



Podcast Transcript

Litigating in a Pandemic: Tips on Dealing with the New Abnormal

Date: September 2, 2020

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Run Time: 22:52

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Lee: Just how much impact is the global pandemic having on litigation activity in courts and arbitration proceedings? How are lawyers and the companies they represent reacting to the challenge this presents to their legal matters? I'm Leeann Lee and you're listening to BakerHosts. On today's episode we will answer those questions and others including a rundown of things to consider and steps to take when you're involved in virtual litigation activities with our guest, John Siegal. John is a partner in BakerHostetler's Litigation Group and has been a trial lawyer based in New York City for more than 30 years. Welcome to the show John.

Siegel: Thank you Leeann.

Lee: To start out with, can you tell us what's been happening with cases and courts since the coronavirus interrupted business in March?

Siegel: Well Leeann, I think we've gone through three phases: shock, adjustment and getting on with it. From mid-March when it felt like the world was closing down, well into mid- to late April, I think there was just disbelief, cancellation of deadlines and basically just a giant adjournment. Then there was a period of adjustment where everybody started to think through what we could do and how we could get our business done, in terms of what the courts could do, what alternative media were available to do the work of litigators. And, my sense and my experience is from June, the beginning of June or so on, we really are in a different, but business-as-usual environment for most litigation.

Lee: Great, and how have you seen lawyers, judges and clients adapt to the new environment, especially in the latter part, in the last few months?

Siegal: Well, first off, obviously, is the pervasive use of videoconferencing technologies to handle all case developments, from court appearances, to depositions, to arbitrations. There's just been a giant shift of litigation activity online. Secondly, and I think this is my experience at least, in courts in the Northeast, which were very significantly closed from mid-March well into the summer, lawyers had to get together and manage our own cases with less access to the courts, less scheduled conferences, less case management. But most lawyers quickly realized, if we're gonna do business, we've got to find ways to move our cases together, and I think that has largely happened. So, it's sort of a diminished role of the courts, an increased role of lawyers cooperating to manage their own cases, and a really revolutionary shift in the use of videoconferencing tools and other online tools to learn to litigate in a socially distant manner.

Lee: Well, with that in mind, are there specific types of activities that appear to be moving forward, and are there other types of activities that seem to have stalled?

Siegal: Yes, for sure. I don't think anyone is really contemplating jury trials in this environment. My understanding, and I've been following this pretty closely, is there was one summary jury trial in a rural county in Texas, but there really have not been jury trials or attempts to hold jury trials. Courts and court administrators don't want to go through the process of summoning citizens to courthouses for jury service in a public health risk environment. Most other things have, to some degree, to a considerable degree, been proceeding, from arraignments that are happening day in and day out, certainly in the courts of New York, to arguments in the United States Supreme Court, which for the first time are being held by teleconference, and pretty much everything in between. I have colleagues who have tried cases in bench trials. I've tried a full arbitration hearing. There have been many depositions, court conferences and the rest, so once the giant coronavirus adjournment sort of started to ease, and before the courts have fully reopened for in-person appearances, which remains the norm in much of the country, and certainly in the courts in the Northeast, there's been a return to a form of normalcy that's obviously completely different because we litigate from our dining room tables and our basement offices and judges are wherever they are, and things are proceeding.

Lee: The new normal, as we all like to say.

Siegal: Yeah, I don't really find it normal. I think it's a new abnormal. It feels like suspended animation, but everybody's struggling through this.

Lee: Well, we've talked a little bit about the global environment. Let's talk a little bit about the individual experiences that you've had. What are virtual depositions like, and what are the problems and challenges you've encountered?

Siegal: I would say that virtual depositions are more like normal depositions than they are dissimilar. A cooperative deposition with collegial counsel is not that much

different in a videoconference atmosphere. A contentious deposition with confrontational counsel is not that much different. Some depositions are good experiences, other ones are bad. In terms of the challenges, I think there's some real technological challenges.

First of all, on virtually all videoconferencing platforms that I've been involved in with multiple locations, parties, counsel, court reporters in different locations, there have been freezes and glitches, particularly in the audio track, and I think it's critical that participants in depositions have a fallback plan to communicate among themselves if the video or audio platform freezes or fails. I think having cell phone numbers available and being able to text the participants or call the participants to alert the others when something goes wrong as a fail-safe is really important.

I know a lot of lawyers are worried about, and find it very difficult to examine a witness, because it's not like sitting in a room at a table with someone. You don't see their full body language. You don't see their full features. Many of us are very worried about that in terms of the ability to assess a witness in the ways that we like to think we're able to do, but I think there are some ways to better approximate that experience online. Different platforms have different features, but I've found, for example, that when examining a witness, it's very helpful to maximize that witness's presence on my screen and to minimize everybody else. If you're using the Zoom platform you can pin the witness's picture so that the witness remains throughout the dominant presence on your screen, and you can come as close to replicating the experience of looking the witness in the eye and conducting your examination. I've found that to be very helpful. I've done the same in a court conference, where I don't want to look at adversary counsel during a court conference, I want to focus on the judge, so I've maximized the judge's picture on my screen and minimized or even eliminated other lawyers so that I'm recreating to the maximum extent possible this sense of having a colloquy with the judge. I think those things have been most helpful in allowing me to adapt a little bit to the new environment.

Lee: Yeah, those are great tips. So, what's your takeaway, your overall thoughts about your experiences of appearing in court?

Siegal: Court appearances differ radically depending on the platform used. The New York state court system uses Skype only. A lot of us have had difficulties getting access and logging in, and that may be in part because the court system's technological capabilities have to catch up a lot. I have a case in Massachusetts where we had a pre-trial conference in state court in Boston, jury case now scheduled for trial in April, but the judge was very direct that the courthouse does not have sufficient technological capabilities to, for example, videoconference in remote witnesses in an effective way. So, the public sector institutions we're dealing with often are scrambling to catch up. Many of our court systems are underfunded and under-resourced and struggling into the 21st century, so some of those things have been more difficult to do. Other institutions, private mediation organizations for example, seem to be as advanced in their technological capabilities as big law firms like ours that have invested a lot in

technology over the years, and certain court proceedings adapt themselves better to these things than others. Appellate arguments, which are very structured, one person speaking at a time, tend obviously to work better than some of the messier court appearances.

I think the one thing that all of this requires from all of us who are participating in this process is, online you can't speak over each other. And while you can have a two- or three- or four-way conversation at a sidebar in a courtroom when you're all in person, only one person can speak at a time on any videoconference and that has to be rigidly enforced by the court reporter who can't possibly make a transcript. People are speaking over each other and you know, Leeann, maybe this is going to require a little better behavior from some of us who tend to interrupt and speak over.

Lee: Good point. I think that will hit home with a lot of our listeners. Similarly, how have your virtual arbitration hearings been working out?

Siegal: I had a three-day arbitration at JAMS, and it was flawless. There were several reasons for that, I think. Everybody did it voluntarily and so we were all committed to making it work. All of the lawyers in the case were people who had preexisting relationships in fact, three of us had been in the same law school class. So there was a cooperation and a collegiality. Our arbitrator in that proceeding, a Vivien Shelanski, is an arbitrator and mediator I've had before who is just exquisite in her manner and her, the atmosphere that she sets in the arbitration room. And it was a smaller case, it was a two-witness case. So maybe these were the best possible circumstances, but it went off flawlessly. Finishing an arbitration hearing at 4:30 in the afternoon sitting in your suit and tie in your bare feet at your dining room table may redefine the cliché of being all dressed up and having nowhere to go.

I think that there were two challenges. One is documentary exhibits are really hard and require a lot of thought. There may be lawyers who feel comfortable publishing documents onscreen in a Zoom or other videoconferencing platform. I'm 60 years old and not that technologically adept and I don't feel comfortable doing it. That arbitration went smoothly because we all agreed to distribute the exhibits to all participants in hard copy in advance. Everybody had a binder of the joint trial list, so the documentary exhibits were not difficult.

The other interesting thing that happened in that case, and I can't attribute this to the online environment, but I do think it contributed to it. This was a commercial case, was about money, of course like all of our business matters there are other things involved, but both of the witnesses at critical points at the end of their testimony became visibly emotional. They were both older men with great business experience, kind of wisened and toughened guys, and both of them became visibly emotional during their testimony. And I do attribute that to some degree to the online environment. Trials are weird, we trial lawyers don't realize how weird they are. We don't often realize what stress they put on our witnesses because we're used to this world and they are not. But there's something about sitting by yourself, in your home, under pressure, under stress, testifying under

oath with your company's business on the line that was clearly an intense and difficult experience for the witnesses. And I do think that's maximized by social distancing, isolation, the inability to physically walk down the hall with counsel and be reassured and the rest. So I don't think we should minimize how unusual and difficult this environment is, even as we turn somersaults to try to get used to it.

Lee: Yeah, and based on that experience you had and what we've talked about already, are there any other suggestions or tips for people who are participating in these virtual hearings that would help make their experience better?

Siegal: Well certainly you've gotta do a trial run-through, even for a deposition I think it's critical to have a moot court dress rehearsal-type situation with a witness so that the witness is comfortable and understands the look and feel of the environment. One thing that our arbitrator, Ms. Shelanski, did that I thought was enormously helpful was she said, I've been doing these, I find them more tiring than an in-person arbitration. There's something about sitting and looking at a screen that is more attentionally demanding than sitting in a room. Leeann, if I'm sitting in a room with you when we're talking and we're making eye contact, but I am not staring straight ahead at you all day. If I was actually it would probably be disconcerting and weird. You look around, you look at the distance, you look from person to person. Your attention moves. Online you're staring at the screen all day, and what she said and I find it to be true is it's just more tiring. And so she asked and we, she suggested and we agreed to shorter hearing days. We had a rigid three-hour in the morning, three-hour in the afternoon schedule that we stuck to religiously and it made it more palatable. So I think there are a lot of things like that this that you really should consider the impact of the online environment and what you need to do to mitigate it, ensure the comfort of your witnesses and not get driven kind of ragged, crazy intense that you can get on when you've been on a Zoom call for 8, 10 hours.

Lee: Well, given that this is going to be going on for the foreseeable future, what steps do you think that court systems and arbitration tribunals are going to have to take if pandemic social distancing continues throughout this year and into 2021?

Siegal: None of us really wants to contemplate that because this is going on and on and everybody wants it to end for all sorts of reasons, and most particularly safety and getting back to school and getting back to work. But look, I think it's prudent to treat this as a situation that is going to go on. It's important that things be scheduled very carefully, that dates be set and held. There's something about having to convene online that requires setting out the time frame differently than in the real world. Obviously, jury trials are the big hurdle nobody wants to deal with, nobody wants to think about. But as there are backlogs, and trial backlogs, if this does continue throughout the year and into next year there's gonna have to be some serious thought about how to do trials and even if there are ways to do jury trials. And we're all gonna have to get more comfortable with it. I think at the outset there was a lot of resistance to doing some types of things online. I have not had a virtual mediation, and I think at the beginning everybody thought a mediation is like the hardest thing to do because the whole theory in mediation is

you're together, and it's informal, and you talk and you work your way through things. I remember a client saying to me, we can't do a mediation, they only work if the mediator can stop on the way from the men's room back to the room and have a casual conversation. But I've heard from people who have done mediations that the breakout rooms really do provide for that, and I've heard of cases that have been successfully mediated and resolved.

So, I think we've gotta have a collective atmosphere of trial and error and of planning, to try to get through this with as few problems as possible. There are gonna be problems, it's suboptimal, we all know that. Maybe there are things that can't be done, there clearly are things that can be done.

Lee: That's for sure.

Siegal: But it takes work.

Lee: And, just as a final question, what do you think is the prognosis for litigation in a global pandemic?

Siegal: Litigation will continue to be able to solve problems, you know? Litigation doesn't solve all problems. Litigation can be abused and misused. I don't think that's any different in an online environment than in a real-life environment. But the litigation process by and large can be used to solve problems. I think it requires more cooperation among lawyers, more lawyer stealth case management if you will, but I have not heard of a system or an institution that hasn't adapted.

The Office of Administrative Trials and Hearings in New York City, which handles administrative claims of all sorts, has apparently held 20,000 virtual hearings since March. I'm on the Civilian Complaint Review Board in New York City. We hear all citizen complaints alleging police misconduct, and while there was great resistance by the police unions to participating in virtual interviews, in the end that is going forward in police misconduct cases and officers are appearing remotely for investigative interviews.

Appellate courts, some are reconvening in person but those that aren't have had quite successful Zoom hearings. The first one I think was the Supreme Court of Kansas that held a Saturday hearing the day before Easter to hear the legislature's challenge to the governor's stay-at-home order that barred church in-person sessions, and they held a remarkable appellate session on a Saturday with, I think it's a seven-judge court or a nine-judge court in different locations, lawyers in different locations. It was as erudite and sophisticated a constitutional administrative law argument as I've heard. So, the prognosis is bouncy. It's a rough road but it's a passable road and we're all trying to find our way down it together.

Lee: Well that's very helpful, and I want to thank you for your time today John.

Siegal: Thank you Leeann and thank our listeners who were themselves trying to manage their legal matters and their business affairs, and we're here to help.

Lee: Thank you John. If you have any questions for John, his contact information is in the show notes. We've also included a link to our Litigation Law Spotlight blog, where John is a regular contributor. As always, thanks for listening to BakerHosts.

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