

## The Future of Litigation Is Ours: A Call to Action

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By **Edward J. Guardaro, Jr.** | April 27, 2020

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While the trial courts and Appellate Division Departments have been shuttered for the last several weeks, the justices from both branches of the Supreme Court have been busy. Despite the courthouse closures and the lack of in-person staff or equipment, many decisions have been published, demonstrating that the courts continue to review and decide previously submitted motions and applications, albeit in a slower fashion.

All branches of the state courts are now preparing to resume full operations virtually. The rapidity of this transition is not surprising for the Appellate Division and the Court of Appeals, both of which for years utilized technology to assist practitioners and the public alike, to keep apprised of the courts' day-to-day functions, including live video streams of in-person oral arguments, emailing procedures and email help contact.

Because of the larger volume and diversity of the workload, the trial courts have been unable, to date, to implement large scale electronic virtual access. However, with the state in a "pause" mode, the justices and state court administrators have taken the time to begin implementation of telephonic, and possibly, videoconferencing, practice aids in these courts as well. While the roll out of these new measures will not be as rapid as those in the appellate courts, they will soon become the norm and allow litigation practice to move forward.

Access to the courts has always been a hallmark of New York's jurisprudence and not even a worldwide pandemic is going to stop the wheels of justice from moving forward.

The newest implantation of technology, announced earlier this week, will take litigants and the public to a new level of virtual practice. The courts new rules will not only provide for all matters to be electronically filed but also for virtual appearances at conferences and hearings. These rules will provide for telephonic, or if possible video, oral argument and will make provisions for individuals with disabilities of any kind. In this way, the courts will continue to provide their services in the face of the severe societal restrictions caused by the recent pandemic.

While we are being compelled by current circumstances to move toward a more virtual practice, it allows us to add resilience to our court system and avoid future disruptions. Events such as a recurrence of the viral outbreak, extreme weather (such as hurricanes and heat waves ) or other unforeseen emergencies all mandate that the system be equipped to avoid any further interruptions of service.

It is now our time, as practitioners, to adapt to this reality, create and innovate new means and methods of practice and help overcome any difficulties the courts may encounter moving forward. There is much to be gained from the changes that are coming. While our methods of practice will be different than in the past, such changes will allow for easier, less costly, access to the courts and more efficient handling of cases and proceedings. Remote practice will allow for multitasking and collaboration previously unknown to many. It will allow better tracking and scheduling of proceedings and give practitioners better tools to manage discovery and present material to the court. While the transition will be phased in over time, the earlier practitioners adopt these new measures and embrace the opportunities they offer, the faster we will all realize their potential.

The appellate courts have been early adopters of technology, and as such it is not surprising that they are the first to implement the opportunity of virtual practice. To that end, the Appellate Division, First, Second, and Fourth Departments, have either re-instituted full calendaring of its appeals or already set forth rules to begin this rollout.

This transition to a new way of practice holds tremendous potential for faster resolution of claims and greater access to the courts. While the complexities of depositions, mediations, and trials will need to be addressed, moving forward, all eyes should be on the opportunity afforded by this new type of practice and the potential efficiencies it offers. The practice we all knew just 60 days ago is over and will, in all likelihood, not be fully restored for some time. Let us embrace the challenges facing this new practice, work collaboratively to overcome obstacles and move forward toward the new model.

We, as practitioners, can assist the bench and bar in bringing the legal system back online and transition from a face-to-face practice to a virtual one. After having spent several years working in the Appellate Division, and 30+ years litigating before all levels of the state and federal courts, I have learned that cooperation and creative thinking are key aspects to an efficient and effective practice. Chief Justice Janet DiFiore, Chief Administrative Law Judge Lawrence Marks and the Presiding Justices of the Appellate Division Departments are showing us a way to the future. As practitioners, we need to follow their lead. We should look at any potential obstacles we encounter during these times as an opportunity to introduce new methodologies and bring a fresh perspective to the practice of law.

Many of us have already participated in video mediations, depositions (where witnesses were already prepared), and settlement conferences. Some have even begun remotely preparing their clients for future depositions. Trial practice must change as well. Eventually, the courthouses will reopen in a modified or limited manner. In fact, the Southern District of New York has already scheduled in person appearances for early June 2020 with accommodations for physical distancing. Soon after this reopening of the court, trials will begin to be scheduled or re-scheduled. We, as practitioners, must take this opportunity to hone our skills while transitioning from the old ways to the new. Convention cannot be used as an obstacle for forward progress. We must create solutions to complex problems.

We are all accustomed to a specific courtroom setting and layout. However, layout of a courtroom is not an impediment to trying cases. There is no rule or statute that dictates that jurors must sit in close proximity to one another or in a certain part of a courtroom. Nor is there a rule that the witness or attorneys must sit or stand in one place. These are merely conventions borrowed from centuries of practice. There is no reason that we cannot quickly and safely move toward trial practice in this changed environment by adopting simple changes to our prior actions. Solutions might involve the following:

- Using larger courtrooms so that jurors, witnesses, court personnel and practitioners can maintain physical distancing
- Adopting the use of proper personal protective devices or clothing for the safe movement of everyone in the courthouse
- Scheduling witnesses efficiently so that there is neither down time nor overlap of personnel in the courthouse
- Using existing technology of microphones and amplifiers, available in every courthouse, so that sound can be heard all over the courtroom
- Using existing video technology to project images and data further
- Allowing court reporters to work remotely by using simple two-way communication devices
- Changing the timing and tempo of questions and answers so that every sound may be recorded and there is no interruption in testimony
- Allowing the installation of electronic signaling (such as lights used at the appellate level) to signal interruptions by the bench

Using these few simple techniques, and many others that our bench and bar will undoubtedly think of, allows us to look forward and bring creative innovation to the courts so that we can lead all by example, represent our clients to the fullest degree possible, and continue to polish the reputation of the bench and bar. Now is the time to heed the words spoken by so many throughout the years: Ask not what your state or country can do for you, but what you can do for your state or country. It is time to step up and meet this great challenge.

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