

Navigating the New Normal: Best Practices for Virtual Advocacy

BY ALISON ARDEN BESUNDER

It has been eight months since the first case of COVID-19 was diagnosed in New York—and it happened to be a lawyer. It feels as if our entire legal practice has been through a fairly vigorous rinse cycle in that time. From a total shutdown of the court system and then an “emergency matters only” policy, we have now progressed to a phase where certain New York courts have successfully conducted in-person jury trials in recent weeks. New Yorkers in general and New York lawyers in particular have lived up to “New York Tough.”

Seeing as we remain in the midst of the pandemic—as Governor Andrew Cuomo put it, getting ready for the second half of the game—this article focuses on taking stock of how the pandemic has affected litigators and litigation practices, which developments may and should be here to stay, and some best practices for navigating the new normal of virtual advocacy, whether in discovery or in trials.

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New Developments

Helmed by Chief Judge Janet DiFiore of the New York State Court of Appeals, New York has turned an unprecedented and challenging situation into an opportunity. From the inception of the court closures, New York courts were encouraged to significantly reduce if not eliminate the backlog of undecided motions on the docket through an “open motions program.” The entire backlog of undecided civil motions

outside of New York City was eliminated; it was vastly reduced in New York City, with Kings County eliminating the backlog entirely. https://www.elaw.com/eLaw21/blog_documents/August3-CJ-Message.pdf

New York City’s courts entered Phase Four of a return to in-person operations in late July, with changes to physical space such as plexiglass dividers. New York State also formed a committee of administrative judges to create a uniform preliminary conference order for city and general litigation

parts. Among options being discussed are a template standing order pre-populated with dates, including compliance dates when someone files for a preliminary conference. See Brendan Kennedy, *Establishing a Functioning Court System Amidst a Global Pandemic*, 7/31/2020, available at www.nysba.org.

This automation is a welcome development. As Deputy Chief Administrative Judge for the New York City Courts George J. Silver stated, “We don’t want to lose track of the significant gains we’ve had during the pandemic. To the extent that we can continue using it, we certainly will, as it has been very effective.” *Id.* Judge Silver aptly quoted Victor Frankl and remarked on a panel (via Zoom), “When we are no longer able to change a situation we are challenged to change ourselves.”

One of these welcome changes is the virtual court conference. In addition to being safer than causing multiple lawyers to wait inside in courtrooms not conducive to the requisite six feet of social distancing, the resulting virtual conferences are more efficient, save unnecessary costs, and often accomplish more in less time. Before COVID-19, calendar calls required an attorney to wait in a courtroom for the better part of a day, often for a five-to-10-minute appearance that could have been conducted telephonically or by video, an experience that can be as stressful as waiting in traffic.

Given the expense and maintenance of court facilities, many of which were built at a time of a much lower volume of litigated disputes, conducting routine preliminary conferences and appearances virtually can increase access to justice by reducing costs to clients and enhance court resources by improving efficiencies. These virtual measures alleviate unnecessary stress in the profession for both judges and lawyers. They can also promote attorney wellness by reducing the demands on

lawyers’ time, allowing them to conduct business more productively and achieve a better work/life balance. https://nysba.org/app/uploads/2020/04/NYSBA_-_Attorney-Wellness.pdf

Best Practices

Some aspects of litigation cannot be fully replicated or replaced by technology. While it is possible to conduct jury trials, depositions, oral arguments, and evidentiary hearings, doing so presents challenges and eliminates a key component of litigation, which is the non-verbal information gathered from in-person presence. Nevertheless, given the recent spike in COVID-19 cases across the country and in New York State, litigating via virtual platforms is here to stay for the foreseeable future. Since many attorneys found themselves thrown into the deep end of technology with which they were, and to some extent still are, unfamiliar, some suggested the institution of best practices, discussed below.

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.

The most important aspect of conducting a video deposition is organizing exhibits. It

is recommended that the deposing party prepare separate PDFs of each exhibit and pre-mark those exhibits for identification in the order that you anticipate using them, saving each file with the assigned identification number. It is helpful to provide the reporting agency with a table of contents of the pre-marked exhibits. If you are reluctant to share your exhibits with opposing counsel in advance, most court reporters allow you to send them the exhibits in advance, will mark the exhibits with the exhibit number or letter during the deposition, and then email the exhibit to opposing counsel and/or the witness as well as share it on the screen. It is recommended that the court reporter allow the witness to control the screen share while reviewing the exhibit on the screen so that the witness can scroll down as he or she reads the exhibits. The benefit to this approach is that you have access to information about the witnesses’ review of the document in real time.

Alternatively, you can send the exhibits in advance to opposing counsel and the witness, and ask that they print the exhibits out in advance if desired. This will save time during the deposition.

As with any remote conference, it is strongly recommended that you engage in a trial run of the link to the platform to ensure that your connection is strong enough and that everyone has the login information.

Jury Trials

The biggest challenge post-COVID remains a return to courtroom proceedings, specifically jury trials. There is no clear guidance on conducting a socially distanced and safe jury trial, although there are best practices. 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 Tik Tok videos of the proceedings;

3. Marking and presenting exhibits and using those exhibits effectively with witnesses. Similar suggestions as set forth above with respect to depositions are helpful, with the added suggestion to provide the Court with a binder of the printed documents for the Court's reference.

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% and a delay of resolution increases that exposure absent a tolling agreement.

Most matters continue to be heard virtually with a limited number of civil cases scheduled for bench trials, however on September 9, jury trials outside of New York City commenced on a pilot basis, with trials being held in the largest courtrooms to allow proper distancing between jurors and all participants, including court reporters, judges, court personnel, litigants, and attorneys. As of October 5, 16 trials were completed, with four in progress. <http://nycourts.gov/whatsnew/pdf/October5-CJMessage.pdf>. Beginning the week of Oct. 19, a limited number of civil jury trials resumed in New York City with 11 trials scheduled in Kings, Richmond, and Bronx Counties, and four scheduled to begin the week of Oct. 25 in Queens and New York Counties. <https://www.nycourts.gov/whatsnew/pdf/October19-CJ-Message.pdf>.

Tech Security

Whether sole practitioners or large law firms, attorneys should not lose sight of

cybersecurity. All lawyers are at risk of hacking given the nature of the client information we possess. The NYSBA Technology Committee has published whitepapers during the crisis to educate lawyers on the technology issues to consider for protecting client information while working remotely as well as the availability of cyber insurance.

<https://nysba.org/app/uploads/2020/03/NYSBA-Cyber-Alert-031220.pdf>

<https://nysba.org/app/uploads/2020/07/FINAL-NYSBA-Cyber-Insurance-Application-Alert-70820.pdf>

Indeed, the Stop Hacks and Improve Electronic Data Security Act (SHIELD ACT), coincidentally effective as of March 21, 2020, imposes information security requirements governing storage, use, disposal, and data notification of a New York resident's private information. The new information security requirements and existing legal ethical principles require that lawyers not lose sight of the protection of personal information that requires compliance. This was the case before COVID-19 with the ubiquity of mobile devices, but is even more of a concern now with employees using their own personal computers to access clients' private information, whether through a remote portal or not.

Alternative Dispute Resolution

It is anticipated that New York State is going to suffer a significant decrease in tax revenue as a result of the pandemic, which will certainly impact the court system. The Office of Court Administration has already announced a cut of \$300 million to the budget, which will impact the timeline on resolution of existing disputes and future disputes. Various programs, including the Presumptive ADR Program implemented in May of 2019 and the recent rollout of online tools urge lawyers to encourage their clients to use alternative dispute resolution measures rather than wait as long as 2021

or even 2022 to get a jury trial. https://www2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf; https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20_42.pdf

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 wait months, if not more than a year, to secure a trial date.

These adaptations to how justice is conducted in the state of New York may have been propelled by the tragedy of the COVID-19 pandemic, however they have introduced serendipitous efficiencies that will work in favor of judges, attorneys, and clients. Adjusting to this new normal has the potential to expedite cases statewide and shrink the backlog that the New York Court System took for granted prior to the pandemic.