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President's Podium:

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Navigating a Legal World Changed by COVID-19

Silver Linings Among the Major Changes in Litigation During and Following 2020

No reasonable person would contest that 2020 was a year full of changes from the “normal” way of living. It was no different for attorneys litigating matters. There were numerous changes to litigation that were, at first, new to us. However, as the year reached its conclusion, it became apparent that not every change in 2020 was a negative. Quite the contrary, there were several notable changes that were somewhat positive if not outright positive.

First, the ability of the legal system to rapidly adapt was certainly a positive, commendable development. There were undoubtedly changes in litigation, as evidenced by the difference in practice between January 2020 and December 2020:

- In the beginning of 2020, nearly all court proceedings were held “live” in court. Few judges allowed telephone hearings and very few held video conference

hearings. By the end of the year, video conference hearings and oral arguments were widespread.

- In the beginning of 2020, video depositions were increasing, but still fairly rare. By the end of 2020, the overwhelming majority of depositions were taking place via video recording.
- In the beginning of 2020, client interactions and seminars were far more likely to be in-person. By the end of 2020, client interactions were nearly exclusively done by email, telephone, and (increasingly) video.

If nothing else, the legal profession showed flexibility to adapt to these changes very quickly. Attorneys and judges learned new technologies, as did the staff members of law firms and courts. In many ways, the speed at which the system adapted is quite remarkable.

The reason for this adaptation can be traced to the desire for resolutions inherent in the legal system. One thinks of the maxim “justice delayed is justice denied.” Indeed, without regard to whether an attorney is on one side or the other, all litigators *should* agree that whoever *should* prevail in a

litigated matter *should* prevail sooner rather than later. The quick adaptation by the court and attorneys reflects that our otherwise imperfect legal system was able to stay somewhat on course notwithstanding new, unanticipated obstacles.

Second, while there is no doubt that this is not a universal rule, there was certainly an increase in the civility of many litigated proceedings. After pondering this issue, the reality may be that much of the combative tone from both attorneys and judges comes from the fact that there is an audience. At least in state court practice, it is fairly common to have a “motion day,” where the court hears numerous motions consecutively in front of court personnel and a gradually decreasing number of attorneys and parties. Judges have an incentive to make subtle (and not-so-subtle) statements as to who is in control of the courtroom, while attorneys have a tendency to want to look good for the spectators and their clients.

In contrast, while many Zoom hearings and oral arguments were broadcast live or recorded for future viewing, there was rarely an audience of any kind. A judge participating in a Zoom video conference

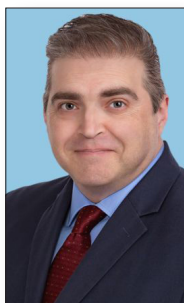
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with a few attorneys has no need to control the courtroom, as the court is in absolute control of the video conference itself. Attorneys do not have an audience to “show off” their oratory skills and can get right to the point.

Frankly, it has been refreshing to participate in nearly every motion hearing or oral argument. Regardless of the result, there was a very noticeable difference in the way that the hearings transpired. During appellate arguments, the judges and justices seem to have been structuring their questions—rather than just having the first or loudest voice prevail. During motion hearings, attorneys have been encouraged to “mute” their microphones (somewhere an attorney joke is writing itself).

Of course, one might also wonder whether the more civil tone arises simply because it is more physically comfortable to attend or preside over a proceeding from the comfort of one’s own office or home. Could it be that simple? If so, this is not necessarily something that should be discouraged moving forward.

Third, there has been no decrease in the quality of judicial opinions. Frankly, as a firm that files numerous summary judgment motions, it has been a banner year both in terms of quantity and obtaining unexpected results from specific judges. Judges that have historically been averse to granting summary judgment issued opinions doing so. The year 2020 was also notable for the number of granted motions for reconsideration. The increasing number of such motions granted suggests that judges have more time to carefully review the motions, rather than denying them with simple boilerplate language. Again, any change that leads to

more accurate rulings should be welcomed as a positive change.

Finally, 2020 brought changes to interactions with clients. Needless to say, there was little or no opportunity to physically interact with clients during most of 2020. This applied to depositions and facilitations, with these events taking place remotely via video conference only. However, it also opened up other opportunities—such as video conferences and seminars. In some ways, a Zoom video conference with a client in 2020 was more personal than a telephone call with that same client in 2019. With the widespread use of Zoom and other such mediums, it is now far more “normal” to use them for a variety of interactions.

Clients may also have noticed that billing entries are now different. Litigation budgets are now being adapted to reduce the amount of time and expense expected for events. Out-of-state depositions can now be taken remotely, at greatly reduced cost for travel. With reduced travel, this means more time for attorneys to focus on the legal issues within the same budget. Another way of looking at that is that clients are getting more out of the same, or perhaps even lower, litigation budget. This, of course, cannot be a bad thing.

In conclusion, regardless of how one views 2020 overall, there were vast changes in litigation. There is no shortage of articles regarding the negative changes. However, there were some silver linings to the changes in litigation that are worth noting. Perhaps building off these changes, courts and attorneys can make more positive changes in the future.

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