

PUBLICATION

An Update on Courts' Pandemic Practices

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As the pandemic unfolded last spring, many federal buildings closed to the public, and judges and their staffs shifted to remote work like many other professionals. Courts quickly turned to virtual hearings and trials, as well as heavier use of telephonic dockets. Some jurisdictions, like the M.D., Ala., were well-positioned for the transition because of a robust telephonic docket procedure developed years ago.

To keep their cases moving, many judges, including bankruptcy judges, developed virtual trial procedures orders on the fly, often on a district-by-district or court-by-court basis. In a major chapter 11 case filed in the Bankruptcy Court for the Northern District of Alabama in the summer of 2020, the Court's order governing procedures for a key hearing to approve the sale of substantially all of the debtors' assets contained several key terms designed to ensure due process and safeguard the integrity of the judicial process, including the following:

- Pretrial status hearing to discuss witnesses and exhibits and to test software functionality;
- Additional information required for witness and participant lists to ensure parties can be reached quickly in the event of audio/video disruption;
- Electronic submission of exhibits via sharefile technology, along with specific instructions for labeling and sorting; and
- Specific provisions requiring witnesses to be viewable by the court and refrain from communication with others during the hearing, with exceptions for conferences with counsel.

Before this case proceeded to hearing on approval of the sale, the parties faced a related challenge of how to conduct a complicated virtual auction of the debtors' assets. With dozens of parties from multiple time zones participating, the debtors and their professionals organized multiple virtual meeting rooms to explore sale structures and asset groupings that would maximize the return to the estate. The virtual format allowed more parties to participate efficiently than might otherwise have been practical, but without the travel and other constraints that come with a physical meeting, what might have been a 2-3 day auction process conducted during relatively normal business hours turned into a week-long affair lasting well past midnight some days.

In the end, the auction resulted in a substantially higher return to the estate than was foreseen when the auction began, and the parties were able to take a favorable result to the court for approval. The hearing to approve the sale involved dozens of parties and their counsel, as is typical in a complex restructuring case, and the court's virtual software solutions were tested at times. But ultimately, the debtors were able to effectively put forth their case for sale approval, and the various parties-in-interest were able to clearly state their positions on the record. While the solution proved adequate under the circumstances, we expect to see most bankruptcy courts moving back to in-person hearings for key proceedings like this as soon as reasonably possible.

Below are some lessons we have learned from this proceeding and other similar virtual proceedings:

Preparing Witnesses. For seasoned witnesses, the focus is mainly on the technological aspects, but for less experienced witnesses, it's important to stress the need to be in a quiet room, seated or standing, but not moving around or distracted. Remote proceedings feel less formal (you know you're wearing shorts, even if no one else does), therefore it is more important to prepare the witness to be focused and circumspect with their responses. And pay attention to body language.

Distractions. Being in front of a screen can present different kinds of distractions from normal proceedings in a courtroom or conference room, like notifications or facial expressions of other participants on the screen. It is important to practice in circumstances as close as possible to what you expect to encounter in the actual hearing to minimize the effect of these distractions.

Exhibits. Practice with electronic exhibits the same way you would practice with physical exhibits to ensure delivery is smooth and effective. Use subfolders and clear labeling, along with local and redundant storage, to make sure documents and other exhibits are readily and reliably available as the hearing progresses. Recognize the limitations of software screen sharing features compared to physical copies and plan accordingly. Take care to avoid inadvertently sharing email and text screens along with documents.

In general, counsel will need to slow down and be more focused and deliberate in their delivery and presentation of exhibits and testimony. Counsel and witnesses should take care not to talk over the judge or other attorneys or witnesses, and should look into the camera, being mindful of how they appear on screen.

While not without issues (no one wants to have to tell a judge he or she is not a cat, or hear "can you hear me now" ever again), courts, counsel, and witnesses have dealt very well with the issues outlined above. Bankruptcy courts were largely able to continue moving their consumer dockets forward, and business cases proceeded. But most judges expressed a desire to return to in-person proceedings, especially in matters involving witness testimony. Given the additional complexity and potential for issues in remote proceedings, along with the apparent judicial preference for in-person evidentiary proceedings, it is no surprise that courts are reassessing their practices and procedures as the threats from the pandemic lessen.

Transitioning Back to Normal?

As vaccines have been deployed and restrictions on gatherings have been rolled back, courts have begun revising procedures and moving towards a return to in-person hearings and trials in many cases, albeit in a non-uniform manner according to the varying rules and policies in place in each jurisdiction.

Court Staff. Many courts are making efforts to move their staffs back to in-person work this summer. The official position of the Administrative Office of the U.S. Courts is that courts encourage but not mandate employee vaccinations. Some federal courts are requiring staff be vaccinated before returning for in-person work (e.g. Rhode Island). Others are taking more creative approaches, for example, allowing unvaccinated workers to return to work but limiting their interaction with the public and/or groups of people indoors (e.g., S.D. Tex).

Public Attendance. Some federal courts, particularly in the south, no longer require vaccinated people to wear masks inside the courthouse (e.g., N.D. Ala., M.D. Ga.), but some (e.g., E.D. Tennessee) have continued their entry restrictions and mask requirements based on local factors such as low vaccination rates.

In-Person Trials. Some courts are resuming in-person trials and hearings this summer, often after surveying court employees and attorneys (e.g., E.D. La.). Others are continuing remote proceedings for the near future, with plans to resume in-person proceedings in the fall.

While most judges and practitioners, when asked, will express a desire to return to pre-pandemic practices as soon as is prudent, it is worth asking whether some remote practices may endure. While everyone may agree that trials and major hearings should be held in person if at all possible, some routine non-evidentiary hearings can be efficiently held remotely. As courts continue to transition out of pandemic practices over the next several months, it will be important to closely monitor the practices in each jurisdiction and assess the possible impact on pending or potential litigation in that forum.