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'Small Steps': Attorneys Welcome SDNY's Easing of COVID-19 Restrictions, But Say Return to Normal Remains Elusive

Attorneys are hopeful that trial delays—which have had significant "ripple effects" for civil litigation—would soon be eased, but one said practitioners were still "on pins and needles" when thinking about how the autumn may unfold.

By Tom McParland | June 15, 2021



The Daniel Patrick Moynihan U.S. Courthouse in the Southern District of New York, at 500 Pearl St. Photo: Ryland West/ALM

Attorneys on Tuesday praised a move by the Manhattan federal court to begin relaxing some of its safety protocols as the court inches toward an eventual return to regular in-person operations.

But the measures, which only apply to bench trials and other non-jury proceedings, were still preliminary and “small steps” that signaled a full resumption of jury trials was at least months away, the litigators told the Law Journal.

Lawyers interviewed on Tuesday said they welcomed a cautious and incremental return to normalcy, but expressed concerns about a possible uptick in COVID-19 cases heading into the fall, when viral transmissions are typically known to rise. They also said that courts would continue to monitor how effective vaccines were against variants to the virus in deciding whether to lift other restrictions.

“I think it’s good news,” said Daniel R. Alonso, a partner in Buckley LLP’s New York office.

“I think the court is being responsible in doing it step by step,” added Alonso, who said he feels “completely comfortable” with the idea of being in a courtroom.

The U.S. District Court for the Southern District of New York announced Monday that, among other things, fully vaccinated persons in courtroom wells would be allowed to remove their masks and no longer observe social distancing when all participants are fully vaccinated. The guidance, however, did not include spectators in the galleries, who would still be required to mask and maintain distance.

The new masking protocols also would not apply when some participants to the proceedings are not vaccinated. In those instances, the court said, it would be up to a judge's discretion whether to allow court staff and attorneys seated at the same side of a counsel table to remain masked without maintaining physical distance.

"While we are hopeful that current downward trends in COVID-19 positivity rates continue, we are mindful that we could start to see a trend in the opposite direction as we ease restrictions," the court said. "If there are outbreaks, we will have to reassess our policies and consider re-imposing certain protocols."

The move was expected to impact a number of situations in both the civil and criminal context, including conferences, oral argument on motions, bail hearings, sentencing and evidentiary hearings.

"It will be immensely helpful for everyone to be able to see each other without masks in all of these key situations," said Rachel Maimin, a white-collar criminal defense attorney and partner with Lowenstein Sandler.

"I personally have been and continue to be confident in the policies put into place by Chief Judge [Laura Taylor] Swain and feel safe and eager to be in court," Maimin said in emailed remarks.

The court, meanwhile, is cognizant of an ever-growing backlog of cases that are set for jury trials. Nowhere has that strain been more acutely felt than in criminal cases, particularly where defendants are incarcerated ahead of trial.

So far, only limited criminal jury trials have resumed in the Southern District, where just a handful of large courtrooms have been outfitted with protective equipment to handle the proceedings.

Carrie Cohen, a partner with Morrison & Foerster, said that the Southern District needed to "weigh safety with constitutional rights."

"The court, as it should be, is proceeding carefully in easing restrictions and is consistent with all the guidance from the [Centers for Disease Control and Prevention]," Cohen said, saying this week's announcement represented "small steps" in the right direction.

"In the court system, the criminal justice system, there's individual rights at stake, and there's a very large backlog," she added.

Cohen said that her own situation allowed her to feel safe returning to the courtroom, but that was a "personal" decision for every attorney. The course of the pandemic, Cohen said, proved that the virus was "unpredictable," and major public health questions still loomed.

"Everyone is a little bit on pins and needles for the fall," she said.

Mark Zauderer, a prominent New York trial and appellate lawyer with Ganfer Shore Leeds & Zauderer, said that prolonged trial delays also had significant "ripple effects" across pending civil litigation.

Most cases, he said, settle when a trial is imminent, but when trials are pushed off indefinitely, there was "much less incentive for the parties to make the hard decisions" that are involved in resolving disputes.

State and federal courts, Zauderer added, were both struggling with the problem of how to find space and safe accommodations, both of which “require a great deal of creativity and steps to ensure safety.”

“Jury trials are the most challenging issue as courts gradually reopen to adjust to the improving conditions,” he said.

Still, attorneys expected their practices to benefit from the incremental easing of restrictions.

Alonso, who litigated a fully remote preliminary injunction hearing last year, complimented the judge’s handling of his case, but said overall it did not compare to the real thing.

“Although our client prevailed in the hearing, it was kind of an unsatisfying experience to examine a witness on video,” he said.

“Every little step on a path to returning to normal is a good thing,” Alonso added.

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