

# Clients & Friends Memo

## **COVID-19 Update: COVID-19 and the Courts**

### **How Court Procedures Across the Country Are Changing and What May Be Here To Stay**

**April 7, 2020**

#### **Overview**

Americans are no stranger to calamitous events—whether human-induced (*e.g.*, the 2008 financial crisis) or nature-induced (*e.g.*, Superstorm Sandy)—and the immediate, and often long-term, changes which result. Currently, we face a disastrous pandemic not experienced by generations of Americans and it is causing profound changes in virtually every facet of life—health, personal mobility, business disruption, financial hardship, etc. The aim of this series of articles is to explore the numerous and varied procedural changes occurring in the legal system and to attempt to project those that may persist, even if in modified form, once the emergency is declared over.

#### **Emergency Procedures in New York District Courts**

In this article, we examine selected procedural changes implemented by the Federal Courts of New York. Specifically, all four District Courts have issued orders suspending commencement of all civil and criminal jury trials for a limited period of time. Personal service of process requirements for the U.S. Marshals Service under Federal Rule of Procedure 4(c)(3) or 28 U.S.C. § 1915(d) are currently suspended in the Southern, Eastern, and Western Districts of New York; and, most of the District Judges and Magistrate Judges for these courts issued individual orders granting filing extensions and hearing adjournments for specific cases on their dockets, as well as “Emergency Individual Rules and Practices” which specify preferred procedures for communicating with chambers and conducting conferences and hearings remotely.

While suspensions, adjournments, and extensions are likely to be limited to the duration of the COVID-19 emergency, other procedures—such as the use of remote-access technology—may persist. For example, new procedures being implemented for teleconferences and remote-participant hearings may become the new norm (or at least more widely offered as options), although they may largely depend on the nature of the hearing and the experiences of the Judiciary (and the Bar) utilizing them. Consider the modified court operations set forth in the notice issued by the Southern District of New York, effective March 30, 2020, which indicates that court reporting

and interpreting services are to be provided remotely.<sup>1</sup> As participants work through, and solve (in short order), any technological issues and related disruptions that might occur, and, perhaps, realize the judicial and party efficiencies which may result without loss of substantive impact, these mechanisms may become a “new normal.”

### **Emergency Procedures in the Second Circuit**

The Second Circuit has also adopted the use of technology to ensure the furtherance of justice amidst the limitations on social interactions. On March 23, 2020, the Second Circuit ordered that oral arguments would be heard by way of teleconference and, further, provided for public access by way of livestreaming the oral arguments. Depending on experience over the duration of the emergency, livestreaming public access could very well remain in place because it would allow, indeed encourage, more real-time public participation/observation of court proceedings in the future. In fact, an April 3, 2020 Law360.com article reported that the Clerk of the Court Catherine O'Hagan Wolfe said, “[t]he livestream has been working well.”<sup>2</sup> However, the proverbial jury remains out on whether the Second Circuit will conduct its oral arguments by means of teleconference beyond the current emergency. While perhaps it may remain available under special circumstances where, *e.g.*, arguing counsel cannot appear in-person, the art of oral arguments before the U.S. Courts of Appeals is practiced in a way that renders it far more effective in person—and possibly even via videoconference<sup>3</sup>—than teleconference.

### **What's Ahead**

As time goes on, we will attempt to follow and examine on-going experiences of the judiciary and the Bar with emergency procedures of the type outlined above and let you know if our predictions may still have viability. To the same end, we will continue to monitor the various courts for new or different emergency procedures and offer similar thoughts on their potential for persisting beyond the COVID-19 emergency.

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<sup>1</sup> Similarly, Local Rules requiring personal appearances for attorney admissions may be waived or performed remotely via teleconference or videoconference at the discretion of the presiding judge in the Eastern and Western Districts of New York. It is very possible that the courts make a decision, in a post COVID-19 world, to permit admissions remotely and only offer in-person swearing in ceremonies on a limited basis.

<sup>2</sup> Brush, Pete; *Virtual 2nd Cir. Off To Smooth Start But No End In Sight*, LAW360.com; <https://www.law360.com/articles/1260407/virtual-2nd-circ-off-to-smooth-start-but-no-end-in-sight>, last visited April 6, 2020.

<sup>3</sup> The U.S. Court of Appeals for the Tenth Circuit, while designating a number of criminal and prison appeals on an oral argument calendar for videoconferencing, also allows counsel in any civil or criminal appeal to request leave to present oral argument by videoconference. <https://www.ca10.uscourts.gov/clerk/videoconferenced-arguments-guide>, last visited April 6, 2020.

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Christopher Hughes	+1 212 504 6891	<a href="mailto:christopher.hughes@cwt.com">christopher.hughes@cwt.com</a>
Bradley Small	+1 212 504 6365	<a href="mailto:bradley.small@cwt.com">bradley.small@cwt.com</a>
Jessica Talar	+1 212 993 3833	<a href="mailto:jessica.talar@cwt.com">jessica.talar@cwt.com</a>