

BUSINESS BY PHONE IN THE FEDERAL COURTS

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### Overview

Among active users of teleconferencing in a court setting are a number of federal district court judges, some of whom were recently interviewed about their current telephone practices. In addition to endorsing its publicized cost-reduction benefits, these judges have found that using the telephone, particularly for discovery matters, is an excellent case-management tool, which both saves time and provides added flexibility for themselves and their staff. Their experiences are summarized here to give a flavor of how increased telephone usage has been found helpful in the federal district courts.

### Background

The use of the telephone to conduct certain judicial proceedings has been getting increased public attention as a practical way of curbing the escalating cost of justice. When a motion or conference can be conducted by phone, the elimination of the time that attorneys traditionally spend commuting and waiting in court, as well as direct travel costs, can be expected to result in lower attorney fees for clients.

The potential savings from teleconferencing are substantial as evidenced by an in-court cost-reduction analysis conducted on the telephone motion practice of Chief Judge Robert F. Peckham (N.D. CA). It was estimated that his procedure alone resulted in a savings to clients of \$28,500, leading the chief judge to

conclude that "...if this simple technique were to be widely utilized throughout the judiciary, the savings to litigants would be many millions of dollars every year".<sup>1/</sup>

With these straight-forward advantages, there are a surprisingly small number of judges known to have adopted teleconferencing for even limited types of court business. One reason for this may be that conducting proceedings by phone is actually quite common, but is considered so routine that it is simply not thought of an "innovative technique". However, it may also be that its use has been constrained because some judges are not certain as to which types of proceedings would be considered appropriate for teleconferencing; or may think that it involves sophisticated equipment or elaborate procedures that are too complicated to investigate. This may be particularly true if coupled with the perception that, while attorneys and litigants can expect to experience direct time and cost savings from teleconferencing, the benefits to the judge seem less obvious.

However, the results from a 1980 survey of 43 judges across the country who conduct telephone proceedings,<sup>2/</sup> and other recent reports from federal district and appellate court judges,<sup>3/</sup> indicate that teleconferencing for selected proceedings is endorsed by the judges, as well as the attorneys, who use it. For example, one recent newspaper article concerning court use of the telephone to economize, quotes Chief Judge Frank Kaufman (D. Maryland) as saying, "Whenever the issue is reasonably simple, I prefer to settle the matter by phone".<sup>4/</sup>

This judicial perspective of the uses, benefits and

limitations of telephone conferences in the federal district courts was the focus of the present research. To gather information, interviews were conducted with those district court judges who could be identified as "active phone users". The identification process was simplified by available articles on teleconferencing that were written by or about a number of federal district court judges; and by the cooperation of the ABA's "Action Committee to Reduce Court Costs and Delays" who shared previous identification efforts undertaken in connection with their research. The number of participants was expanded by asking those already identified if they were aware of others who conducted court business by phone. A resultant total of thirteen federal district court judges (see listing in Appendix 1) were asked to describe how they have used the telephone to their advantage.<sup>5/</sup>

While this particular paper addresses the experiences of federal district court judges, it should also be noted that appellate courts, notably the ninth and third circuits, have also conducted telephone hearings; and the general description of procedures, advantages and disadvantages presented here should be considered pertinent to circuit as well as district judges.

#### The General Uses of Teleconferencing

Teleconferencing here refers to any proceeding where at least one of the parties is communicating with the court by phone. Its primary use has been as a tool to expedite the discovery process. The judges interviewed noted that even in the most complicated cases, many of the specific pretrial motions and conferences can easily be handled by phone. Proceeding in this way appears to

speed a case to trial or settlement by cutting down the number of in-person appearances, reducing "frivolous" delaying tactics, and focusing the critical issues.

Using the phone has proved a particularly efficient method when one or more of the attorneys are at some distance from the court. This was highlighted in the extreme by a West Coast judge who made extensive use of the phone to manage the discovery phase of a complicated case involving attorneys in Washington and Guam. It was noted that out-of-town counsel are quite common throughout the federal court system as so many of the cases involve Washington, D.C. attorneys.

Though phone use is commonly thought of as an alternative to personal appearances, a number of the judges indicated that they also teleconference motions that otherwise would be decided on the papers alone. Used in this way, telephone hearings were cited as a practical way of preserving limited argument, assuring counsel that their positions have been considered, and providing the judge an opportunity to articulate reasons without the burden of opinion writing.

#### Types of Proceedings

The choice of proceedings for which the telephone has been found appropriate depends on the philosophy of the particular judge and can vary substantially even among members of the same court. All of the judges interviewed, however, have found teleconferencing suitable for conducting certain scheduling, status and pretrial conferences. About half have taken testimony by phone, and one

indicated that while he did not take testimony, he recommends the procedure to attorneys for taking depositions.

All of the judges have handled non-dispositive civil motions by phone. A majority have also dealt with motions for summary judgment and dismissal, but note that this is a less frequent use, which they approach with caution. Some will consider telephone motions in criminal cases, but most indicated that they deal only with civil motions, citing the defendant's right to be present at all stages of a criminal case.

#### Feasibility Factors

Overall, teleconferencing has been found less feasible when the number of parties is large, when exhibits are involved, or where the subject matter of the particular conference or motion is complex and the proceeding is expected to be lengthy. The judges note that the majority of their telephone conferences last only five or ten minutes.

Few judges decide the appropriateness of telephone usage on these criteria alone, however, noting that there are no hard and fast rules. For example, one judge, who does not generally teleconference motions with exhibits, overrode this preference when he felt that delay in a particular case would be prejudicial to one of the parties. He arranged for counsel to organize the document exchange in advance and conducted the hearing by phone. On the other hand, a judge who had initially scheduled testimony by phone, rescheduled for an in-person appearance when a meritorious request from one counsel, concerning a witness observer, was objected to by

opposing counsel. In both of these instances, the decisions were made by a balancing of objectives, given the expediency and fairness demands of a particular situation.

### Specific Uses

The frequency of telephone appearances, as well as the attendant procedures, vary both with the preferences of the individual judge and the particular type of business at hand. For some judges, resort to the phone for a specific proceeding is a case by case decision as a particular problem arises, or when scheduling difficulties would cause unnecessary delay if a trip to court were required. For example, in one case, when a last minute problem arose requiring a conference, but the judge's calendar precluded a court appearance before trial, a conference call, placed at a specific time after court adjournment, resolved the matter and averted a change in the trial schedule. In another case calling for a timely pretrial conference, one of the attorneys, though in town, was scheduled for appearance in another court. He was directed by the judge to place a phone call from the other court, and delay was avoided.

In addition to case-specific operations, some of the judges have set up procedures to integrate teleconferencing more fully into the ongoing system of case-management. One judge, who sets automatic thirty day status conferences for those cases with protracted trial dates, will conduct these conferences by phone on request. Another judge, when notifying out of town counsel of a scheduling conference, simultaneously advises that they have the

option of appearing by phone. While this practice was initiated in response to the energy crisis, it has proved so successful that the judge is considering its expansion to include all attorneys. Several judges stressed the efficiency of holding a majority of the scheduling and pretrial conferences by phone, particularly in complicated cases involving out-of-town attorneys.

A broader use of teleconferencing was described by one small-court judge who will teleconference any appropriate civil motion or conference if such a request is made by one of the attorneys not later than three days before the scheduled court date. The judge is considering issuance of a local rule to establish this policy.

In the most fully developed implementation of teleconferencing, all but the most complicated non-dispositive motions are calendared for telephone hearing during a specific hour set aside on the weekly motion day. As one hearing nears conclusion, the judge's secretary is signalled to begin placing the next call on a second conference line, a procedure that avoids any delay between hearings.

Most of the above examples deal with the telephone proceeding as a substitute for an in-person appearance. However, telephone hearings have also been used to supplement what otherwise would be a "papers only" proceeding in order to increase the quality of the court-attorney contact. For example, one judge will conduct, on request, a telephone hearing on any motion that would otherwise be decided on the papers. However, to avoid redundancy, the judge limits the permissible arguments to those that have not already



been briefed.

Some types of proceedings that are held by phone are amenable to prior scheduling, in which case the notification procedures are similar to those for an in-court appearance. Few of the judges, however, limit their phone use to scheduled proceedings. The teleconference finds much of its value in the freedom to take advantage of unscheduled opportunity. For example, one judge noted that whenever he has unexpected breaks in his schedule, as when a case set for trial settles at the last minute, he reviews the pending motions on which he is ready to rule. A secretary calls the parties involved to ascertain if they are available and willing to proceed by phone at that time; if so, the rulings are given with no further delay.

In other situations, unscheduled conference calls have been used to address minor problems as they arise rather than taking the time and resources required for either in-person or written resolutions. Along that line, a telephone conference is cited as a simple method for resolving any scheduling difficulties. For example, when an attorney calls in with a scheduling conflict, one judge, whose phone is equipped with an "add on" feature, will call the other attorney involved and add him or her to the conversation. Once all parties are on the line with their calendars in front of them, mutually convenient dates can be set without numerous callbacks.

A particularly significant use of the unscheduled teleconference was noted by a number of judges who ask that attorneys call the court during a deposition if a problem is

encountered. An immediate ruling on a motion to compel allows the deposition to continue as scheduled. Moreover, the judges report that simply having such a speedy resolution procedure in place seems to have cut down the number of 'frivolous' delaying objections made by counsel.

### Procedures

The responding judges have remained flexible and inventive regarding teleconference arrangements. For example, most allow for some of the attorneys to appear in-person while others appear by phone. If an attorney objects to the simultaneous in-person appearance of opposing counsel, the attorney who is present is simply sent to a phone in another room of the courthouse.

Flexibility is also seen in fixing responsibility for placing the conference call. Some of the courts always have the moving party place the call, and one reserves this as a court function, but in most instances the decision depends on what is most convenient under the circumstances. For example, many courts place calls that are within the capacity of their direct-dial equipment but have counsel place calls when the number of parties involved exceeds this capacity.

When the teleconference is scheduled, the call is placed as prearranged by either counsel or court personnel, and the judge notified when all parties are on the line. In addition to giving the usual instructions for conducting the proceeding, the parties are generally told to identify themselves prior to making a statement. When required by the nature of the proceeding, or

preferred by the judge in other instances, the court reporter will make a record. Judges generally take the call in chambers, but one court is in the process of making arrangements for courtroom teleconferencing to ensure public accessibility when pertinent.

Few difficulties with these procedures were mentioned, though it was cautioned that the court reporter sometimes has difficulty if no special equipment is provided for ease of record taking (e.g., speaker phone or headset). Additionally, one judge mentioned that speakers occasionally forget to identify themselves (thereby slowing up the proceeding); and another that certain attorneys, lacking the normal visual cues that their point has been made, will sometimes go on longer than necessary.

#### Benefits/Limitations of Teleconferencing

The judges agreed that teleconferencing affords substantial financial and time savings to attorneys and their clients. They have also found that, properly used, teleconferencing provides similar benefits to the court with no sacrifice in quality; quite the contrary, reduced delay and personal (if telephonic) contact argue for enhanced quality. On matters so straightforward that formal procedures are not required, a telephone conference means quick and controlled trouble shooting that enables the judge, court staff and attorneys to focus their time and attention on the more critical aspects of a case.

The teleconferencing option also allows for greater scheduling leeway when travel time need not be factored in. This consideration seems particularly important where the parties are at

some distance from the court (a common occurrence in the less populous districts) and when the weather renders travel plans tentative.

An unexpected benefit, mentioned by almost all judges, has been the decreased time consumed by the proceedings themselves. This was attributed to a more focused proceeding in which all parties were prepared to come to the point quickly, perhaps in part because telephone conferences are not conducive to formal presentations.

When used to supplement paper proceedings, the benefits of telephone hearings derive from improved communication between the court and the bar. With a forum for limited discussion, all parties know both that their arguments have been given consideration and that the judge is actively involved in the case at all stages. Judges, in turn, can be confident that all pertinent information has been presented and that all parties understand what is expected of them.

As to limitations, mentioned were the obvious necessity for in-person contact where confidence is required or where the manner of presentation or "eye contact" is important to determine the quality of the information. It was noted that teleconferencing was clearly inappropriate for any pro se proceeding, and might best be avoided when the judge is aware that the attorneys involved are either generally uncooperative or do not get along with one another. These limitations are in addition to the previously mentioned cautions on dispositive and criminal matters; or when dealing with complex issues, lengthy proceedings or a large number

of parties.

It should also be kept in mind that the court bears the cost of the calls it places. Though it is possible to bill phone charges through to the parties, few instances of rebilling were reported by the judges interviewed. Since most conference calls last only a few minutes, the cost of rebilling in many cases may exceed the cost of the teleconference. Most judges felt that any additional cost will be offset by the more efficient utilization of court resources.

#### Equipment for Teleconferencing

At its simplest, no special equipment is necessary for a teleconference. It is always possible to direct one of the parties to place the call. Many law offices are equipped with direct dial conferencing capacity, and where this is not the case, they may place a conference call through the operator. The judges interviewed noted that the bar has been very receptive to such requests given the alternative costs of travel and the time savings involved.

For calls originating from the court, GSA offers two services. The simplest is local teleconferencing, which is available in many, but not all, locations. (Local GSA operators can provide information on availability.) Through this service, up to five locations within the contiguous U.S. can be connected by calling the local GSA operator. This service is offered at the regular FTS rate of 29 cents per minute, and is available on a "first come, first served" basis.

The second GSA service is National Teleconferencing, which has the potential to connect up to 23 phones throughout the contiguous U.S. at a cost of \$3.00 a minute. This service is provided through the National Teleconference Operator (FTS 245-3333), and the user is charged a lump sum on the monthly bill for all conference calls placed during the billing period.

While these operator-mediated options have the benefit of requiring no special lines or equipment, those judges who have a direct-dial teleconferencing capacity prefer this method of placing calls (billed at the regular FTS rate of 29 cents per minute). Many existing government lines have either the actual or potential capacity for a three location linkup at the present time. Information on direct-dial conference options can be obtained from local GSA or telephone company representatives.

Additional hardware associated with teleconferencing can improve the ease, quality and amplification of the transmission when more than one person is at a single location. This is important in the court context for proceedings where record making is essential or where one or more parties are present at the proceeding. Equipment options for this purpose include headsets that link to the phones; the widely used speaker phone; and the more sophisticated portable conference phone that comes with built in speakers and microphones. For record taking, a tape recorder that links to the phone is another possibility.

The cost and availability of telephone options and equipment vary from place to place, with information obtainable from the local phone company and private telephone vendors. The type of

equipment which might be necessary would depend upon the planned uses of teleconferencing.

### Conclusion

In the current climate, judicial time and personnel are scarce resources. While management techniques alone cannot solve the problem of congested court dockets, they can be used to temper some of its adverse effects through more effective resource allocation. Increased use of the telephone is one such technique, which is appealing in its simplicity, availability and familiarity.

Perhaps the very simplicity and familiarity explain why so little attention has been paid to the potential of teleconferencing in federal courts. The press of major problems sometimes causes small but significant opportunities to be missed. More likely, it is probable that far greater use is being made than that identified in this report. As mentioned at the start, little comment may result because judges assume that "everyone does it". If so, we invite all judges with teleconferencing experience to communicate with the Federal Judicial Center so that the benefits can be more thoroughly understood, fully shared, and widely enjoyed.

## REFERENCED NOTES

1. The Third Branch (Noteworthy Section), Vol. 13, No. 11, (November, 1981) pp. 2,8.
2. Hanson, Roger A., Mahoney, Barry, Nejelski, Paul, and Shuart, Kathy L., "Lady Justice- Only a Phone Call Away", Judges's Journal, (Spring, 1981), pp.43-49,57.
3. Luongo, Alfred L., "Telephone Conferencing in a Federal District Court", Judge's Journal (Spring, 1981), p. 48; Kang, Connie, "How Technology Speeds Justice in Busy Circuit Court", San Francisco Examiner, June 12, 1981, p.1.
4. Gottschalk, Earl C., Jr., "Courts Calling on Telephones to Economize", Wall Street Journal, (June, 1981) p. 29
5. The protocol used to guide the interviews is presented as Appendix 2. It was first developed through personal interviews with two judges from the Eastern District of Pennsylvania. After finalization of the protocol, the same interviewer collected all additional information over the phone during December, 1981 and January, 1982.



APPENDIX 1

JUDGES INTERVIEWED

JUDGE BECKER - PHILADELPHIA

JUDGE BRIMMER - CHEYENNE

JUDGE GREEN - PHILADELPHIA

JUDGE HARVEY - BALTIMORE

JUDGE KAUFMAN - BALTIMORE

JUDGE LACEY - NEWARK

JUDGE LUONGO - PHILADELPHIA

JUDGE MERHIGE - RICHMOND

JUDGE PECKHAM - SAN FRANCISCO

JUDGE SCHWARZER - SAN FRANCISCO

JUDGE TAKASUGI - LOS ANGELOS

JUDGE WEINSTEIN - NEW YORK

JUDGE YOUNG - BALTIMORE

