

Court Hearings in a Time of Social Distancing: Considerations for Video- or Teleconference Hearings

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It should come as no surprise that courts across the country have begun to explore and use video- and teleconferencing as a way to keep pending cases moving during the coronavirus (COVID-19) pandemic. This is particularly true for federal courts with busy trial dockets and pressing criminal matters. While recent legislation has focused on authorizing federal courts to use such technology in criminal cases, this will likely provide a roadmap for civil cases as well. The authors of this Alert have already received a court order in a civil case requiring a remote, technology-assisted hearing.

As part of the CARES Act that was signed into law on March 27, Congress provided a new opportunity for federal courts to authorize the use of video- or teleconferencing for certain criminal proceedings. Section 15002(b) of the CARES Act provides that upon finding that emergency conditions related to the COVID-19 will materially affect the functioning of a court the chief judge of a district may authorize the use of video- or teleconferencing for a broad variety of criminal proceedings, including felony guilty pleas or sentencing. *See* Sect. 15002(b)(2). Following such an order, individual judges may, with the consent of the defendant, use video- or teleconferencing to conduct hearings that previously required the defendant to appear in person.

As more courts consider using video- and teleconferencing options, attorneys and courts should prepare for that possibility. We all know that technology is not perfect. Attorneys and courts should therefore be aware of some of the common concerns accompanying video- and teleconferencing and make allowances or preparations to avoid these issues in the event of a video- or teleconference hearing. Below

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is an overview of recurring issues of which attorneys and courts should be aware as they consider conducting court hearings by video- or teleconference.

- **Fairness and Due Process**. A video- or teleconference hearing does not provide the same experience or non-verbal information as an in-person hearing. Fairness and due process concerns are an obvious concern for remote criminal hearings, and civil litigants should also consider whether and how they can fairly present the same experience and non-verbal information without live, in-person witnesses. Whether to seek advance relief on (or at least preserve) those concerns, if any, depending on the facts and circumstances of a particular case could be a critical decision to make **before** such a remote, technology-assisted hearing takes place.
- **Credibility Evidence**. Similarly, a video- or teleconference hearing does not allow the court to evaluate a witness or attorney's credibility in the same way that the court would during an in-person hearing. If credibility is a key component of a proceeding, attorneys should consider alternative ways to demonstrate credibility evidence in a video- or teleconference hearing.
- **Jurisdictional and Identification Issues**. Presenting witness testimony during a video- or teleconference hearing may require attorneys or the court to compel a witness to appear or to administer an oath to a remote witness. It is unclear whether a court may compel a witness to appear electronically at a video- or teleconference hearing, even if that witness is within close proximity to the courthouse. Further, if a witness does "appear," the attorneys or court will need to determine whether someone capable of administering an oath is available with the witness or whether the parties may agree to administer the oath remotely. Further, proving that the individual speaking remotely is John Doe could be tricky and could, for obvious reasons, lead to appellate issues.
- **Technological Prejudice**. Not all attorneys, or geographical regions, have access to the same technological capabilities, and slower internet speeds or lower bandwidth may hinder and prejudice a party's presentation. Attorneys should consider how to put themselves in the best position to avoid a technological disparity, which may require seeking out other or better locations (or services) from which to conduct the video- or teleconference hearing.
- **Technological Interruptions and Errors**. Despite great technological advances, video- and teleconferencing systems sometimes suffer from poor sound quality or connection issues. This may result in the need to repeat information or to interrupt a speaker to alert them to a technological issue. These interruptions make it even more difficult to discern who is speaking, both for the conference participants and the court reporter covering the hearing. Transcripts will necessarily be less reliable unless there are technological advances to ensure that a court reporter can easily (and quickly) identify each remote speaker in real time. Attorneys and courts should be cognizant of these issues and make efforts to reduce the risk of technological interruptions and errors.
- **Complications Associated with Multiple Parties and Counsel**. Video- or teleconference hearings may be particularly challenging in large cases with multiple parties or for parties with multiple counsel. Each attorney added to a conference increases the risk of technological interruptions or errors. To avoid

these issues, some courts may consider limiting the number of attorneys that may participate in a video- or teleconference hearing. Attorneys and courts should consider whether they can conduct the hearing with such limitations or if all counsel are necessary and what procedures and ground rules can be put in place with the court's blessing *before* the remote hearing commences.

- **Confidentiality Protections.** Courts have limited ability to control who "appears" for a hearing if the conference information is shared electronically, participants "conference" in other lines to listen to the hearing, or participants are overheard or victims of the newly popular "zoom-bombing." This creates grave concerns for hearings that discuss sensitive or confidential matters or for cases where a protective order is in place. Courts should be especially sensitive to confidentiality issues, and attorneys should be vigilant to comply with their confidentiality obligations, during video- and teleconferences where all participants cannot be verified. Global concerns with computer hacking are only heightened with the use of unsecured technology while conducting a remote hearing involving sensitive information, financial data, trade secrets, insider trading risks, and the like.
- **Unauthorized Recordings.** Adding to the confidentiality concerns above, courts may not be aware of, and have even less control to prevent, unauthorized video or audio recordings of a video- or teleconference hearing. Further, because courts may not be able to determine or limit the participants on a conference, a court may not be able to determine who is responsible for an unauthorized recording or to impose the appropriate sanctions. To the extent that a court does not authorize recordings, courts and officers of the court will need to take special precautions to ensure that conference participants do not make and disseminate any unauthorized recordings.
- **Sidebar Options.** Video- and teleconferences limit the ability of counsel to approach the bench and discuss attorney-only issues without being heard by witnesses or non-party observers. While several conference services provide private chat functions, these functions are rarely vetted in a courtroom setting and may introduce additional concerns about *ex parte* communications. It is therefore difficult, if not impossible, for a court to conduct a sidebar conference without including all video- or teleconference participants. Attorneys and courts should be cognizant of this limitation if witnesses or non-parties join a video- or teleconference hearing.
- **Public Right of Access.** For many courts, even if authorized, non-confidential video- and teleconference hearings are difficult to make available to the public with the same level of access that in-person hearings in a public courthouse allow. Courts will need to determine whether they will allow hearings to be recorded and posted online. Courts may also need to invest in or procure additional technological resources to provide the public with adequate access to video- or teleconference hearings while ensuring that members of the public are not able to disrupt the hearing by anonymously interfering on a live video- or teleconference line. While a Court Security Office (CSO) could physically escort an unruly participant from a courtroom, a CSO has limited options to stop an online disturbance during a remote hearing. If members of the public and the press are permitted to simultaneously listen to a hearing, the technology should prohibit anything more than listening.

- **General Confusion.** In a remote format, it is more likely that the courts, attorneys, and witnesses may become confused, review the wrong exhibit, or turn to the wrong page of a document. It will necessarily occur much more frequently than in a more orderly in-person hearing at a courthouse. There is no doubt that these difficulties will exponentially increase during video- or teleconference hearings, and such difficulties will be more difficult to correct without visual cues to demonstrate confusion or mistake. Attorneys must be even more vigilant to remain courteous, allow others to speak without interruption, and clearly direct all conference participants to specific portions of exhibits to ensure that all participants are on the same page before arguments or witness examinations are commenced.
- **Document or Exhibit Logistics.** Video- and teleconference hearings also require additional logistical planning to ensure that the court and other conference participants have advance copies of, or original, pieces of evidence, hearing documents, or presentations. Attorneys may be required to overnight or email documents to conference participants ahead of time. Or the court may be able to allow “screen-sharing” capabilities during the conference to enable attorneys to share views of documents or presentations in real time. Attorneys should plan ahead to ensure that all conference participants receive, or have nimble access to, any materials that will be presented or discussed at the video- or teleconference hearing.

Video- or teleconference hearings may not be ideal, and they will certainly bring their own challenges, but such remote court hearings may become essential to ensure that justice does not stall during these chaotic times. Video- and teleconference hearings provide a unique opportunity for courts to keep their dockets on track and for attorneys to advance their clients’ interests.

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