

Civil Litigation: Weathering disruptions while practicing in pandemic times



By **DAVID M. TANG**

“Do the thing and you will have the power.” – Ralph Waldo Emerson

“Hope the internet is still on,” I thought to myself as I force-closed the Skype app and then, with a quick prayer, re-tapped the link to the Skype call for the evidentiary hearing, from which I had just been dropped. I was in the middle of a direct examination of our main witness.

Such is the plight of an otherwise prepared lawyer in the summer of 2020. A day before, I had plugged in, then packed an extra battery charger, tested my microphone, and set up a mini-tripod in order to keep my iPhone at eye level for the virtual hearing. But this was the first time I was inquiring into matters, while miles away from my witness, who, as far as I could tell, was logged in while sitting in a cozy, well-lit corner of her kitchen.

Thankfully, my witness was patient and well-prepared. And the judge and opposing counsel seemed unphased about the 45 seconds that felt like an hour that it took me to get back into the hearing and complete the examination.

A Series of Firsts. This experience and being asked to navigate a number of other “firsts” have been the norm in my practice this year. Brené Brown has spoken about navigating the awkwardness of a tough “first time” — or as she calls it, the FFTs (“effing first times”) — that inevitably present in new situations or in pandemic times. For me, the list of new situations includes advising clients on pending cases when courts are closed and no motion practice is permitted, reviewing a stipulation to set ground rules for remote depositions (including no electronic communications until the conclusion), and successfully navigating an application to designate a commercial case as an “essential matter” during the COVID-19 Public Health Emergency as set forth in Administrative Order AO-78-20 during the period, when no new filings were then permitted, under the restrictions of the governor’s

earliest New York on Pause Executive Orders.

Some Rules Still Apply. Fortunately, a number of things remain unchanged: Good briefing and better facts than the other side resulted in a favorable ruling on a motion for summary judgment of dismissal, after my first virtual special term argument. The experience was unusual in that two cases were returnable that morning but because the court used a separate Skype link for each matter, I did not see or hear argument on the other case. Further, the regular routine of motion argument was missing: There was no walk to the Hall of Justice, no deputies at the security desk to acknowledge, no jostle for space in the elevator, no judge in a black robe, no exchange with colleagues in the hallway before or after special term. That morning, it was just me, my notes, a tripod, and eight minutes of argument and questions, while staring at the camera lens of my iPhone.

Also, despite the recent disruptions to personal and professional routines, many aspects of the practice of law are untouched, including: the basics of case law research, statutory deadlines, the power of persuasive writing, the reliability of e-filing, clients’ expectations for clarity and responsiveness, and my own and my law partners’ desire for a frictionless experience in the delivery of legal services.

Also, unchanged is the opportunity to review habits and procedures and test new processes to improve the delivery of work product. For my most recent virtual hearing, instead of preparing a briefcase full of marked folders with four copies of each exhibit, I checked to be sure we had a complete set of PDFs in easily accessible format, so that the necessary document could be sent to the court and counsel during the hearing or at break, which proved convenient. My new checklist for witness preparation includes a reminder to confirm the witness has prior experience with the remote conference technology or to test it, and also to remind the witness to be near reliable Wi-Fi at the appropriate time, and to keep their equipment charged or plugged in if she will be using a mobile device to login.

Setting and Managing Expectations is Still Critical. Before this year, I never had to inform a

client that there was a prohibition on filing new state court actions. Our team navigated those kinds of conversations this spring. I confirmed that my colleagues and I were monitoring the multiple executive orders and memoranda from the Administrative Law Judge to stay abreast of when the Pause-related restrictions were lifted. Setting new expectations while adjusting my own routines, which are impacted by school and gym closures and new rules for social interaction, remains a work in progress. I was pleased to successfully pitch new work via a Zoom conference. Although the virtual introduction to the client was different from the “before times,” the work after being engaged, fortunately, is still the same — gather and review the necessary client documents, outline a litigation strategy and get client authorization to proceed.

Still, dealing with little changes in so many areas (remembering my mask when I leave the house, adjusting to the firm’s new clean-desk policy, refining the meet-in-the-grocery-parking-lot-for client-signatures/notarization technique, logging in daily to report no recent COVID-19 symptoms, navigating visitor restrictions at the office, respecting limitations on the number of people allowed in the elevator, etc.) is mentally taxing. Even those who have stayed safe and avoided contracting the virus are at risk of COVID-related brain fog. Articles in *Forbes* and the *Huffington Post* have described “allostatic load” as the accumulated physiological burden from stress and frequent secretion of stress hormone and a normal reaction, when individuals are unable to do activities they are accustomed to and are missing out on stimulation that keeps the brain engaged and active. Although it was somewhat normalizing to know that I am not alone in dealing with pandemic-related brain fog, it still did not alleviate the symptoms of constant, continued disruption. In short, it is generally exhausting to be in public health emergency survival mode for four-plus months.

To set up better outcomes and ensure I am as well-equipped for the work week, I am enjoying the benefits of some regular exercise and incorporating, with some success, an evening wind-down routine that includes unplugging from

devices after hours. I also recently decided that regardless of whether we were looking for a challenge, those who are called to advise and represent clients in pandemic times have the opportunity to learn to build new habits, to adjust faster,

to improve and enjoy the practice of law more than ever. To quote Marie Forleo, "Everything is figureoutable."

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