Going to Trial During the Pandemic

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During the coronavirus pandemic, the question arises: Should litigants and lawyers attend trial proceedings through the technology platforms that exist, like Zoom and Skype, or should we all strive to attend court in person? The answer is evolving as infection rates change and as we learn to implement sound safety measures.

Some court proceedings require in-person attendance, while others can be handled remotely. Criminal trials, for instance, where defendants face incarceration, are being held in-person. On the other hand, civil motions and appeals can be filed and argued without a courthouse appearance. Person to person contact, we have learned, is not always necessary. But evidentiary trials pose challenges in a pandemic. This is especially true for virtual hearings, as there are limits on their efficacy.

As I write this, four months have passed since the World Health Organization declared COVID-19 a global pandemic. Courts and arbitration firms are reopening. Though various mandates have been issued regarding what can open, what cannot, where we can dine, where we cannot, and so on, little has been written from courts discussing the struggles judges face. Two noteworthy opinions were recently issued in a pair of divorce actions pending in New York State Supreme Court.

Difficulties in a Virtual World

In the first case, S.C. v. Y. L, 2020 NY Slip Op 50590(11), 67 Misc.Bd 1219(A) (Sup Ct. New York Co. May 18, 2020), the husband moved for contempt against his wife because she was not following the court's orders regarding visitation rights with his children. He also sought to have her held in contempt because she would not leave the marital residence as ordered so it could be sold. The court, Justice Matthew Cooper, noted that judges have been operating in a virtual world now for months, performing their duties "from their kitchens and living rooms instead of from their courtrooms."

Bench trials and evidentiary hearings are being conducted with the participants all in different locations. But he astutely noted: "Still, no matter how advanced the technology, helpful the support services, and surprisingly fast and successful the transitions implementing the technology, I believe most judges, and most attorneys as well, find virtual proceedings to be a poor, if necessary, substitute for actual ones." The court said:

Judges are frequently called upon to assess each parent's credibility, character, temperament, and sincerity. This is difficult enough even in a physical courtroom setting. But at least there, the judge can closely view the parties both on and off the witness stand, scrutinize their body language, note how they react to what happens in the courtroom, and observe how they otherwise comport themselves throughout the proceedings. It becomes much harder in a virtual courtroom setting, such as the one presently operating out of my kitchen, where the view is limited to what can be shown in fragmentary form on the screen of a laptop computer.

The case was two years old, and the court, therefore, became familiar with the parties. The motion papers and oral argument from counsel allowed the court to make appropriate directives to ensure that the father was not deprived of

access to his children. The court wrote that addressing issues of contempt of court—and proper sanctions—to be harder to resolve in a virtual world. Assuming there was a contemptuous disregard for the court's orders in vacating the marital apartment, can a hearing to address the wife's contempt via computer screen provide a proper forum where the outcome could be imprisonment?

The court concluded that "a contempt hearing is far too serious a proceeding to operate under these less than optimum conditions." And even if a proceeding to decide contempt was appropriate, "it would be unthinkable to incarcerate anybody for an offense like not leaving one's home during the COVID-19 outbreak, with the serious threat of infection rendered even more acute by the inevitable conditions of incarceration."

One might conclude, the court wrote, that the wife was getting away with contempt, and not being held accountable. The court said that may be true for now, but only for now. When the marital house is eventually sold, the proceeds can then be escrowed and divided not equally, but equitably, to award the father all damages to which he is rightfully entitled based on the wife's disregard for the court's orders.

The second case, AS. v. N.S., 2020 NY Slip. Op 20161 (Sup Ct. New York Co. July 1, 2020), concerned custody of the parties' young children. The judge scheduled trial for July 13, 2020. Further postponements, the judge wrote, could harm the children given the "intense acrimony" between the parents. At issue was whether to have the custody trial held virtually, as scheduled, on July 13, 2020, to which the mother's counsel agreed, while the children's attorney and counsel for the father objected to a virtual hearing. The court ruled that the custody hearing would proceed virtually as scheduled, over counsels' objections.

The court acknowledged the limitations and "inherent difficulties" involved in virtual hearings, but said, given the unpredictable nature of COVID-19, the children's best interests were paramount. It cited cases that struck the balance between proceeding with a virtual trial, with its inherent limits, against waiting for an in-person trial. It ruled in favor of the former, citing, among other things. New Jersey's recent rules directing that most virtual hearings proceed even over attorney objections, with the exception in matters involving sentencing, termination of parental rights, mental incapacity hearings, or matters that could result in a jail sentence.

The court's decision to proceed with trial is understandable. However, it is unclear why it did not have the hearing in court, consistent with the New York State Court website showing that it is now in phase three of reopening, which includes in-person proceedings for "essential family matters,..heard by the assigned judge." See http://www.nycourts.gov/limited-fiiings.shtml. The website also states that a "limited number of bench trials" are authorized.

As we move ahead in the coming months, virtual trials hopefully will be less frequent, limited perhaps to cases where both sides agree to proceed remotely. If one or both parties want to try the case in the courthouse, the protocols in place, discussed below, should permit it.

Safety Protocols

On July 6, 2020, the Southern District of New York reopened courthouses to the public. All individuals seeking to enter the court must be screened for COVID-19 exposure. Screening includes measurements of body temperature. Once inside the courthouse, individuals must wear masks, observe social distancing and wash or sanitize their hands often. Sanitizers are stationed at all entrances. Markings are being placed in the well of the courtroom, at counsel tables and in the public seating gallery, to indicate where people may stand or sit. Markings will also be placed on gallery benches, indicating where it is permissible to sit. These protocols have been adopted with the guidance of the CDC, New York State, and other health experts.

As of this writing, most courts in New York State are in phase four of reopening. New York State courts in New York City are in phase three. The distinctions of each phase are explained at http://www.nycourts.gov/limited- filings.shtml. Most of the state courts provide for virtual rather than in-person proceedings for:

- non-essential matters
- juvenile delinquency proceedings
- adoptions
- eviction matters in which all parties are represented by counsel
- proceedings pertaining to a hospitalized adult
- mediation and other types of alternative dispute resolution, and
- criminal matters, except preliminary hearings, and selected plea and sentencing proceedings.

In person proceedings are now authorized for preliminary hearings in criminal cases for defendants in jail on felony complaints, sentencing, and a "limited number" of bench trials in civil cases.

As for New York State court protocols, a June 9, 2020 press release states that the following will be enforced in the New York State courts within New York City:

- Non-employee court visitors will have to undergo COVID -19 screening before entering the courthouse
- All staff who interact with court visitors must wear a mask
- Anyone entering the courthouse will have to wear a mask
- Courthouse areas will be carefully marked to ensure proper physical distancing
- Court facilities will be regularly sanitized
- Acrylic barriers, hand sanitizer dispensers and other safety features will be installed in courthouse areas as needed.

Conclusion

When and where a person feels comfortable in public is a matter of preference. However, thankfully, we have, as of now, contained the virus's spread in New York, and court administrators have now implemented safety protocols. All efforts should be made by judges, therefore, to proceed with evidentiary bench trials in person when possible. It's hard to argue that effective advocacy and trial rulings are undiminished in a virtual setting. If an in-person trial is not yet possible, a virtual trial may be warranted. But that should be the exception.

If a trial lawyer objects to proceeding with a virtual evidentiary trial because of its obstacles, those objections should be carefully weighed. The decision for a court, with so few rules in place on this narrow issue, to conduct one civil trial in the courthouse while having another tried virtually raises fundamental issues of fairness given the advantages of the former. Given current technology, the shortcomings of virtual trials are uniformly acknowledged, and should be conducted sparingly.

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