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# In Some Court Cases, Tech Solutions Aren't Enough

► **Kandice Hull, chair of the Litigation Group with McNees Wallace & Nurick, discusses how the criminal and civil court systems are coping with the “new normal” in the era of COVID-19 – and how she sees things playing out in the future.**

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**CCBJ: While most of our readers practiced at traditional law firms before moving in-house, they were not necessarily litigators or in practices that required a high level of direct interaction with the judiciary. Could you provide us with a brief overview of what that type of practice looked like pre-COVID-19, and give us some insights into how the judiciary operates?**

**Kandice Hull:** The litigation practice has been affected, I would say, in three ways. Traditionally, you had interaction with the clients, and that has been hampered, certainly. Most cases, you would go out and meet with the client at their business to learn about their operations and what the particulars of the case were. Now, that may not be feasible or welcome. Client interactions in terms of gathering documents and preparing the case together have been impacted.

Under typical circumstances, there would be quite a bit of interaction with opposing counsel. You would have in-person depositions and things like that. And then third there were the court appearances. For a piece of business litigation, before you got to the trial, the court appearances could be relatively frequent, with arguments on motions as well as status conferences. Some federal courts required initial case management conferences. And those have all been placed on hold, or there's been some alternative technology employed. Prior to the pandemic, at least twice a week, I'd be out of my office at a meeting somewhere, or at a deposition or mediation or an actual court appearance. It went from where you were somewhere else about 40 percent of the time to always being in your home office, or only occasionally being able to access your business office.

**How would you say that law firms are adjusting, and what does pretrial discovery look like?**

When the pandemic intensified in March and there were these shutdowns, I think initially people with litigation cases thought, “We can ride this out, if this is a two- to four-week delay” – which at the time is all some people thought it was going to be – “we'll just postpone everything and we'll pick it back up again in 30 days.” There was a lot of resistance at first. Once it became clear that that wasn't going to happen, people started looking for other solutions.

The rise of the videoconference has gotten a lot of attention, and certainly it's been prevalent in the litigation world. It's the way to interact with your clients, and in some cases with opposing counsel as well. With respect to pretrial discovery, the big issue there is depositions, where you normally met in person. The court reporting services that provide that type of service to larger law firms have really been on the ball in terms of providing options to the firm – just saying, “Hey, you can do this. We're still up and operational. Go ahead with your deposition.” Once it became clear that waiting it out wasn't going to work, people started to try various videoconferencing solutions and found out that they were effective in a lot of cases. There are still some concerns with the video deposition, including security issues and evaluating witness demeanor, but people are more and more willing to give it a try. People are experimenting with which kind of technology works best for them and which one they feel most comfortable with.

**What are some of the adjustments and new technologies that we're seeing implemented to keep courthouses safe for employees, lawyers, litigants and others who may have traditionally had to appear in court in person?**

First, there are what I would call the non-technological adjustments. The courthouses are screening people, just as most businesses are, before they come in. But they're

also changing their process for how they handle large court appearances. In a civil practice, in the past, you might have had a motions court provide a list of 10 or 20 motions to be heard in a day, and everyone would show up at 9 a.m. and wait until their motion was called. I'm not sure that practice is coming back anytime soon. The courts are looking to end those cattle call-type proceedings by giving everyone a specific time to show up instead – if you're showing up at all, rather than doing it telephonically or by videoconference.

Criminal cases have been heavily impacted. Courts would often have criminal court days where many people would be in the courthouse at one time, but now they've started putting different people on different floors of the courthouse, so that they can be distanced and wait in a safe space until their case is called. They're scheduling fewer cases for any one day, and scheduling more days with fewer

people. It's a burden on the judiciary, having to operate in that way, doing all of those things to physically keep people apart when they have to show up.

In terms of technology, a lot of arguments and conferences are being handled by phone whenever possible. Some courts have set up videoconferencing. Some have not. But where it can be done by phone, where it's a motion or argument by the lawyers, as opposed to something where the clients have to appear, it's likely that the court is going to look to implement technology, whether it's something as basic as a phone call or something more like a videoconference.

**How are people on all sides adjusting to the new use of technology? Are you seeing any problems with people not having adequate access to technology or the internet?**



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In most cases, I don't think that jury trials have resumed. That is something that everyone is still trying to figure out, much like what it's going to look like when children return to school in the fall, if they do. We need to figure out how to keep people distant and safe and still allow this to happen. There is talk of plexiglass dividers between the jurors, or keeping seats open between them in the jury box. That may work in some courtrooms, where there's space to do that. Some courtrooms are smaller than that, which is certainly a problem. And then there's the question of what to do when a jury has to deliberate, and they have to be locked in a room, essentially, for hours together. That could be a difficult situation to overcome. Because you do wonder, is there the same discussion and free flow of ideas if they implement some technology so that they are not in the same room, and does that impact the kind of results that people think they are going to get from a jury trial?

Bench trials are occurring, particularly in injunctions and those types of emergency matters where a decision cannot wait. As I mentioned, in those cases, the court is mostly employing distancing practices to try to keep people safe – making sure everyone stays as far apart as possible, wearing masks, generally trying to follow the Centers for Disease Control guidelines about how to stay safe. I do think courts



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appreciate when technology and the electronic presentation of evidence, rather than paper copies, makes that easier. You can sit at your counsel table and project the documents onto a screen, rather than walking around and distributing paper to three or four different people.

However, I do think that there is actually a huge problem with the different levels of access to technology. And unfortunately, this pandemic is going to exacerbate what was already a problem in terms of access to justice between people with means and people without means. Our firm has done pro bono work. With some domestic violence victims, for example, you have people who don't have access to something as basic as a cell phone, so they can't participate remotely. Then they are forced to either come into the court and risk exposure to the coronavirus or have their case delayed in some way. This has highlighted a problem that already existed. The lawyers in most cases have the technology, but what happens when the clients do not? That is something that the courts are really going to have to address if they continue to use these platforms, because you don't want people to have different levels of quality of access to the courts because of their financial means.

## How has alternative dispute resolution (ADR) adjusted?

ADR continues to function, and they have implemented remote arbitrations and mediations. They use the technology that allows breakout rooms in videoconferences. I would say that there are pluses and minuses to ADR done in this way. Because of the delays that are being faced in the court system, as well as the uncertainty surrounding what jury trials will look like, and even in some cases, bench trials,



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more cases are going to be pushed to ADR, where they think they can get some quicker resolution.

The problem, in my opinion, is that, particularly with mediation, it's not as effective to do it via videoconference as opposed to in person. Part of what compels people to reach an agreement at a mediation is the intensity of the moment, that you're there, you've devoted your day to this issue. You've got all of the facts before you, all of the people around you talking about it. That is your focus for that day. If you are doing mediation from home via video breakout, it's pretty easy to work on some other project simultaneously, or even walk away and wash your dishes or something like that, and you lose that intensity level that exists when you're there for in-person mediation. But like I said, more people will be trying ADR options regardless, because of the delays in the courtroom.

**Which methods of adaptation that we've seen during the pandemic do you think have been the most successful and least successful? Do you think any are here to stay?**

I think what is here to stay are the telephonic and videoconference oral arguments involving just the attorneys. Those have gone pretty smoothly. Where there's not a need to have the client present, not a lot is lost by not being there in person. It saves clients money too, because lawyers often have to travel to the courthouse, wait for their motion to be called, perhaps argue for 30 minutes and then travel back. That could end up being several hours of time. Whereas if you do it via phone or videoconference, it's much more efficient. So I think that's here to stay.

What's been least successful? Well, I just mentioned mediation. Also, I don't think video depositions will replace in-person depositions when the pandemic passes. I know a lot of litigators feel that they really gain something by looking at the witness face-to-face – that they can sense more about the testimony face to face.

**Is there anything that we missed that you'd like to add?**

Something that still needs to be addressed with these new technologies is the security aspect. Zoom has been in the news for some of the security problems it faced early on, which they've tried to address. But there's still a question mark with a lot of these new technologies. If you are doing, for example, a deposition in a trade secrets case, and every document that you're showing to the witness is potentially a trade secret, you want to be very sure that no one else can look at what's going on in that videoconference and that it remains secure. I'm not sure if everybody has that comfort level just yet. Given all of the issues with cybersecurity and law firms, that is something that is going to have to be considered going forward. How do we protect confidential client information that may be stored on these videoconferencing platforms? I don't see it as something that's going to make the technology go away, but it's an issue that people need to look at as we continue to move forward with it. ■



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