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Digital Courtroom Advocacy: A Second Look

What will happen when the pandemic subsides, as it eventually will? Will the advent of digital technology forever alter the way in which law is practiced in the courts?

By **David B. Saxe** | May 05, 2020



The COVID-19 pandemic has thrust a dagger into the heart of our state court system. Digital technology will, however, enable the court system to return its operations to what might be termed a “new normal.” Just recently the Appellate Division, First and Second Departments, announced their transition to virtual court operations and the First Department indicated that it would schedule a May Special Term, to hear prior perfected appeals (before the COVID-19 pandemic) on submission or by Skype.

The Office of Court Administration is to be applauded for its heroic efforts in seeing to it that all available technology is utilized to enable the courts to continue to fulfill its vital functions.

But what will happen when the pandemic subsides, as it eventually will? Will the advent of digital technology forever alter the way in which law is practiced in the courts?

Joel Cohen has written a cogent and perceptive piece (“Courtroom Advocacy, When This Is All Over (<https://www.law.com/newyorklawjournal/2020/04/02/courtroom-advocacy-when-this-is-all-over/>),” New York Law Journal, April 3, 2020), in which he discussed the possibility of digital advocacy becoming widely utilized and accepted in the legal profession after the chaos of the current crisis has subsided. It is inevitable but, at the same time, Cohen correctly points out how important the in-person, physical presence of lawyers

in court is to the overall pursuit of justice. What would be lost if lawyers were relegated permanently to the screens of their laptops or iPads is to Cohen the advent of a barren world where the skills of experienced advocates is lessened, if not eliminated.

In another recent piece (Ross & Hennessy, "How COVID-19 Might Uproot Centuries of Litigation Tradition," Law360, April 22, 2020), the authors note that the history of litigation involves a foundational tradition of reliance on demeanor evidence for the purpose of making credibility determinations—and that the current pandemic has abruptly altered that tradition. They seem to have a more benign view of digital technology as it will intersect the litigation world; they point out that video and teleconferencing may bring about more courteous behavior and lessen intimidation and bullying tactics practiced by certain lawyers.

Litigation—the work that lawyers do in court—is at its root social and embracing, even through all its rancor and argumentative engagement. Lawyers in court regularly interact with other lawyers, judges, witnesses, jurors and assorted court employees and, in doing so, pick up hints and stratagems from these connections enabling them to better represent their clients. Many of these benefits will be lost if the litigation process allows the curtain to be brought down on in-person appearances in place of the sterility of digital advocacy.

It is not only lawyers and their clients who will lose out. Judges—the other end of the courtroom continuum—will also be affected. Interaction with lawyers is a fundamental part of a judge's life on the bench—at conferences, hearing argued motions, and of course, trying cases. Suppose lawyers are left to the sidelines, no longer able to interact directly with judges except through a Zoom filter?

I wonder how judges presiding in the Matrimonial Parts in Supreme Court (where I sat for about six years) will now be able to effectively navigate the contentious conferences that involve custody, visitation and relocation disputes. Digital technology—even with the ability to utilize breakout rooms on Zoom, may be inadequate to counter the need for in-person connections to deal with the recurring flow of emotions often attendant to these issues. I wonder too how appellate panels will deal with the effect of not sitting together on the bench or even at the conference that normally follows argument. Will this cause a lack of cohesiveness that I believe is vital for appellate adjudication and, if so, to what extent can it be countered by digital technology?

Add to this a point that at first may seem minor or even silly—loss of the ceremonial function under which a judge or judges enter the courtroom. I have always believed that this process sets the courtroom aside as a place of dignity where serious work was to take place. Removing this tic from the past through the use of technology might reduce judges to mere clerks in the eyes of the public.

But all this is speculation. What we do know is that the current pandemic has altered the way law is being practiced. Certain of the old ways will be properly eliminated by technology. Many of the mandated appearances for litigation were time-consuming, expensive and unnecessary. For example, mandated in-person appearances for discovery and status conferences ought to be consigned to the dustbin. Digital technology can effectively fill this gap here and in other areas as well. But, we should be careful not to allow our litigation practices to lose the power, energy and excitement of lawyers coming to court to do what lawyers do best.

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