

Crisis Is the Mother of Change: How a Pandemic Sparked Progress in Courtroom Efficiency

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Abstract: American courts, especially state courts, aren't known for being on the forefront of technology, and the rules set by state and federal courts have limited the use of some modern technology that many of us take for granted in our personal and professional lives. But the COVID-19 outbreak left courts with little alternative; it was either stop the judicial system in its tracks or adjust the rules. This forced the adoption of some efficiencies that many lawyers had been hoping for, and now hope are here to stay. This article discusses those changes and the impact they are having on the judicial process.

COVID-19 forced the courts to reckon with persistent inefficiencies in their systems and operations, particularly with respect to state courts. The pandemic further shone a spotlight on the existing technological infrastructure of court systems and law firms alike, many of which disconcertingly found that their technology was woefully inadequate to meet the needs of working remotely on a full-time basis. Although state court processing efficiencies vary state by state and locality by locality, as well as type of court and their volume of cases, many courts were inefficient and suffered from backlog and slow processing even before the onset of the pandemic. These inefficiencies led to increased costs in legal fees to clients, a resulting interference with access to justice, and badly needed dispute resolution in the commercial and contractual arena.

COVID-19 initiated a waterfall of change in state's court systems. As with the dust pile of Dictaphones, fax machines, and carbon copy paper (fun fact: "cut and paste" literally meant to cut and paste the paper in front of you), COVID catapulted an industry comfortably clinging to the antiquated "way it's always been

done” into the deep end of the future, leaving us with little choice but to adapt.

Since the pandemic has been raging for a full year, it should be clear to the legal profession that the “new normal” is here to stay for the foreseeable and perhaps distant future.¹ For all the enthusiasm some may feel about the long-awaited shift, such as avoiding the “time sink” of enduring several hours in court—not to mention traffic (reported to be 54 hours per year for the average commuter)—for a 10-minute conference, there are also irritants attendant to working from home, and litigation is no exception.²

Despite the initial shock of being completely remote for both the courts and practitioners, the interim solutions that were implemented bode well for long-term changes and improvements to efficiencies as courts ease back to normal operations. Hopefully, the courts will continue to use the available technological options that they have already implemented and continue to focus on streamlining operations and maximizing efficiency and productivity. Some of the impacts of the COVID pandemic, both positive and negative, and the prospects for the “new normal” of litigation in the court system, are discussed below, along with key considerations that the courts and practitioners should focus on to strengthen their foundations for the current situation and any future emergencies.

Who’s in Your WiFi?

Remote work, or “telecommuting,” can only be as seamless as the technology permits. Telecommuting necessarily assumes continuous electricity and WiFi with enough bandwidth to support the many people working and schooling from home. In early August, Hurricane Isaiah unexpectedly threw out power along the East Coast for days, disrupting the otherwise continuous flow of remote work that many had adapted to.

Law firms and courts alike were forced to rely on their employees’ own personal computers, left without enough company or court laptops to dispense to each employee. This raises security, privacy, and confidentiality concerns that are almost impossible to entirely protect against from hundreds if not thousands of locations inside and outside a particular state.

Adding to the challenges to infrastructure is the technological capability of human resources and court personnel. Many are not

up to date on new software or the tools within that software to work quicker and more efficiently. (Another fun fact: some court personnel and practitioners in New York continue to use Corel WordPerfect).

A written policy regarding remote working procedures is advisable for any organization whose employees are working outside of the security confines of a centralized office. Employees and court personnel should sign a confidentiality and security policy that reminds them not to work over public WiFi networks and to maintain a password on laptop computers.³ Greater efforts should be given to continuing technology education for employees and personnel to ensure technology agility.

Out-of-Office Collaboration and Where We Work

COVID quickly exposed a pre-existing generational divide in the attitudes toward remote work or “work from home.”⁴ In light of the continuing safety protocols and social distancing, workers and employees need to adapt to working remotely and telecommuting as a “new normal” and not just an exception or an earned privilege. For law firms especially, this leads to the need to reformulate criteria for what constitutes productivity.⁵ It is also incumbent on employers and court supervisors to encourage improving on communication skills and utilizing tools to collaborate rather than just popping into an associate’s office and expecting her or him to always be available at the desk.⁶ This can be challenging in litigation, which tends to be paper-heavy, whether by preference, necessity, or a combination of the two. Moving toward digital record keeping, scanning, and securely shared drives that can be accessed remotely can be helpful to manage every phase of litigation, from inception through discovery and to hearing and trial.

New social distancing and safety protocols dictate revisiting of offices and their layouts. Open floor plans had already been on the rise in the corporate world. The days of the large partner office may be gone; law firms will soon need to mimic their clients’ businesses in office design. At \$100 per square foot and beyond in New York City, the cost per attorney to maintain excess office space limits business and growth opportunities, and is a high price to pay for unnecessarily storing paper files. Although litigators may prefer the pre-COVID way—litigation teams in conference rooms poring over

high piles of boxes and binders, late nights of ordering in and car services home—the pandemic has presented a unique opportunity to ask ourselves whether this is really necessary or whether remote work is better for our attorneys and our clients.

Rethinking office spaces as a “refuge” or “sanctuary” for lawyers and clients, or “hoteling” offices—where attorneys do not enjoy a designated home office but may share it according to the times they are in the office—can enhance the bottom line and reduce the skyrocketing line item of real estate, particularly in large cities.⁷ Firms should continue toward the trend of a “paperless practice” by reducing unnecessary printing and copying, and increasing scanning and digital filing, with the attendant benefit of secure, remote access to files to enhance the ability to work remotely when emergency circumstances dictate. Courts can encourage this by continuing the progress that has been made toward e-filing in all cases, not just in commercial cases.⁸

Increase in Litigated Matters

Courts across the country began closing pursuant to state executive orders and judicial administrative orders in March 2020. Almost all courts ceased “non-essential” court matters in order to avoid community spread and cauterize any further destabilization of the court system. In New York State, Chief Judge Janet DiFiore announced the elimination of the backlog of undecided matters, a process that was already in progress and had made substantial headway as of the State of Judiciary announcement on February 26, 2020.⁹

Around July, courts began to emerge from their pandemic shells to expand beyond “emergency” or “essential” matters. Litigation may be somewhat protected by the economic plunge from the impact of COVID closures on businesses and consumer spending.¹⁰ By one estimate, 5,308 lawsuits have been filed raising legal issues relating to the pandemic as of September 18, 2020, in areas ranging from insurance, to government-mandated business closures, bans on large gatherings, and refunds for tuition payments.¹¹ This explosion of litigation across the country means that litigators will be busy doing what they do best: engaging in written discovery, taking depositions, moving for summary judgment, and preparing for and conducting a trial. This begs the question of how litigators

and courts will brave this new virtual world with respect to each of these aspects. There are no clear-cut answers, although there are some guidelines from the various judges and courts depending on the jurisdiction as discussed below.

“Virtual” Courts

State court systems have universally strived to strengthen their technology infrastructure and expand their virtual courts. New York’s Fourth District (Saratoga environs) installed virtual kiosks near the courthouse entrances to assist *pro se* litigants with live videoconference assistance from court personnel and to participate in proceedings. There is also a Coronavirus Hotline to provide assistance to litigants on court operations. The New York State system originally began with Skype conferencing capability, moving to Microsoft Teams in the fall, with all conferences scheduled virtually. Microsoft Teams allows for enhanced evidence presentation and the ability to seamlessly present video, audio, and other formats, as well as breakout rooms.

Pre-Trial Appearances, Preliminary Conferences, Compliance Conferences

As New York State Chief Judge DiFiore noted, “Technology has played an important and integral role for us, allowing us to move our cases forward while at the same time limiting courthouse traffic and mitigating the spread of COVID. So, as we creatively explore the many ways in which technology and virtual operations can appropriately become a permanent part of our operation, we are equally excited about the prospect of a new and even more productive normal.”

For the foreseeable future, pre-trial appearances will be conducted telephonically or via zoom. New York State courts have adopted what is essentially an “all virtual” model, with all court appearances conducted virtually using only Skype for Business because of its security and encryption.

New York also expanded its capability for e-filing and launched an Electronic Document Delivery System (EDDS) to file electronically in cases where it was previously unavailable, such as

matrimonial or guardianship matters. At a recent webinar of the New York State Commercial Judges hosted by the New York State Bar Association, the judges imparted their approach to navigating motions and bench trials remotely and what their expectations are for the future of jury trials. New York City courts entered “Phase 4” on August 3, wherein certain types of cases, such as housing, can proceed to trial. The federal courts in the Southern and Eastern Districts accepted new filings via PACER and permitted judges to employ telephone and video conferences “where practicable” in determining whether to enforce compliance with trial-specific deadlines. The Southern District implemented a 2020 Phased Re-Entry Plan with strict protocols for visitors to the courthouse.¹²

Across the country, in Los Angeles, as of July 23, all jury and non-jury civil trials that had been scheduled to commence prior to August 8 were continued until further notice, with a direction that no civil non-jury trials would begin before November 16, 2020, and civil jury trials would not start until at least January 2021.

Of course, the same judgment, discretion, and decorum used in person in the courtroom applies to virtual-conferencing etiquette. All saw the viral videos of lawyers conducting conferences in their pajamas, from their beds or couches, or even toilets being flushed during SCOTUS oral arguments. Beyond that, lawyers should not record Skype conferences without the court’s permission and should not assume that the Skype transcript or audio recording will be preserved or available.

Depositions and Discovery

Most courts universally encouraged counsel to cooperate in adjusting existing discovery deadlines in light of the pandemic. In June, the New York Chief Administrative Judge Lawrence K. Marks “strongly encouraged” litigants to “pursue discovery in cooperative fashion and to employ remote technology in discovery whenever possible.” Written discovery will not be much different than before, as most have adopted exchange of written discovery demands and responses via electronic means. The private sector has quickly filled the void, with court reporter agencies offering video deposition services that facilitate the introduction of exhibits and allow submission of exhibits in advance to be marked and used as if in person.

Jury Trials

The biggest challenge remains a return to courtroom proceedings, specifically jury trials. There are best practices but no clear guidance on conducting a socially distanced and safe jury trial.¹³ Among other questions for practitioners and the judges to consider are:

1. How to effectively conduct *voir dire*;
2. How to ensure jurors' compliance with basic juror conduct like paying attention to the evidence presented rather than surfing social media or posting TikTok videos of the proceedings;
3. Marking and presenting exhibits, and using those exhibits effectively with witnesses.

Just as this article was being completed, the U.S. District Court for the Southern District of New York announced that jury trials can resume on Wednesday, September 23 as part of Phase 3 of their reopening plan. The order of jury trials will be prioritized according to agreed-on criteria and will be conducted in the large courtrooms of the Foley Square and White Plains courthouses.

Litigants may wish to consider consenting to a bench trial, which more readily lends itself to being conducted remotely. There is an incentive for defendants who face exposure to a monetary judgment to do so, particularly in New York State, where the statutory rate of pre-judgment interest remains at 9 percent and a delay of resolution increases that exposure absent a tolling agreement.

New York moved into Phase 4 to continue to hear most matters virtually, with a limited number of civil cases scheduled for bench trials. Chief Judge DiFiore announced the commencement of jury trials outside of New York City on a “pilot basis,” with trials to be held in the largest courtrooms to allow proper distancing between jurors and all participants, including court reporters, judges, court personnel, litigants, and attorneys. On September 21, five jury trials had been conducted across the state as part of the pilot with no reported incidents involving participants’ health and safety.¹⁴ As of now, the pilot is slated to expand to New York City in October. The pragmatic reality is that commercial matters are not going to be considered “essential” and will not be given priority in scheduling. As a practical matter given the various protocols in place, a litigant

has a better of chance of securing a virtual bench trial date sooner than waiting for a jury trial date, whether remote or in person, given the backlog of cases ready for trial that could not proceed in the six months between March and September. Even in disputed commercial matters where settlement was previously attempted, litigators would be well served to set their clients' expectations and use this opportunity to pursue alternative dispute resolution measures to settle disputes that could otherwise await months, if not more than a year, to secure a trial date.

Notes

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1. Samuel, A., Remote Work Isn't Going Away. So Let's Just Deal With the Obstacles, *Wall Street Journal*, August 2, 2020.

2. A. Jaffe, Will the Coronavirus Have a Lasting Impact on Carbon Emissions, *Bulletin of the Atomic Scientists*, April 2, 2020 (available at <https://thebulletin.org/2020/04/will-the-coronavirus-have-a-lasting-impact-on-carbon-emissions/>).

3. See Cybersecurity Alert: Tips for Working Securely While Working Remotely, Technology and Legal Profession Committee of the New York State Bar Association, March 12, 2020, available at <https://nysba.org/app/uploads/2020/03/NYSBA-Cyber-Alert-031220.pdf> (last visited September 25, 2020). See also <https://nysba.org/committees/committee-on-technology-and-the-legal-profession/>.

4. See <https://www.virtualvocations.com/blog/telecommuting-news/generational-remote-work-statistics-survey/>; Generational Remote Work Statistics: How Millenials, Gen-Xers, and Baby Boomers Telework, Virtual Vocations, June 2019, available at https://staticblog.virtualvocations.com/2019/06/Virtual-Vocations_Generational-Remote-Work-Statistics-Telework-Report-PDF_2019.pdf.

5. See V. Hudgens, COVID-19 Proved Associates Can Work Remotely, but Will Partners Ignore the Success?, *Legal Tech News*, June 22, 2020, available at <https://www.law.com/legaltechnews/2020/06/22/covid-proved-associates-can-work-remotely-but-will-partners-ignore-the-success/>

6. See, e.g., B. Larson, *Harvard Business Review, A Guide to Managing Your (Newly) Remote Workers*, March 18, 2020, <https://hbr.org/2020/03/a-guide-to-managing-your-newly-remote-workers>; Communications Tips for Remote Work During COVID-19, available at <https://hrdailyadvisor.blr.com/2020/04/10/communication-tips-for-remote-work-during-covid-19/>

covid-19/; *see also* <https://www.uschamber.com/co/run/human-resources/improving-remote-team-communication>; <https://www.forbes.com/sites/nicolebendaly/2020/03/20/your-team-is-now-working-remotely5-ways-to-strengthen-communication-and-team-cohesion-in-the-covid-19-world/#57419895b70d>.

7. J. DeGrasa Smith, Social Distancing: The Future for Lawyers Working Remotely, Bloomberg Law, available at <https://www.bloomberglaw.com/product/health/document/X2IQ0KEO000000>

8. See New York State Court of Appeals Notice to the Bar, May 11, 2020, available at https://www.nycourts.gov/ctapps/news/nottobar/nottobar05112020.pdf?utm_campaign=Membership&utm_source=hs_email&utm_medium=email&utm_content=87826062&_hsenc=p2ANqtz-9sF6-hVxcDInz9II1pbaO2Q6h6WwfdT_Z8UqiefwKKTyMnQ6cMmpztuPcoHSMMxC3sfOmCxh5srLd6zowt0h9KWZoeaw&_hsmi=87826062.

9. The State of Our Judiciary 2020, February 26, 2020, available at http://www.nycourts.gov/ctapps/news/20_SOJ-Speech.pdf.

10. J. Ablin, Wall Street v. Main Street: The Impact of COVID-19, Cresset, May 12, 2020, available at https://cressetcapital.com/headline/wall-street-vs-main-street-the-impact-of-covid-19/?utm_campaign=Ablin%20Distribution&utm_source=hs_email&utm_medium=email&utm_content=87822012&_hsenc=p2ANqtz-_FHmswpN6RH2w_VqdwoXkfMlbMTNEwqZNY74lAwDDd2R9mNs0AUvqQOjzPxQ4kxESIbw7_6Y8bDiv9lgv-TWd_EP1DCA&_hsmi=87822012.

11. <https://www.huntonak.com/en/covid-19-tracker.html>; *see also* Scanning the COVID-19 Litigation Scene, <https://www.jdsupra.com/legalnews/scanning-the-covid-19-litigation-scene-68159/>.

12. <https://www.nysd.uscourts.gov/sites/default/files/2020-06/reentry%20public%20286.22.20%29.pdf>.

13. A. Loiaza-Delgado, Best Practices for Remote Hearings, American Bar Association, June 9, 2020, available at <https://www.americanbar.org/groups/litigation/committees/trial-evidence/articles/2020/best-practices-remote-hearings/>.

14. <http://www.nycourts.gov/whatsnew/pdf/September21-CJ-Message.pdf>.