

# Remote Participation in Bankruptcy Court Proceedings

Federal Judicial Center  
2017

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first printing

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Appendices (All appendices are available online at [fjc.dcn](http://fjc.dcn) and [fjc.gov](http://fjc.gov).)

Appendix A: A Compilation of Local Rules, Standing Orders, and Court and Chambers Procedures Regarding the Use of Teleconferencing and Videoconferencing in the U.S. Bankruptcy Courts

Appendix B: Sample Case Management Orders

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Appendix D: Resources for Courts Considering the Use of DP Technology

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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<sup>1</sup> 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](http://fjc.dcn)) and its Internet site ([fjc.gov](http://fjc.gov)). Appendix A is a compilation of related local rules,

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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).

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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-

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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;

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- 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

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that committee's report to the September 2014 Judicial Conference.<sup>2</sup> 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.<sup>3</sup> CourtSpeak accesses the court's digital audio recording software to extract previously recorded hearings, converts them to the common MP3 audio format, and docket 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

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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.<sup>4</sup>

***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.”<sup>5</sup> 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.<sup>6</sup> The 1996 amendment, however, established a standard for when contempor-

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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).

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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.<sup>7</sup>

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-

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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).

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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.<sup>8</sup> 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 re-affirmation 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.

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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,

### *III. Teleconferencing*

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.

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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-

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cure a fixed videoconferencing system if it is deemed to meet local requirements.<sup>9</sup>

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 (NVTCS) 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.

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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 case-loads 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.

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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

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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-

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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*,<sup>10</sup> 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

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

#### *IV. Videoconferencing*

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

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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

#### *IV. Videoconferencing*

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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