

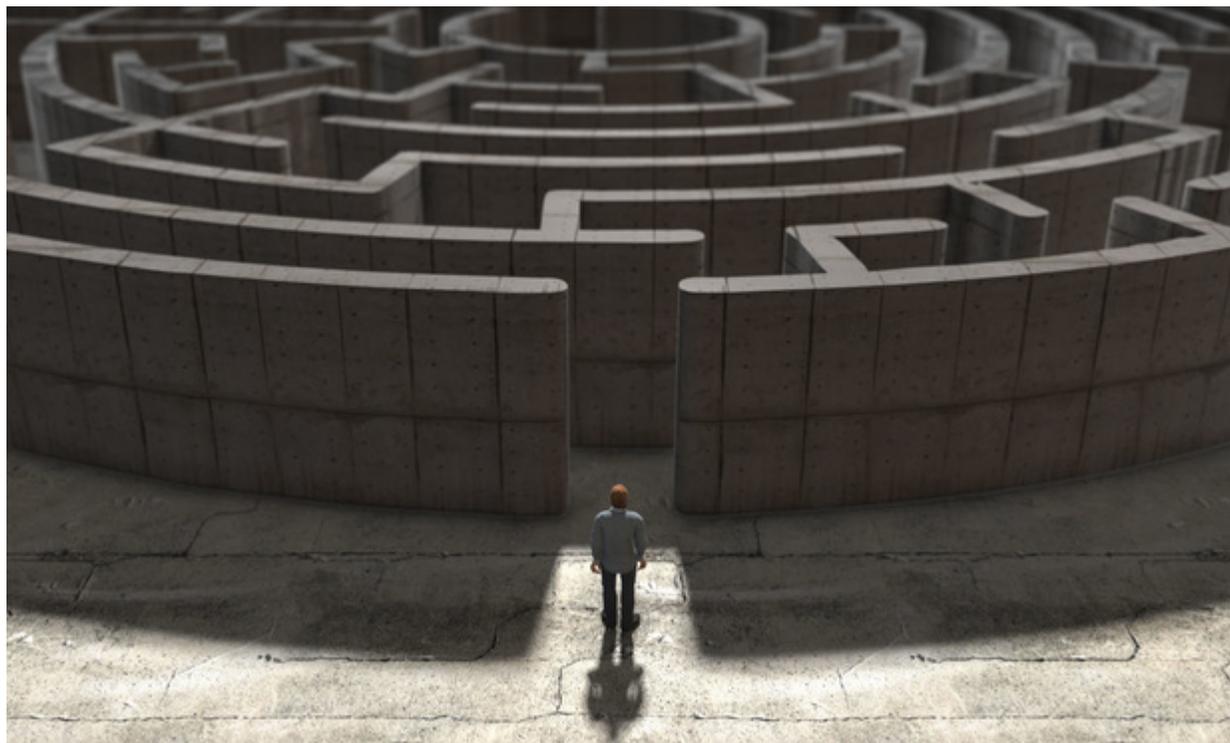
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## 'Rolling With the Punches': Litigators Use Creativity to Manage Their Cases Without Jury Trials on Tap

While several major court functions are still shut down, including the filing of new cases, jury trials and unrestricted access to courthouses, attorneys acknowledged that the reopening process is not entirely in the hands of court leaders.

By Jane Wester | May 11, 2020



New York's civil litigators have had to think outside the box to advance cases as jury trial dates still seem a distant possibility.

While they are exercising creativity and gaining access to more court services as restrictions loosen, the lack of face-to-face contact has continued to be a drag on their work, litigators said in a series of interviews.

Lawyers praised state court leaders for reopening the electronic filing of motions in pending cases categorized as "non-essential," (<https://www.law.com/newyorklawjournal/2020/03/23/cuomo-suspends-statute-of-limitations-marks-defines-essential-court-services-in-covid-19-response/>) which were frozen in March as the courts braced for the brunt of the coronavirus crisis.

While several major court functions are still shut down, including the filing of new cases, jury trials and unrestricted access to courthouses, state court spokesman Lucian Chalfen said court leaders will be monitoring and evaluating decisions from Gov. Andrew Cuomo, who has laid out a phased reopening plan based on public health benchmarks. Chief Judge Janet DiFiore has warned that long-term planning is difficult as the state continues to face unprecedented challenges.

"In a sense, the courts are a microcosm of our society at large. As health conditions improve in the broader community, they are likely to make it easier for courts to resume normal operations," said Ganfer Shore Leeds & Zauderer partner Mark Zauderer.

Electronic motion filing, which reopened Monday (<https://www.law.com/newyorklawjournal/2020/04/30/relaxing-restrictions-ny-courts-say-electronic-motion-filing-is-set-to-resume-for-pending-cases/>), was the court system's second major step back toward full function. The first, on April 13, allowed judges to hold virtual conferences in pending cases. As of Thursday, judges have held conferences in about 30,000 cases, and about 10,000 cases have been settled or otherwise disposed, Chalfen said.

David Miller, a partner at Greenberg Traurig and a former assistant U.S. attorney in the Southern District of New York, said attorneys and litigants alike will have to continue "rolling with the punches" as the court system seeks a new normal.

"It's really difficult to anticipate how cases are gonna play out over the next three to six months and when trials are going to resume," he said. "It's also difficult to predict what logistics courts will put into effect in order to ensure that trials are conducted in a safe manner."

Zauderer, who led New York's Commission on the Jury during the tenure of Chief Judge Judith Kaye, said the assembly of new jury pools will involve many of the same challenges as the efforts to bring employees back into workplaces.

Adjustments will be necessary to make people feel secure, Zauderer said, and that process is likely to take time.

The unusual circumstances of the pandemic have required creativity from lawyers who want to resolve their cases, especially when setting a trial date is off the table. Zauderer said that from a business perspective, the lack of trials places a particular burden on personal injury law firms.

"Everyone knows cases don't settle so easily until there is an actual trial on the horizon ... and because that's been impossible at this point, it's affected many law firms whose cash flow depends on the continued processing and settlement of cases to pay the overhead and pay the lawyers," he said.

The economic stress of the pandemic has also affected clients, whether they're slow to pay bills or suddenly eager to resolve a case.

The pandemic may act as an "external pressure" leading some litigants to settle, Miller said.

Julian Modesti of Harris Beach, a Syracuse-based commercial litigator and mediator, said he encountered the opposite situation in one case, where settlement discussions fell apart because one party's financial circumstances changed abruptly.

Modesti said that so far during the pandemic, personal injury lawyers have been more likely to find a path toward settlement than commercial litigators.

"Everybody's cautiously surveying the landscape," especially in commercial law, he said.

He said attorneys have been interested in resolving cases themselves instead of going through a mediator, possibly because many lawyers have more time in their schedules right now.

In one case, Modesti said he was retained to mediate before the pandemic, but the mediation has been delayed because one attorney insisted it take place in person. Video and phone mediation is a cost-effective option that has grown in popularity, Modesti said, but some benefits of sharing a room are irreplaceable.

"It comes down to the intricacies of communications, interconnectedness and relationship-building, each of which is critical to a successful mediation but handicapped by the use of a screen or a phone," he said.

While the speed of the New York courts' transition to virtual work has been widely seen as impressive, Zauderer noted that the lack of in-person contact among attorneys is a real cost of the pandemic for the legal profession.

Lawyers have adjusted to the use of Skype and similar services in many ways, he said, but they're not the same as walking to a colleague's office down the hall to discuss a legal question.

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