, and is it consistent with the local legal culture? How much will or should videoconferencing replace the judge's taking the time to travel to other sites within the district and showing them the attention that a personal visit represents? If the judge travels to a "remote" site, will videoconferencing be used to allow parties at the "main" site to appear and thus avoid traveling to the remote site where the judge will be? Does videoconferencing support the nationalization of bankruptcy practice?

As is true of every new technology, videoconferencing has advantages and disadvantages. Courts need to weigh all of the relevant considerations, no matter how intangible, against the more obvious convenience and cost savings that result from allowing videoconferencing.

V. Conclusion

It is possible to imagine a future in which courtrooms are not used for any proceedings—attorneys make video appearances from their offices; litigants and witnesses appear from home using telephone, computer, or other video cameras; and judges preside by video camera from their chambers. As bankruptcy courts embrace the advantages of DP technology, however, it is important to preserve the dignity and solemnity of the court as an institution.

Because of the potential to save money and other resources, bankruptcy courts should consider using DP technology for conducting proceedings. In some circumstances, using the technology would benefit the court and litigants without sacrificing essential elements of the judicial process. This guide, and other resources identified in the appendices, are intended to help courts and individual judges strike the appropriate balance in using DP technology to fit their particular circumstances.

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This guide on the use of distance participation (DP) technology to conduct bankruptcy hearings and trials provides an overview of general considerations, ranging from philosophical to practical, and then examines separately the use of teleconferencing and videoconferencing. Each district, and indeed each judge, must decide whether to use DP technology, and if so, how to use it. The goals of this guide are to aid in making those decisions, and to encourage the use of DP technology so as to promote access to the courts, make the best use of existing judicial resources, and contain costs while maintaining the quality of court proceedings and compliance with the Federal Rules of Bankruptcy Procedure, the Federal Rules of Evidence, and other legal authority. Its suggestions are based on the varied experiences of bankruptcy judges and clerks of court around the country.

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ORDER ESTABLISHING REMOTE TRIAL PROCEDURES – COVER SHEET

The below sample Order Establishing Remote Trial Procedures has not been prepared by Judge Bason, and is not endorsed by him, but is being provided to parties as a sample of the type of order that might be appropriate in connection with evidentiary hearings/trials that are not conducted in person.

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

[DIVISION NAME] DIVISION

In re: [DEBTOR NAME], Debtor.	Case No.: Adv. Proc. No.: Chapter [__]
[PLAINTIFF NAME], Plaintiff, v. [PLAINTIFF NAME], Defendant.	**ORDER ESTABLISHING REMOTE TRIAL PROCEDURES**

This adversary proceeding is scheduled for trial beginning on [Insert Date] (the "Trial"). In light of the current COVID-19 pandemic, the Chief Judge of the District Court has issued orders closing all courthouses in Central District of California, through and including June 1, 2020. *See* Order of the Chief Judge No. 20-42 (March 19, 2020) and General Order No. 20-05 (April 13, 2020). Pursuant to Rule 43(a) of the Federal Rules of Civil Procedure ("Federal Rules"), made applicable here by Rule 9017 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), the current pandemic and closure of the Court's facilities provide "good cause in compelling circumstances" to conduct the Trial remotely, through the use of telephonic and videoconferencing technologies.

Further, the Court finds that the procedures adopted herein will provide "adequate safeguards" for purposes of Federal Rule 43(a) and ensure due process of law. These procedures will (i) enable the Court to identify, communicate with, and judge the demeanor of all witnesses in real time, (ii) enable counsel for the parties to see and hear the witness testimony, interpose objections, and communicate with the Court in real time, (iii) enable the parties, the witnesses and the Court to have simultaneous access to an identical set of pre-marked exhibits, (iv) avoid any undue influence or interference with the witnesses in connection with their testimony, and (v) preserve the ability of any witness to be represented by counsel during the proceeding, and to communicate with such counsel as the Court deems appropriate.

Accordingly, it is hereby **ORDERED**:

1. Audio and Video Conference Solutions. The Trial shall take place using the telephonic and videoconferencing solutions described herein. Participants in the Trial will be connected with the courtroom using these technologies but will not be physically present in the courtroom. The Court will utilize CourtCall for audio and [Skype for Business] for video.

   a. Audio. Participants must contact CourtCall to arrange their participation in the audio portion of the proceedings. Each party is responsible for arranging and paying the cost for its respective witnesses to participate in the Court Call audio feed. CourtCall may be reached at (888) 882-6878 or (866) 582-6878 and additional information is available at https://courtcall.com.

b. Video. The Court staff will provide a link or URL (internet address) that enables participation in the video portion of the proceedings, to the list of persons identified by the parties in accordance with Paragraph 3 below. With the assistance of Court personnel, all counsel and witnesses shall participate in appropriate pre-Trial testing to determine that each participant's audio and video capabilities are functional.

2. Required Equipment. For purposes of participation in the Trial, each participating attorney and each witness must have simultaneous access to (1) a telephone for connecting to CourtCall for audio, (2) a computer, equipped with a camera, that is capable of receiving and transmitting video using the Court's video solution, (3) Internet browsing software that is adequate to facilitate the Court's videoconference solution, (4) an Internet connection with bandwidth adequate to support the individual's use of that video solution, and (5) Adobe Acrobat Reader for purposes of reviewing exhibits, as directed by counsel or the Court. The telephone must have a handset or headset and microphone attached, and if the telephone is a cellular phone, the attorney or witness using it must be situated in a location with cellular service adequate to provide clear audio. Further, absent compelling circumstances, the Court will not permit any counsel or witness to participate in the audio portion of the Trial by speakerphone. The Court's experience is that speakerphones do not provide adequate sound quality for purposes of producing a good audio recording of its proceedings.

3. Prior Notice of Trial Participants. No later than five business days prior to the Trial, the parties shall provide to the courtroom deputy [provide email address], and to each other, a list of all attorneys and witnesses who will participate in the Trial, together with an email address and telephone number for each. The telephone number provided should be a number at which the attorney or witness can be reached during the Trial in the event of an interruption in the audio or video feed. [This requirement is in addition to any requirements previously established by the Court for the parties to disclose to each other, by a date certain, the identity of the witnesses they intend to present at trial.]

4. Electronic Submission of Trial Exhibits. No later than five business days prior to the Trial, the parties shall provide to the courtroom deputy [provide email address], each other, and each witness, a .pdf (Adobe Acrobat) file of each exhibit the parties may use at Trial for any purposes, including for rebuttal or impeachment. The parties may distribute these electronic documents by way of a secure link to an FTP or other file sharing service, if necessary. The .pdf files shall be named sequentially. Plaintiff's exhibits shall be numbered as follows: P_Ex_1, P_Ex_2, P_Ex_3, etc. Defendants exhibits shall be lettered as follows: D_Ex_A, D_Ex_B, D_Ex_3, etc. Upon receipt of the electronic documents (or a download link), each attorney and witness shall take the steps necessary to ensure that all electronic documents can be successfully opened and are readily available during the Trial. [Subject to any order of the Court requiring that any exhibit be redacted or sealed, all exhibits will be filed on the docket by the Clerk of the Court, and shall become part of the trial record, following the Trial.]

5. Remote Witness Testimony. Having found "good cause in compelling circumstances" and "adequate safeguards," any witness called to testify at the Trial shall testify by contemporaneous transmission from a different location into the courtroom (each a "Remote Witness").

a. All Remote Witnesses shall be placed under oath and their testimony shall have the same effect and be binding upon the Remote Witness in the same manner as if such Remote Witness was sworn and testified in open court.

b. Each Remote Witness shall provide their testimony from a quiet room and must situate themselves in such a manner as to be able to both view the video feed and be seen by the Court.

c. While the Remote Witness is sworn and testifying: (i) no person may be present in the room from which the Remote Witness is testifying, (ii) the Remote Witness may not have in the room any documents except the exhibit submitted by the parties pursuant to Paragraph 4 above [and any declaration submitted in lieu of direct testimony], and (iii) may not communicate with any other person regarding the subject of their testimony, by electronic means or otherwise. If the

witness or their counsel seek to communicate with one another, either shall openly request a recess for such purpose. If such request is granted by the Court, the witness and their counsel may privately confer "offline," i.e., by telephonic means that are not transmitted to the other parties.

6. Courtroom Formalities. Although conducted using telephonic and videoconferencing technologies, the Trial constitutes a court proceeding. No person shall record—from any location or by any means—the audio or video of the Trial. The audio recording created and maintained by the Court shall constitute the official record of the Trial. Further, the formalities of a courtroom shall be observed. Counsel and witnesses shall dress appropriately, exercise civility, and otherwise conduct themselves in a manner consistent with the dignity of the Court and its proceedings.

7. Technical Pre-Trial Conference. On [Insert Date], the Court will hold a technical pre-trial conference for the purpose of testing both the telephonic and video conference technologies. All parties and witnesses must participate in the technical pre-trial conference. All participants are admonished not to discuss the substance of the Trial at the technical pre-trial conference, but instead limit their comments to the functionality of the technology and any procedural matters that relating to the technology.

8. Retention of Jurisdiction. The Court retains jurisdiction with respect to all matters arising from or related to this Order.

# # #

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 477R* **May 11, 2017**

Revised May 22, 2017

Securing Communication of Protected Client Information

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

I. Introduction

In Formal Opinion 99-413 this Committee addressed a lawyer's confidentiality obligations for email communications with clients. While the basic obligations of confidentiality remain applicable today, the role and risks of technology in the practice of law have evolved since 1999 prompting the need to update Opinion 99-413.

Formal Opinion 99-413 concluded: "Lawyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to a client's representation."[1]

Unlike 1999 where multiple methods of communication were prevalent, today, many lawyers primarily use electronic means to communicate and exchange documents with clients, other lawyers, and even with other persons who are assisting a lawyer in delivering legal services to clients.[2]

Since 1999, those providing legal services now regularly use a variety of devices to create, transmit and store confidential communications, including desktop, laptop and notebook

*The opinion below is a revision of, and replaces Formal Opinion 477 as issued by the Committee May 11, 2017. This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2016. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

1. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413, at 11 (1999).

2. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); ABA COMMISSION ON ETHICS 20/20 REPORT TO THE HOUSE OF DELEGATES (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_outsourcing_posting.authcheckdam.pdf.

computers, tablet devices, smartphones, and cloud resource and storage locations. Each device and each storage location offer an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation, and thus implicate a lawyer's ethical duties.[3]

In 2012 the ABA adopted "technology amendments" to the Model Rules, including updating the Comments to Rule 1.1 on lawyer technological competency and adding paragraph (c) and a new Comment to Rule 1.6, addressing a lawyer's obligation to take reasonable measures to prevent inadvertent or unauthorized disclosure of information relating to the representation.

At the same time, the term "cybersecurity" has come into existence to encompass the broad range of issues relating to preserving individual privacy from intrusion by nefarious actors throughout the internet. Cybersecurity recognizes a post-Opinion 99-413 world where law enforcement discusses hacking and data loss in terms of "when," and not "if."[4] Law firms are targets for two general reasons: (1) they obtain, store and use highly sensitive information about their clients while at times utilizing safeguards to shield that information that may be inferior to those deployed by the client, and (2) the information in their possession is more likely to be of interest to a hacker and likely less voluminous than that held by the client.[5]

The Model Rules do not impose greater or different duties of confidentiality based upon the method by which a lawyer communicates with a client. But how a lawyer should comply with the core duty of confidentiality in an ever-changing technological world requires some reflection.

Against this backdrop we describe the "technology amendments" made to the Model Rules in 2012, identify some of the technology risks lawyers face, and discuss factors other than the Model Rules of Professional Conduct that lawyers should consider when using electronic means to communicate regarding client matters.

II. Duty of Competence

Since 1983, Model Rule 1.1 has read: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6] The scope of this requirement was

3. *See* JILL D. RHODES & VINCENT I. POLLEY, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 7 (2013) [hereinafter ABA CYBERSECURITY HANDBOOK].

4. "Cybersecurity" is defined as "measures taken to protect a computer or computer system (as on the internet) against unauthorized access or attack." CYBERSECURITY, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/cybersecurity (last visited Sept. 10, 2016). In 2012 the ABA created the Cybersecurity Legal Task Force to help lawyers grapple with the legal challenges created by cyberspace. In 2013 the Task Force published The ABA Cybersecurity Handbook: A Resource For Attorneys, Law Firms, and Business Professionals.

5. Bradford A. Bleier, Unit Chief to the Cyber National Security Section in the FBI's Cyber Division, indicated that "[l]aw firms have tremendous concentrations of really critical private information, and breaking into a firm's computer system is a really optimal way to obtain economic and personal security information." Ed Finkel, Cyberspace Under Siege, A.B.A. J., Nov. 1, 2010.

6. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 37-44 (Art Garwin ed., 2013).

clarified in 2012 when the ABA recognized the increasing impact of technology on the practice of law and the duty of lawyers to develop an understanding of that technology. Thus, Comment [8] to Rule 1.1 was modified to read:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)[7]

Regarding the change to Rule 1.1's Comment, the ABA Commission on Ethics 20/20 explained:

> Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] [renumbered as Comment [8]] specifies that, to remain competent, lawyers need to "keep abreast of changes in the law and its practice." The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document. [8]

III. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the rule and the commentary about what efforts are required to preserve the confidentiality of information relating to the representation. Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.[9] The 2012 modification added a new duty in paragraph (c) that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[10]

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7. *Id.* at 43.

8. ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer's substantive duty of competence: "Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase 'including the benefits and risks associated with relevant technology,' would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."

9. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2016).

10. *Id.* at (c).

Amended Comment [18] explains:

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.[11]

Therefore, in an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the reasonable efforts standard:

> . . . rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.[12]

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- the sensitivity of the information,

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11. The 20/20 Commission's report emphasized that lawyers are not the guarantors of data safety. It wrote: "[t]o be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances."

12. ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 48-49.

- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[13]

A fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances. Model Rule 1.4 may require a lawyer to discuss security safeguards with clients. Under certain circumstances, the lawyer may need to obtain informed consent from the client regarding whether to the use enhanced security measures, the costs involved, and the impact of those costs on the expense of the representation where nonstandard and not easily available or affordable security methods may be required or requested by the client. Reasonable efforts, as it pertains to certain highly sensitive information, might require avoiding the use of electronic methods or any technology to communicate with the client altogether, just as it warranted avoiding the use of the telephone, fax and mail in Formal Opinion 99-413.

In contrast, for matters of normal or low sensitivity, standard security methods with low to reasonable costs to implement, may be sufficient to meet the reasonable-efforts standard to protect client information from inadvertent and unauthorized disclosure.

In the technological landscape of Opinion 99-413, and due to the reasonable expectations of privacy available to email communications at the time, unencrypted email posed no greater risk of interception or disclosure than other non-electronic forms of communication. This basic premise remains true today for routine communication with clients, presuming the lawyer has implemented basic and reasonably available methods of common electronic security measures.[14] Thus, the use of unencrypted routine email generally remains an acceptable method of lawyer-client communication.

However, cyber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email. For example, electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications. Therefore, lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the Comment [18] factors to determine what effort is reasonable.

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13. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2016). "The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available." ABA COMMISSION REPORT 105A, *supra* note 8, at 5.

14. See item 3 below.

While it is beyond the scope of an ethics opinion to specify the reasonable steps that lawyers should take under any given set of facts, we offer the following considerations as guidance:

1. Understand the Nature of the Threat.

   Understanding the nature of the threat includes consideration of the sensitivity of a client's information and whether the client's matter is a higher risk for cyber intrusion. Client matters involving proprietary information in highly sensitive industries such as industrial designs, mergers and acquisitions or trade secrets, and industries like healthcare, banking, defense or education, may present a higher risk of data theft.[15] "Reasonable efforts" in higher risk scenarios generally means that greater effort is warranted.

2. Understand How Client Confidential Information is Transmitted and Where It Is Stored.

   A lawyer should understand how their firm's electronic communications are created, where client data resides, and what avenues exist to access that information. Understanding these processes will assist a lawyer in managing the risk of inadvertent or unauthorized disclosure of client-related information. Every access point is a potential entry point for a data loss or disclosure. The lawyer's task is complicated in a world where multiple devices may be used to communicate with or about a client and then store those communications. Each access point, and each device, should be evaluated for security compliance.

3. Understand and Use Reasonable Electronic Security Measures.

   Model Rule 1.6(c) requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. As Comment [18] makes clear, what is deemed to be "reasonable" may vary, depending on the facts and circumstances of each case. Electronic disclosure of, or access to, client communications can occur in different forms ranging from a direct intrusion into a law firm's systems to theft or interception of information during the transmission process. Making reasonable efforts to protect against unauthorized disclosure in client communications thus includes analysis of security measures applied to both disclosure and access to a law firm's technology system and transmissions.

   A lawyer should understand and use electronic security measures to safeguard client communications and information. A lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex

15. *See, e.g.*, Noah Garner, *The Most Prominent Cyber Threats Faced by High-Target Industries*, TREND-MICRO (Jan. 25, 2016), http://blog.trendmicro.com/the-most-prominent-cyber-threats-faced-by-high-target-industries/.

passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software. Each of these measures is routinely accessible and reasonably affordable or free. Lawyers may consider refusing access to firm systems to devices failing to comply with these basic methods. It also may be reasonable to use commonly available methods to remotely disable lost or stolen devices, and to destroy the data contained on those devices, especially if encryption is not also being used.

Other available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems.

In the electronic world, "delete" usually does not mean information is permanently deleted, and "deleted" data may be subject to recovery. Therefore, a lawyer should consider whether certain data should *ever* be stored in an unencrypted environment, or electronically transmitted at all.

4. Determine How Electronic Communications About Clients Matters Should Be Protected.

Different communications require different levels of protection. At the beginning of the client-lawyer relationship, the lawyer and client should discuss what levels of security will be necessary for each electronic communication about client matters. Communications to third parties containing protected client information requires analysis to determine what degree of protection is appropriate. In situations where the communication (and any attachments) are sensitive or warrant extra security, additional electronic protection may be required. For example, if client information is of sufficient sensitivity, a lawyer should encrypt the transmission and determine how to do so to sufficiently protect it,[16] and consider the use of password protection for any attachments. Alternatively, lawyers can consider the use of a well vetted and secure third-party cloud based file storage system to exchange documents normally attached to emails.

Thus, routine communications sent electronically are those communications that do not contain information warranting additional security measures beyond basic methods. However, in some circumstances, a client's lack of technological sophistication or the limitations of technology available to the client may require alternative non-electronic forms of communication altogether.

16. *See* Cal. Formal Op. 2010-179 (2010); ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 121. Indeed, certain laws and regulations require encryption in certain situations. *Id.* at 58-59.

A lawyer also should be cautious in communicating with a client if the client uses computers or other devices subject to the access or control of a third party.[17] If so, the attorney-client privilege and confidentiality of communications and attached documents may be waived. Therefore, the lawyer should warn the client about the risk of sending or receiving electronic communications using a computer or other device, or email account, to which a third party has, or may gain, access.[18]

5. Label Client Confidential Information.

Lawyers should follow the better practice of marking privileged and confidential client communications as "privileged and confidential" in order to alert anyone to whom the communication was inadvertently disclosed that the communication is intended to be privileged and confidential. This can also consist of something as simple as appending a message or "disclaimer" to client emails, where such a disclaimer is accurate and appropriate for the communication.[19]

Model Rule 4.4(b) obligates a lawyer who "knows or reasonably should know" that he has received an inadvertently sent "document or electronically stored information relating to the representation of the lawyer's client" to promptly notify the sending lawyer. A clear and conspicuous appropriately used disclaimer may affect whether a recipient lawyer's duty under Model Rule 4.4(b) for inadvertently transmitted communications is satisfied.

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17. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459, Duty to Protect the Confidentiality of E-mail Communications with One's Client (2011). Formal Op. 11-459 was issued prior to the 2012 amendments to Rule 1.6. These amendments added new Rule 1.6(c), which provides that lawyers "shall" make reasonable efforts to prevent the unauthorized or inadvertent access to client information. *See, e.g.*, Scott v. Beth Israel Med. Center, Inc., Civ. A. No. 3:04-CV-139-RJC-DCK, 847 N.Y.S.2d 436 (Sup. Ct. 2007); Mason v. ILS Tech., LLC, 2008 WL 731557, 2008 BL 298576 (W.D.N.C. 2008); Holmes v. Petrovich Dev Co., LLC, 191 Cal. App. 4th 1047 (2011) (employee communications with lawyer over company owned computer not privileged); Bingham v. BayCare Health Sys., 2016 WL 3917513, 2016 BL 233476 (M.D. Fla. July 20, 2016) (collecting cases on privilege waiver for privileged emails sent or received through an employer's email server).

18. Some state bar ethics opinions have explored the circumstances under which email communications should be afforded special security protections. *See, e.g.*, Tex. Prof'l Ethics Comm. Op. 648 (2015) that identified six situations in which a lawyer should consider whether to encrypt or use some other type of security precaution:

- communicating highly sensitive or confidential information via email or unencrypted email connections;
- sending an email to or from an account that the email sender or recipient shares with others;
- sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer…;
- sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;
- sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
- sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.

19. *See* Veteran Med. Prods. v. Bionix Dev. Corp., Case No. 1:05-cv-655, 2008 WL 696546 at *8, 2008 BL 51876 at *8 (W.D. Mich. Mar. 13, 2008) (email disclaimer that read "this email and any files transmitted with are confidential and are intended solely for the use of the individual or entity to whom they are addressed" with nondisclosure constitutes a reasonable effort to maintain the secrecy of its business plan).

6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security.

Model Rule 5.1 provides that a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 also provides that lawyers having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. In addition, Rule 5.3 requires lawyers who are responsible for managing and supervising nonlawyer assistants to take reasonable steps to reasonably assure that the conduct of such assistants is compatible with the ethical duties of the lawyer. These requirements are as applicable to electronic practices as they are to comparable office procedures.

In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

7. Conduct Due Diligence on Vendors Providing Communication Technology.

Consistent with Model Rule 1.6(c), Model Rule 5.3 imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's "conduct is compatible with the professional obligations of the lawyer."

In ABA Formal Opinion 08-451, this Committee analyzed Model Rule 5.3 and a lawyer's obligation when outsourcing legal and nonlegal services. That opinion identified several issues a lawyer should consider when selecting the outsource vendor, to meet the lawyer's due diligence and duty of supervision. Those factors also apply in the analysis of vendor selection in the context of electronic communications. Such factors may include:

- reference checks and vendor credentials;
- vendor's security policies and protocols;
- vendor's hiring practices;
- the use of confidentiality agreements;
- vendor's conflicts check system to screen for adversity; and

- the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement.

Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.[20]

Since the issuance of Formal Opinion 08-451, Comment [3] to Model Rule 5.3 was added to address outsourcing, including "using an Internet-based service to store client information." Comment [3] provides that the "reasonable efforts" required by Model Rule 5.3 to ensure that the nonlawyer's services are provided in a manner that is compatible with the lawyer's professional obligations "will depend upon the circumstances." Comment [3] contains suggested factors that might be taken into account:

- the education, experience, and reputation of the nonlawyer;
- the nature of the services involved;
- the terms of any arrangements concerning the protection of client information; and
- the legal and ethical environments of the jurisdictions in which the services will be performed particularly with regard to confidentiality.

Comment [3] further provides that when retaining or directing a nonlawyer outside of the firm, lawyers should communicate "directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."[21] If the client has not directed the selection of the outside nonlawyer vendor, the lawyer has the responsibility to monitor how those services are being performed.[22]

Even after a lawyer examines these various considerations and is satisfied that the security employed is sufficient to comply with the duty of confidentiality, the lawyer must periodically reassess these factors to confirm that the lawyer's actions continue to comply with the ethical obligations and have not been rendered inadequate by changes in circumstances or technology.

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20. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmts. [2] & [8] (2016).

21. The ABA's catalog of state bar ethics opinions applying the rules of professional conduct to cloud storage arrangements involving client information can be found at:
http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html.

22. By contrast, where a client directs the selection of a particular nonlawyer service provider outside the firm, "the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer." MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [4] (2016). The concept of monitoring recognizes that although it may not be possible to "directly supervise" a client directed nonlawyer outside the firm performing services in connection with a matter, a lawyer must nevertheless remain aware of how the nonlawyer services are being performed. ABA COMMISSION ON ETHICS 20/20 REPORT 105C, at 12 (Aug. 2012),
http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.authcheckdam.pdf.

IV. Duty to Communicate

Communications between a lawyer and client generally are addressed in Rule 1.4. When the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved.[23] The lawyer and client then should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted. Similarly, a lawyer should consult with the client as to how to appropriately and safely use technology in their communication, in compliance with other laws that might be applicable to the client. Whether a lawyer is using methods and practices to comply with administrative, statutory, or international legal standards is beyond the scope of this opinion.

A client may insist or require that the lawyer undertake certain forms of communication. As explained in Comment [19] to Model Rule 1.6, "A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule."

V. Conclusion

Rule 1.1 requires a lawyer to provide competent representation to a client. Comment [8] to Rule 1.1 advises lawyers that to maintain the requisite knowledge and skill for competent representation, a lawyer should keep abreast of the benefits and risks associated with relevant technology. Rule 1.6(c) requires a lawyer to make "reasonable efforts" to prevent the inadvertent or unauthorized disclosure of or access to information relating to the representation.

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

23. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(1) & (4) (2016).

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The Ethical Challenges of Remote Work: Four Critical Duties Lawyers Must Uphold

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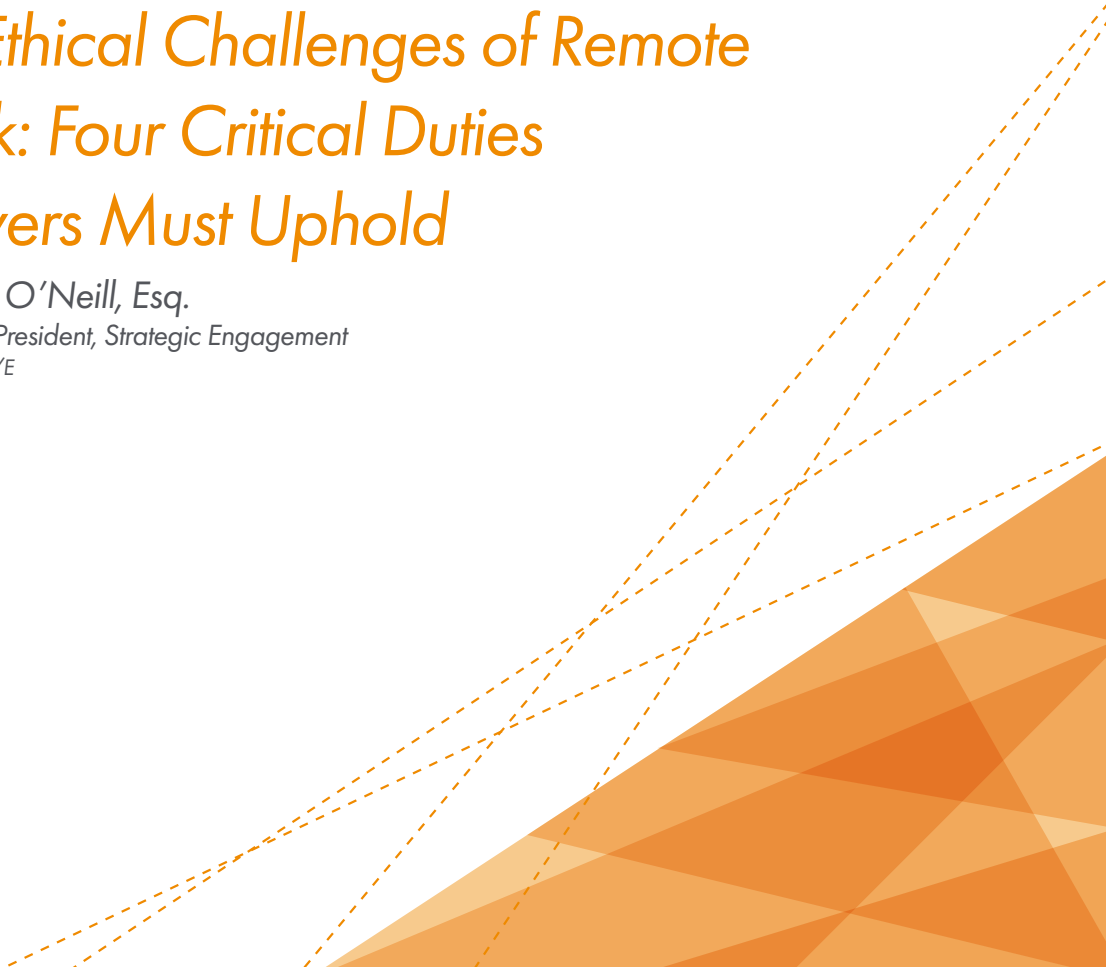

As the COVID-19 pandemic spread across the United States, legal professionals were compelled to transition—often with only a few days' notice—to a work-from-home model. Without plans and protocols at the ready, law firms and corporate legal departments have had to create new models on the fly, all the while keeping in mind the ethical responsibilities borne by lawyers and the teams they supervise.

Here is a summary of the key ABA Model Rules of Professional Conduct that are implicated by remote work, and practical suggestions and strategies for how you can fulfill them.

The Duty of Competence

Model Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

While full-time remote work may be a new paradigm for many attorneys, they must nonetheless carry out that work competently—and perhaps the biggest challenge is gaining competence with the technology that enables their work. To meet the strictures of Rule 1.1, lawyers aren't expected to be perfect—the applicable standard is reasonableness. What is reasonable competence for lawyers using technology to work from home under the unprecedented circumstances of COVID-19? According to Comment 8 to Rule 1.1c, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

To maximize the benefits and simultaneously reduce the risks for clients, lawyers should take the following steps to ensure that they are exercising technological competence:

- **Follow your organization's policies and procedures.** If your organization has developed new protocols in the wake of COVID-19, be sure to adhere to them. If you believe those protocols need to be adjusted as the situation evolves, make those recommendations to your IT or information security team—don't go rogue by making unilateral decisions about technology.
- **Evaluate your home technology infrastructure.** Confirm whether you can work effectively and securely from home. Do you have enough devices and the right devices? Do you have the software and computing power you need to work outside the office? Do you have an up-to-date router with sufficient speed and coverage throughout the home, and do you have enough bandwidth (especially if you are sharing Wi-Fi with a working spouse, roommate, or children)? If you answered no to any of these questions, an upgrade is in order.
- **Ensure you have secure access to all enterprise systems and software that you need.** If your organization does not specify a login protocol, use a virtual private network ("VPN") to ensure a private, secure connection.
- **Familiarize yourself with videoconferencing tools.** Know how to use these tools effectively, as well as how to reduce their risks. Implement security measures such as setting passwords, requiring people to log in to join a meeting, restricting attendees' ability to share their screen, and blocking new attendees from joining after the meeting has started. While recording a videoconference call may seem like a convenience, keep in mind that any recordings might be discoverable.
- **Learn how to use your organization's collaboration platforms and tools.** Secure client portals and tools such as Slack, Skype, Asana, Trello, DocuSign and others, can facilitate remote work. Check with IT to see what platforms and tools are approved for use.
- **Follow cybersecurity best practices.** ABA Formal Opinion 477R obligates lawyers to understand and use electronic security measures to safeguard client communications and information. These best practices include using strong passwords (and better yet, passphrases), with a unique password for each system, device, and account; enabling multifactor authentication; securing your home Wi-Fi network with passwords and encryption; updating your software regularly; and enabling antivirus software and firewalls.
- **Store data in approved locations; back up data regularly.** Data should only be stored in locations approved by your organization. To the extent it's permissible to store information on local devices or in personal cloud repositories, be sure those locations are backed up regularly to ensure that your client and practice information is recoverable if you are hacked or experience some other data loss incident.

- **Be aware of cyberthreats.** Scammers are using phishing emails and texts that prey on your concerns and fears around COVID-19 to install malware on your systems or steal your information. Do not disclose or send personal or financial information in email or other online messages. Look for phishing tipoffs in messages such as misspellings, incorrect grammar and awkward syntax. And never open an attachment from an unknown sender or click on a link in an unsolicited email without first investigating its legitimacy.

The Duty of Diligence

Model Rule 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client.

The coronavirus pandemic poses a number of challenges to maintaining our obligations to diligently represent clients and respond to their requests in a timely fashion, as required by Rule 1.3. Similar difficulties exist with respect to maintaining general competence as effective counselors, as mandated by Rule 1.1. The following are some suggestions that may help lawyers overcome these challenges:

- **Take care of your physical and mental health.** A diligent, competent lawyer must be a healthy lawyer. Do what you can to keep yourself and your family physically healthy. Most of us feel anxious and worried—recognize and respect that stress, and find ways to cope with it, whether it's engaging in physical activity, meditating, reading a book, or socializing with friends on Zoom.
- **Find balance.** It's challenging to balance the practice of law with obligations to your family, friends, and community. Give yourself grace in this process; it's unlikely that you'll be as productive or energetic during this time. After all, we are living through a global health and economic crisis never seen in our lifetimes.
- **Recognize and manage distractions.** Between the 24-hour news cycle, spouses and partners working from home, kids schooling from home, and social distancing requirements, it's easy to get distracted during the workday. Create boundaries and rules around your workday to minimize interruptions, and adjust your hours to accommodate your needs.
- **Adapt your organization's systems and processes to the remote work environment**. Make sure you have access to the software and documents, whether online or in hard copy, that you need to support your clients. Rely on the assistance resources offered by your firm or company.
- **Maintain your overall professionalism.** While the coronavirus has tested everyone's patience and caused tempers to flare, you should do your part to be courteous and respectful to everyone. Continue to look the part of a professional: while you don't need to dress up in a suit to work from home, don't show up to video conferences in your pajamas. Additionally, accommodate scheduling needs as readily as you can. Finally, work with adversaries to devise mutually agreeable solutions if conflicts arise.
- **Communicate promptly and reasonably with clients.** In addition to Model Rules 1.1 and 1.3, Model Rule 1.4 requires lawyers to keep clients reasonably informed about the status of their matters and to comply with reasonable client requests about their matters. It may be difficult to be as prompt and diligent working from home as when you were working from an office, but set expectations so that clients and colleagues know when they're best able to reach you and how quickly you're likely to respond.

The Duty of Confidentiality

Model Rule 1.6(c): A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

In tandem, Rule 1.1 and Rule 1.6 require lawyers to act competently when safeguarding information that relates to the representation of a client. Comment 18 to Rule 1.6 sets forth factors that determine whether a lawyer's actions constitute reasonable efforts to protect information, depending on "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards and the extent to which the safeguards adversely affect the lawyer's ability to represent clients."

Reasonable efforts to secure information in a remote working environment include the following:

- **Set up a private, secure workplace.** Be aware of others who may hear your conversations or see your private work materials. Don't forget about devices such as Alexa

and Siri; turn them off or have conversations out of their earshot.

- **Adopt a locked screen and clean desk policy.** When you are away from your computer and mobile devices, put them in a password-protected sleep mode. Clean off all papers from your desk. Depending on the sensitivity of the documents, you may want to secure them in a locked cabinet or drawer.
- **Restrict others' use of your business devices.** If possible, do not allow other members of your household to use your devices. If you must share devices, protect your user accounts so no one else can access your profile or post information to your social media account.
- **Establish the privilege—but only when legitimate.** Include privilege-invoking language in your communications and attachments, but don't overdesignate: make sure you reserve privilege labeling for documents that are actually privileged. Also, weigh whether it might be better to communicate privileged or otherwise sensitive information by phone or videoconference rather than in writing. Consider including language invoking the privilege on calendar invitations for virtual meetings as well, and limit invitations to these meetings to reduce the risk of waiving the protection.
- **Follow the best practices for cybersecurity outlined above.**

The Duty of Supervision

Model Rule 5.1(b): A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Model Rule 5.3(b): A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

Rule 5.1 and Rule 5.3 set forth the responsibilities for supervising lawyers and nonlawyers. The standard is the same for both rules: a lawyer must ensure that the lawyers and nonlawyers they supervise act competently and diligently and take steps to avoid compromising confidential information. Here are a few tips for maintaining effective remote relationships with those you supervise:

- **Communicate frequently, clearly, and effectively.** Choose the right communication channel and ensure you give regular guidance to counsel and nonlawyer collaborators. Consider whether to open a dedicated channel, such as Skype or Slack, for ease of communicating online.
- **Check in on a regular schedule.** Set a time on everyone's calendars for a weekly or biweekly review of progress.
- **Explain your availability to teams.** Let your team know when it will be easiest to reach you and whether you cannot be reached during certain times of the day based on your personal or other professional obligations.
- **Require accountability and be accountable in return.** Set deadlines for deliverables and explain when you will respond or share feedback. Be considerate and let others know if you cannot meet a deadline, and don't be surprised if others are facing their own scheduling challenges.
- **Leverage the power of collaboration tools.** Think about how collaboration platforms and technology can make it easier for you to work with a team to share documents, updates, and ideas.

Your ethical obligations as a lawyer demand that you continue to meet these duties—and all the others imposed by applicable rules of ethics—even while we're all working under unprecedented challenges. For additional recommendations on how to provide competent and diligent representation, protect client confidences, and supervise others while working remotely, check out our on-demand webinar.

Faculty

Joseph R. Dunn is a member of the Bankruptcy & Restructuring group at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. in San Diego and co-chairs its Cross-Border Asset Recovery Practice. He focuses his practice on asset recovery, judgment enforcement and litigation in the insolvency arena. Mr. Dunn has experience in complex creditor rights litigation, bankruptcy litigation and other work in insolvency scenarios. He has represented institutional creditors, bankruptcy trustees, litigation trustees and other fiduciaries in investigating and pursuing complex asset-recovery matters, often through litigation focused on piercing fraudulent schemes and offshore asset-protection devices. He has represented institutional investors, hedge funds and large financial institutions, and regularly practices in courts around the country. Mr. Dunn has served various leadership roles in local and statewide bankruptcy organizations, including on the advisory board for ABI's Battleground West conference and on the Selection Committee for the Ninth Circuit's Lawyer Representative Program. He also serves on the board of a San Diego-based nonprofit organization focused on assisting victims of domestic violence and sexual assault. Mr. Dunn founded the Finance Association at California State University, Chico. He received his J.D. from Washington & Lee University, and while there was a member of Virginia Capital Case Clearinghouse, for which he assisted in representing capital murder defendants.

Richard H. Golubow is a founder and the managing partner of Winthrop Golubow Hollander, LLP in Newport Beach, Calif., and devotes his practice to and has experience in the areas of financial restructuring, insolvency law, complex bankruptcy and business reorganizations, and related litigation liquidations, out-of-court workouts, acquisitions and sales of distressed assets, UCC Article 9 foreclosure sales, general assignments for the benefit of creditors, and receiverships. His clients include debtors, creditors, creditor committees, trustees, assignees for the benefit of creditors, receivers and asset-purchasers in a wide range of industries. Mr. Golubow has been frequently honored or recognized as the recipient of bankruptcy or financial restructuring attorney of the year awards by several leading international organizations and financial publications, including a 2017 "Deal of the Year" Award by The M&A Advisor. He is rated AV-Preeminent by Martindale-Hubbell, is often selected as a *Southern California Super Lawyer*, and he was selected from 2017-21 as a "Top 50 Orange County Super Lawyer." Mr. Golubow has been recognized in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, and he is rated "superb" by AVVO. Mr. Golubow is a member of the International Network of Boutique and Independent Law Firms, and he is a frequent speaker, panelist, moderator and author on a wide range of bankruptcy and financial-restructuring topics for several professional organizations and publications, including ABI, the California Bankruptcy Forum, the California Receivers Forum, *Financier Worldwide* magazine and *Corporate LiveWire* magazine. He previously clerked for Hon. John J. Wilson in the U.S. Bankruptcy Court for the Central District of California in Santa Ana. Mr. Golubow received his B.S. in 1985 from the State University of New York at Albany and his J.D. in 1992 from Southwestern University School of Law in Los Angeles.

Hon. Deborah J. Saltzman is a U.S. Bankruptcy Judge for the Central District of California in Los Angeles and Santa Barbara, appointed on March 18, 2010, and also hears cases in the Northern Division in Santa Barbara. As a member of the Ninth Circuit Bankruptcy Education Committee, she welcomes the opportunity to participate in bankruptcy education programs. She also currently serves

on the Ninth Circuit Wellness Committee. Prior to her appointment to the bench, Judge Saltzman practiced bankruptcy law in Los Angeles, representing debtors, secured and unsecured creditors, asset-purchasers, creditors' committees and landlords in chapter 11 and out-of-court restructurings, as well as related financing transactions and litigation. She received her B.A. in 1991 from Amherst College Phi Beta Kappa and her J.D. in 1996 from the University of Virginia School of Law.

Nellwyn W. Voorhies is executive director of Donlin, Recano & Company, Inc. in San Diego and has more than 25 years of experience in the restructuring legal community. She previously practiced at several large firms, including Levene, Neale, Bender, Rankin & Brill, LLP, Baker & McKenzie and Sheppard, Mullin, Richter & Hampton LLP. Ms. Voorhies brings her legal expertise to the claims management industry, having been a director at Kurtzman Carson Consultants LLC and vice president of Sales and Marketing at Rust Omni. She worked on numerous chapter 11 cases as an attorney, including Daewoo Motor America, Stateline Hotel Inc., C&R Clothiers and Kenny Rogers Roasters. Ms. Voorhies serves on ABI's Southwest Bankruptcy Conference advisory board, is active within the American Bar Association's Business Bankruptcy Committee of its Business Law Section, and serves on the board of the International Women's Insolvency & Restructuring Confederation (IWIRC). She received her B.A. *cum laude* from Georgetown University and her J.D. from the University of California, Berkeley.