

Snapshot of commercial litigation amid a pandemic

Late last year, Dale A. Worrall, a member of Harris Beach's business and commercial litigation practice group, litigated a two-week bench trial in Cooperstown.

All the lawyers wore masks. Whenever the lawyers had to touch exhibits, they had to wear rubber gloves. Worrall learned that the gloves would make it hard to turn pages, so he learned to wear just one glove. Witnesses wore face shields "so the court could weigh their credibility."

"By day two or three, it's the new normal," Worrall says.

This is commercial litigation in the era of COVID-19.

Worrall's experience trying a case in person appears to be the exception to the rule as commercial litigators report that both the federal judiciary and state judiciary have moved to handling the vast majority of matters through virtual appearances and videoconferencing technology.

"Everything is running very smoothly," Worrall says. "Virtual court appearances, virtual arguments, are the new norm. They're very, very smooth. The courts did an absolutely remarkable job in keeping these cases moving. I have not seen a significant backlog in cases."

Mallory K. Smith, an associate attorney with Pullano & Farrow's litigation department, says that when the courts were mostly shuttered during New York's shutdown in 2020, sparking a backlog and causing commercial litigators to adjust how they are approaching cases right now.

Smith notes that clients are not huge fans of having cases drag on for years.

"A lot of cases look like they are going to be dragging on for a long time," Smith says.

Smith says that clients are now more interested in pursuing alternative dispute resolution like arbitration and mediation in order to resolve their disputes due the pandemic's effects on caseloads in the court system.

Courts also are encouraging parties to pursue private mediation, Smith says.

Smith also has found that collegiality and understanding from opposing counsel, clients and judges has surged because of the challenges presented by the pandemic and affected how "people are approaching commercial litigation cases," Smith says. "People are very cognizant about the limitations on attorneys and clients because they're working remotely or not at full capacity.

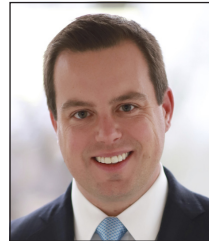
"People are a lot more accommodating with extensions," she says. "Courts are not as strict with scheduling orders. They still want you to try to comply with them, but they are not as stingy with granting extensions. I have found that to be very helpful."

Smith notes she has had the experience of having opposing counsel not respond for two weeks and then finding out that they had COVID-19. It is important to extend professional courtesy and "just take into consideration people's health and living situations," Smith says.

"Everyone understands that this is something no one expected," Worrall says. "It's a once in a lifetime event. No one is rushing off the courthouse to file an action. People try to work these disputes out and not file a formal action unless it's absolutely necessary or one party feels that the other party is using the pandemic to avoid an obligation."

Randy Oppenheimer, Barclay Damon's commercial litigation practice area co-chair, says that "there have been no jury trials downstate, and here in Western New York there is such a huge backlog in so many kinds of commercial matters. But there also is a very large backlog in criminal matters.

"The courts are pushing for lawyers to consider mediation to try to



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resolve cases. The courts are pushing lawyers to opt for bench trials rather than jury trials as those can be virtual. I don't know when we'll have jury trials."

Brittany Lawrence, another partner at Barclay Damon specializing in litigation, also says that there is a backlog regarding the cases that are ready to go to trial. She says that she is hearing from both the federal and state courts that more cases are being settled.

"Courts are encouraging parties to resolve their disputes," Lawrence says. "It's been a stressful time for businesses. If everyone rushes to file all sorts of cases, that is not going to be productive."

Earlier on in the pandemic, litigators anticipated more litigation over alleged failure to perform contracts and the termination of contracts, but businesses have been able to reopen and continue to operate,

Lawrence says. As a result, disputes that have arisen since the start of the pandemic have been more related to normal business disputes than anything driven directly because of COVID-19.

Routine discovery practice and filing motions has not changed, Oppenheimer says.

Depositions are mostly being taken virtually at this time, Oppenheimer says, but lawyers are able to accomplish most of the goals of depositions through the software programs that have been developed to handle virtual depositions.

During an in-person deposition, Oppenheimer says he is able to point to a specific place on a document page in order to draw a witness' attention to it and he is constantly scanning the entire room to see what is going on.

During a virtual deposition, dozens or hundreds of documents have to be uploaded to the platform ahead of time, and it's hard visually to look at the thumbnail images on a screen to gauge what is going on, Oppenheimer says.

"There's just something about the depth perception we have and the range of vision we have," Oppenheimer says.

Anytime you need to weigh the credibility of a witness you want to do depositions or trials in person, Worrall says.

"To the extent you're going to want to read and understand credibility, it's better to do it in person," Worrall says.

Oppenheimer says he has been able to conduct effective depositions virtually and defend depositions virtually effectively.

"It's effective enough so that after the pandemic is finally gone, rather than jumping on an airplane to fly to California or Minnesota or other places to conduct a deposition, I might just schedule them virtually," Oppenheimer says. "They are that effective."

Worrall notes that, in a virtual deposition, all the documents that might be used in the depositions must be marked ahead of time, and a document can't be marked on the fly because a witness says something unexpected.

Oppenheimer says he is skeptical about when trials will be able to resume. He notes that jury rooms are often cramped and he questions when people will be comfortable being that close to each other.

"The whole concept of a trial is a public event but with the pandemic we haven't had any public anything," Oppenheimer says.

Delay in holding trials is not to everyone's disadvantage, Oppenheimer says.

Oppenheimer notes that defendants prefer to have delay in trials because "their risk is still unliquidated."

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