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JUDICIAL OPERATIONS DURING COVID: LESSONS LEARNED THAT MAY REMAIN AFTER COVID

**SHERYL P. GIUGLIANO, MARTI P. MURRAY,
and DOUGLAS SPELFOGEL**

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The COVID-19 pandemic created unprecedented challenges for legal professionals and testifying experts in the courtroom. As a result, advancements in technology were dramatically accelerated, as courts and the insolvency and restructuring community sought to respond to the resulting fallout from the crisis. Many of the lessons learned and the procedures adopted during the COVID-19 pandemic may remain as courts preserve the increased flexibility and reduced costs of remote operations when they are beneficial, while returning to in-person court proceedings more generally.

COVID-19 ARRIVES

Prior to COVID-19, remote appearances by telephone were fairly routine on non-evidentiary matters. As a result of health and related issues arising from the COVID-19 pandemic, courts and professionals looked to expand remote access. This included conducting evidentiary trials and hearings via videoconferencing platforms notwithstanding objections by counsel regarding the challenges of presenting evidence remotely. For example, in November 2020, the New York State Unified Court System suspended all new jury trials and grand juries due to the resurgence of COVID-19 in areas throughout the state. Many federal courts similarly suspended in-person proceedings.

When in-person meetings, depositions, and hearings became impossible, the insolvency and restructuring community adopted new procedures and protocols for a virtual setting. The virtual world created unique challenges for legal professionals, witnesses, courts and the presiding judges. This article focuses on the advancements deployed in the legal community in response to the adverse impact on the judicial process from the pandemic, including, as follows:



- maintaining the public record;
- conducting virtual depositions, hearings, and trials, and the ethical issues and pitfalls that can arise in those settings;
- handling evidence; and
- practical pointers.

THE LEGAL FOUNDATION FOR VIRTUAL OPERATIONS

The virtual operations implemented during the COVID-19 pandemic, which allowed litigation proceedings to continue during unprecedented times, are rooted in a pre-existing legal foundation.

First, Rule 43(b)(4) of the Federal Rules of Civil Procedure provides a procedural mechanism for remote live testimony, stating that “at trial, a witness’s testimony must be taken in open court,” and “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.” Fed. R. Civ. P. 43. The Advisory Committee Note on the 1996 Amendment provides that: “[c]ontemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the fact finder may exert a powerful force for truth telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.” The Committee found that “[t]he most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place.

¹ Disclaimer: None of the statements, facts or opinions contained in this article constitute the official policy of any judge, court, agency or government official, or quasi-governmental agency.

Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other – and perhaps more important – witnesses might not be available at a later time.”

Second, Rule 30(b)(4) of the Federal Rules of Civil Procedure allows for remote depositions and reads as follows: “[t]he parties may stipulate – or the court may on motion order – that a deposition be taken by telephone or other remote means. For purposes of this rule and Rule 28(a), 37(A)(2) and 37(b)(1), the deposition takes place where the deponent answers the questions.”

Third, Rule 804(a)(4) of the Federal Rules of Evidence permits the use of deposition testimony when a witness is considered unavailable due to illness, which is known as the “unavailability” hearsay rule. Fed. R. Evid. 804(a)(4).

CONDUCTING VIRTUAL DEPOSITIONS, HEARINGS, AND TRIALS

Remote depositions and hearings appear to be part of the “new normal.” COVID-19 era courts found that the pandemic encouraged the use of remote depositions, because they allow discovery to go forward while keeping witnesses and professionals safe from the risks of the pandemic. See, e.g., *Rouviere v. Depuy Orthopaedics, Inc.*, 2020 U.S. Dist. LEXIS 122184 at *7 (S.D.N.Y. July 11, 2020) (denying motion to conduct in person deposition or alternatively extend discovery deadline until the COVID-19 pandemic has subsided and instead ordering the deposition to be completed by remote means and noting “conducting depositions remotely is becoming the ‘new normal...’ [t]he more recent court decisions [permitting remote depositions during the pandemic] build on pre-pandemic case law that liberally allowed for and encouraged remote depositions and the technology for taking depositions in a way that has improved significantly over time” (citations omitted)).

Fairly early in the COVID-19 pandemic, courts across the country acknowledged this “new normal,” issuing decisions permitting remote testimony and administrative orders establishing remote trial procedures. See, e.g., *Joffe v. Kings & Spalding LLC*, 2020 U.S. Dist. LEXIS 111188, n.7 (S.D.N.Y. June 24, 2020) (denying motion for reconsideration to allow plaintiff to take third-party witnesses’ out of state depositions in person and noting that “[c]ourts in this circuit have been cognizant of the risks of in-person testimony and have encouraged remote depositions as a matter of course”); *Cesari S.R.L. v. Peju Province*

Winery, L.P., 2020 U.S. Dist. LEXIS 151184 (S.D.N.Y. Aug. 20, 2020) (ordering remote deposition protocol pursuant to rules 26(c)(1), 30(b)(4) and “the Court’s inherent authority to manage discovery” and stating the court reporter need not necessarily be physically present with the witness during when the deposition is being taken due to COVID-19); Order Regarding Virtual Hearings, General Order No. 4-1 (S.D. Ohio Aug. 21, 2020 (issuing remote hearing guidelines on a variety of issues including platforms to use, required equipment, exhibits and testimony, recordings, and general recommendations); Administrative Order 2020-06 (Bankr. S.D. Fla. March 19, 2020) (modifying original signature rule and establishing procedures for admission of direct evidence through declarations or affidavits during the COVID-19 pandemic).

During the COVID-19 pandemic, courts also issued decisions in pending cases permitting remote trials and finding “good cause” under Fed. R. Civ. P. 43(a) for remote live testimony. Some courts implemented protocols to govern the conduct of virtual sessions in court, in depositions, at hearings, and in trial. See, e.g., *Flores v. Town of Islip*, 2020 U.S. Dist. LEXIS 159252 (E.D.N.Y. Sept. 1, 2020) (granting motion to proceed with trial remotely despite objections that it violated Fed. R. Civ. P. 43(a) and noting COVID-19 provided good cause to permit remote testimony); Order Granting Plaintiffs’ Motion for Entry of an Order Permitting the Trial to be Held Using Video-Conference Technologies and Compelling Witnesses to Appear Remotely, *Earl E. Gales, Jr. v. John Emil Alle (In re Alle)*, Case No. 2:13-bk-38801-SK, Docket (Bankr. C.D. Cal. Aug. 25, 2020) (D.E. #433); Order Setting Evidentiary Hearing by Video Conference and Establishing Related Deadlines, *In re Rubie’s Costume Company, Inc.*, Case Nos. 20-71970 thru 20-71975 (Bankr. S.D.N.Y. June 8, 2020) (D.E. #109); *Argonaut Ins. Co. v. Manetta Enters.*, 2020 U.S. Dist. LEXIS 103625 at *4-5 (E.D.N.Y. June 11, 2020) (dismissing defendant’s arguments regarding glitches in technology, lack of access to witnesses and hard copies of documents, and video impairing counsel’s ability to cross-examine witnesses when finding that COVID-19 constituted good cause to hold a bench trial via video-conference). But see *Pilkington v. Tutor Perini Bldg., Corp.*, 2020 U.S. Dist. LEXIS 47357 at *57 (S.D.N.Y. 2020) (noting it may not be feasible to schedule an evidentiary trial on civil matters during the COVID-19 outbreak) (order establishing trial procedures and finding that remote trial had “adequate safeguards” for the purposes of FRCP 43(a) and would not violate due process).

ETHICAL CONSIDERATIONS DURING REMOTE DEPOSITIONS, HEARINGS, AND TRIALS

As we saw during the COVID-19 pandemic, although there are numerous benefits to virtual proceedings and remote appearances, they also pose unique ethical and other challenges.

New Technology. Attorneys, as well as financial advisors and other professionals practicing in this new virtual world should take time to learn about new technology being used by the courts. Model Rule 1.1, Comment 8 states that “to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” A few examples demonstrate how failing to become familiar with the requisite technology could result in ethical issues, these include: inadvertently sharing a confidential document by uploading the incorrect document; misusing a camera or microphone by failing to realize that one’s microphone is on when on a break and talking to a client, or making public what one thinks is a private statement to co-counsel publicly; or preventable issues with technology causing frustrating delays or inaccurate transcripts.

Deposition Exhibits. Deposition exhibits in a virtual world raise unique issues, including when they should be transmitted and viewed. Opposing counsel may send deposition exhibits well in advance of the actual deposition. The best practice is to avoid opening the documents until the day of the deposition unless otherwise instructed by opposing counsel. Additionally, if the parties are exchanging documents by mail, and a professional is concerned they may arrive early, consider placing the exhibits in a sealed envelope or package with explicit instructions that the seal may not be broken until the time of the deposition and on camera.

Communications During Depositions. Note, the fact that a deposition is remote does not change the rules on communicating with a witness during a deposition. If the communication is not allowed during a traditional deposition, it is not allowed in a remote deposition. Attorneys are not allowed to communicate with or advise their clients during a remote deposition, with some narrow exceptions. For example, an attorney may instruct a deponent not to answer when necessary to preserve privilege, to enforce a court ordered limitation, or to present a motion. See Fed. R. Civ. P. 30(c)(2). Depending on the jurisdiction, attorneys may be allowed to communicate with their clients during a break from the deposition, but attorneys should be careful to ensure a secure line of communication that is not being recorded by the remote deposition software.

TIPS FOR REMOTE DEPOSITIONS, HEARINGS, AND TRIALS

In addition to avoiding ethical pitfalls inherent in remote and virtual proceedings, maintaining professionalism outside of the physical courtroom is a challenge when operating virtually. It is important to consider what the judge or factfinder hears and sees during a virtual presentation. To that end, professionals may be guided by the following tips for remote hearings and other virtual proceedings:

Setting and Preparation: Use conference rooms instead of a home environment; set-up a podium or desk for the screen; join the proceeding ten to fifteen minutes before the scheduled start time to make sure the technology is functioning properly; when testifying at home, ensure exhibits are shared with all necessary parties in advance; and ensure a reliable internet connection for the day(s) of the hearing; use easily identifiable filenames with the exhibit number and document name for ease of reference.

Controlling Audio and Visual: Consider a “neutral” background, which could include a virtual or an otherwise professional background, and make sure that the lighting in the room is appropriate for the time of day; the lighting should neither be too light or too dark, and should be flattering; test the background and lighting days in advance of an appearance; and know how to use the on/off button for the camera (if on video) and the mute/unmute buttons.

Master the Technology/Be Secure: Learn how to use the screen sharing mechanism so that you can take control of the presentation and select what is being shown to all participants; there may be multiple technologies that must be employed in a remote hearing or deposition – one technology to access the proceeding, and another technology to view exhibits. Both should be tested well in advance of the proceeding, and the participant should be comfortable that both the proceedings and the exhibits can be viewed comfortably on a simultaneous basis; use a secure and encrypted platform to prevent unwanted/unknown participants; practice using technology or take a training with the technology provider prior to the hearing; and ensure easy access to secure breakout rooms, and consider paying for a “break out room” that has a connection that is only available to you and your client.

Personal Presentation: Maintain eye contact with the judge as much as possible; manage the video camera for a respectable view; ensure outside intrusions are eliminated; wear professional attire; and keep phones and other devices on silent. Expert and fact witnesses should confirm with counsel beforehand whether it is

best to look directly into the camera when speaking, as opposed to virtually addressing counsel or the court.

Know the Rules: Check the court's website and particular judge's rules in advance of the hearing (some require signing-up in advance for remote technology); for testifying experts it may be good practice to get direction from counsel in advance as to whether it is permissible to have a clean copy of any expert reports filed in the matter, which may assist the expert in addressing issues arising, as opposed to having to scroll through a lengthy report on a screen; agree with opposing counsel on procedures to submit and exchange information and materials in advance in case of a technology failure; and if permissible, send the court an electronic copy of any slides and documents/exhibits before the hearing;

CONCLUSION

A legal foundation for virtual hearings and other proceedings pre-existed the COVID-19 pandemic, but the ethical and practical challenges of a virtual world became much more apparent when the technology was utilized on a daily basis. Many of the remote procedures adopted during the pandemic may remain for use when they are beneficial. Some advantages of these remote procedures include the increased flexibility and reduced costs of remote operations that can help eliminate or reduce the costs of travel, especially in large matters with many participants. Yet, in-person court proceedings will resume, with the traditional costs and benefits of live interaction, such as the benefits of personal contact, in-person negotiations, and live interactions with the judge.

Some of the key lessons gleaned from this article regarding remote judicial proceedings include:

- Always have a back-up plan if the technology currently in use fails;
- Work with your clients, witnesses and opposing counsel to ensure that all parties are comfortable with the technology utilized;
- Become familiar with any new technology before using it in a deposition, hearing, or trial; and
- Keep abreast of local rules regarding remote procedures.

ABOUT THE AUTHORS



Sheryl P. Giugliano
Ruskin Moscou Faltischek, P.C.

Sheryl is a partner in the Corporate Restructuring & Bankruptcy practice group of Ruskin Moscou Faltischek, P.C. Her experience includes restructuring, bankruptcy, and litigation. Sheryl works with companies facing solvency, litigation or operational issues to identify a solution and implement a strategic response, including negotiating with interested parties, creditors, and shareholders, as well as a possible bankruptcy filing or out-of-court wind down.



Marti P. Murray
The Brattle Group

Marti is a Principal at The Brattle Group where she is the Practice Leader for the Alternative Investments Practice and the Co-Practice Leader for the Bankruptcy & Restructuring Practice. She has served as a financial advisor, a court-appointed fiduciary, and as a testifying expert. As a testifying expert, her subject matter expertise includes corporate financial distress and restructuring, business and securities valuation, solvency, fraudulent conveyance, corporate credit, securities trading, fraud (including Ponzi schemes), and the alternative investment management industry.



Douglas Spelfogel
Mayer Brown

Douglas is a partner at Mayer Brown and co-leader of its Restructuring practice in New York. Doug concentrates his practice on representation of financial institutions, indenture trustee banks, lenders, private equity and hedge funds, creditors and creditors' committees, landlords, trustees, officers, directors, and debtors in complex financial restructurings, asset sales, workouts, and business reorganizations, often involving multi-billion-dollar transactions, both out-of-court and through Chapter 11 of the Bankruptcy Code.



Hon. Alan S. Trust
Chief Judge, U.S. Bankruptcy Court for the Eastern District of New York

Judge Trust was appointed to EDNY in 2008 and became Chief Judge in October 2020. He is an adjunct professor at St. John's University School of Law; has served as President of the FBA EDNY Chapter and Chair of the FBA Bankruptcy Law Section; is a coordinating editor of the *ABI Journal*; sat in the District of Connecticut and mediated cases in SDNY, CT and EDNY; served as a faculty member for several FJC workshops; serves on the AO Judiciary Data Working Group; was instrumental in creation of the EDNY Pro Bono Mediation Program and Consumer Lawyer Advisory Committee. He graduated Syracuse University *summa cum laude* in 1981 as Phi Beta Kappa, and graduated 1984 *cum laude* from NYU School of Law, after serving on *New York University Law Review*.