A Rearview Look at the Pandemic - *New York Law Journal*

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The World Health Organization declared the COVID-19 pandemic over on May 5, 2023. For over three years before its long-awaited end, we lived differently. We traveled less, dined in more, became more glued to our computers and televisions, and stopped interacting in person. Now that the pandemic is behind us, it's worth reflecting on some of the changes that were implemented and their lasting impact on the legal profession.

A Google search on how the pandemic has changed the practice of law produces the response that attorneys suffered from increased substance abuse, alcohol consumption and stress. Sadly, this is true. But the intent of the search wasn't to read about the pandemic's immediate effect on trial lawyers, but how their daily professional lives have changed. The few articles that address this often delve into hybrid work schedules that have undeniably altered society. There are, however, other noteworthy changes.

Many courts are now more strained than before COVID-19 struck. Courts struggled, especially during the height of the pandemic, to manage growing caseloads and bring cases to conclusion. A backlog resulted, and much of that persists. Many cases take longer to get to trial and, justice delayed is justice denied.

At the same time, technology—much of which we had to start using because of the pandemic—has positively changed the profession. Had it not been for technological advances made over the last two decades (e.g., Zoom, Microsoft Teams and remote and mobile access), the judiciary would likely have been crippled by the pandemic.

The opposite happened. As the legal profession's drum beat on, courts and practitioners saw the benefits of technology. Lawyers continued to ably communicate with clients, adversaries and the court; conduct discovery; and file motions. Many courts held evidentiary hearings and other proceedings remotely. In April 2020, The Coronavirus Aid, Relief, and Economic Security Act authorized federal courts to hold civil and some criminal proceedings by teleconference. A month later, the U.S. Supreme Court took the unprecedented step of hearing oral arguments by telephone. Many tasks, as we came to learn, did not require in-person appearances.

Although in-person court appearances were commonly replaced through technology by compulsion, most practitioners and courts fully agree that many legal proceedings need to be in person. Stories abound where vexing problems arose at remote trials, including jurors connecting to the courtroom while driving. In addition, in-person proceedings allow for a much better overall experience, visually and auditorily, without room for the technological missteps and limits we all experienced in one form or another when using videoconferencing platforms. There is also no dispute that a courtroom commands a certain majesty and reverence that cannot be replicated by technology.

Courts have come to adopt rules to try to strike a balance between in-person and remote proceedings. For example, Rule 36 of the New York Supreme Court Commercial Division Rules states that if technology allows a party and counsel to

communicate confidentially, the court may, with the consent of the parties, conduct evidentiary hearings or non-jury trials through video technology. Many courts also now address oral argument on motions by videoconference. However, an in-person oral argument may be preferred when, for example, the motion is dispositive or there are multiple parties or documents involved.

But if it is routine, we learned videoconferencing is quite efficient. Courts appropriately now defer to the parties' counsel on the logistics of oral argument. Many courts in the New York Commercial Division, for example, address this in their individual part rules by stating that oral arguments on motions are presumptively virtual, but parties may request in-person argument.

Depositions may also be more efficient when taken remotely, and this too is a matter generally left to the litigants' discretion. Local Civil Rule 30.2 for the Southern and Eastern Districts of New York provides that a party's motion to "take the deposition of an adverse party by telephone or other remote means will presumptively be granted." A party can also file a protective order motion to take a remote deposition of an out-of-state witness, even if the governing procedural rules contemplate that the deposition is to be held in New York.

The pandemic taught us that many tasks can be done more efficiently through technology. Many of us will recall when a lawyer needed to travel to court and wait, sometimes hours, to be called by the judge or clerk for a status conference to discuss settlement prospects or get a discovery schedule. Today, status conferences with all counsel before the court by videoconference are routine. This lasting development is a significant time and cost-saver. So too with lawyer-client meetings. Before the pandemic, many clients came to our Manhattan law office to discuss issues in their commercial cases. Now, it is rare when this cannot be done effectively by videoconference.

Mediators likewise use these technologies with greater frequency. Given the current backlog with court dockets, there's a greater push to get civil cases into mediation for settlement. That's not surprising, as mediation has been encouraged since at least the 1970s when dockets became increasingly congested. But a client who has hired a lawyer to litigate the case often wants his or her day in court and to have the dispute decided by a judge or jury. Nonetheless, mediation saves the client time and money and most clients are receptive.

Although mediations were conducted in person without fail before the pandemic, we quickly saw mediation can be done remotely and saves money when travel is eliminated. Videoconferencing also allows the mediator to separate the parties and lawyers into different virtual "rooms" to allow for private online discussions, something that is critical to any productive mediation session.

But is remote mediation preferable? This too should be left to the parties' discretion. Maurice Gallipoli, the former Assignment Judge in the Superior Court of New Jersey for Hudson County, now of counsel at Porzio, Bromberg & Newman, observed that about half of all mediations he now conducts in private practice are done remotely. He said that whether the mediation is held in person or remotely is based on many factors, including attorney preference and travel for litigants. However, he acknowledged that in-person mediation is "more conducive to a better outcome."

It's hard to dispute that the parties' full commitment to the process if they aren't there in person can be, and often is, compromised. As to conducting binding arbitrations remotely, Gallipoli said that, unlike mediations, arbitrations are "really in-person bench trials," and a remote arbitration is disfavored because it is "no substitute to ascertain truth and witnesses' credibility."

As mentioned, there is no scarcity of literature on post-pandemic hybrid work schedules and their lasting impact. How the hybrid work schedule is structured will vary by individual and company preference, but having the option to work remotely is undeniably a game-changer. As noted by Forbes, attorneys are known "for having high-stress, high-demand careers that come with long hours in the office. Cutting out the commute time to work and having the ease of working out of a home

office means that attorneys can better balance their careers with their personal lives." According to JD Supra, as of January 2024, roughly 44% of lawyers in the United States work full-time in their office. Thus, more than half of all attorneys prefer to work remotely, at least sometimes.

While many things have changed, some haven't. The basic human need to speak with one another remains, and likely always will. We spend significant time hovering over one or more electronic devices, and that time only increased during the pandemic. True, email is efficient, but there's a fundamental need to hold actual conversations. In that vein, despite the many benefits of technology, the telephone remains a vital tool. A dialogue by phone helps clarify and streamline complex issues, allows one to actually hear a person's sentiments and voice inflections, and avoids both the ambiguities that can arise with written communications and the glitches that invariably come with videoconferencing. Similarly, the value of in-person networking remains. A virtual networking event has benefits, but it is no substitute for face-to-face social interaction. Being there matters.

Most practitioners didn't know that they could adapt to the virtual world as quickly as we all did. Most law firms and courts had the IT infrastructure and personnel in place in March 2020 when the need to go virtual was thrust upon us. However, the technologies were infrequently used. The spotlight then suddenly shone on IT departments, whose personnel proved indispensable in a tumultuous era.

With the advent of being able to store more and more data in the cloud, the proliferation of generative AI technologies, widespread e-discovery platforms, and the technological advances yet to come, they will continue to play an indispensable role in the legal profession.

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