

Questions Clients Are Asking About COVID-19

U.S. Outlook: Top Questions About Civil Litigation Amid Coronavirus Outbreak

March 24, 2020

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Andrew Rossman
andrewrossman@quinnemanuel.com
Phone: +1 212 849 7282

Christopher Kercher
christopherkercher@quinnemanuel.com
Phone: +1 212 849 7263

Jonathan Bunge
jonathanbunge@quinnemanuel.com
Phone: +1 312 705 7476

Kimberly Carson
kimberlycarson@quinnemanuel.com
Phone: +1 212 849 7309

Owen Roberts
owenroberts@quinnemanuel.com
Phone: +1 213 443 3273

Karl Stern
karlstern@quinnemanuel.com
Phone: +1 713 221 7171

The coronavirus (“COVID-19”) pandemic has presented novel challenges to civil litigation. Courts across the country are struggling to balance the demands of justice and public health. Consistent with government guidance on social distancing, courts at the federal and state levels have reduced in-person proceedings and non-essential functions. In turn, litigants have been urged to defer non-urgent litigation, to avoid diverting resources from an overburdened court system in this time of crisis. Now more than ever, the bar must do its part by acting with civility, creativity, and a spirit of cooperation to help the courts and litigants navigate these challenging days.

As the government signals that these restrictions may be needed for weeks to come, how can we continue to achieve civil justice efficiently? One important answer to this question is virtual technologies that allow litigation tasks to proceed from afar. The kind of extensive reliance on remote technology required by COVID-19 is foreign to even the savviest litigators and most experienced judges. The drama of the American courtroom is the stuff of movies and television. An impassioned closing to a jury, a withering cross-examination of a recalcitrant witness, a scholarly argument to an appellate panel—all venerated devices for attaining justice and all placed on hold by the novel coronavirus. This extraordinary public health emergency has forced an immediate and dramatic change to the manner in which litigation is conducted all over the country. Where it was once rare to argue a motion by phone, unusual to conduct a deposition remotely, and unheard of to do so for a trial witness, in the near term, this is becoming the new normal. Both courts and counsel are rapidly adapting to this new reality. And once they do, some of the innovations of this crisis are likely to endure; the litigation technologies and techniques we use out of necessity today could very well be used as a matter of course in the years to come.

This memorandum reviews the evolving landscape of how courts are responding to COVID-19 and how civil litigation has been impacted, and it provides guidance for navigating some of these changes.

1) How have courts responded?

As the pandemic crisis deepened in March 2020—and states of emergency were declared and restrictions were placed on gatherings, travel, work, and movement—courts across the country began implementing measures to help slow the virus’s spread.

These measures vary by court but as to civil matters generally include: (i) imposing public access restrictions, including barring visitors who have been exposed to COVID-19; (ii) cancelling oral arguments and deciding matters on the papers, or otherwise hearing arguments telephonically if a judge deems it necessary; (iii) cancelling or postponing other in-person conferences, or otherwise converting them to telephonic conferences; and (iv) postponing bench and jury trials.¹

In addition, courts continue to move toward: (i) permitting as many employees to telework as practicable; (ii) conducting in-person court proceedings only when absolutely necessary (*i.e.*, emergency matters); (iii) utilizing videoconferencing or audioconferencing capabilities where practicable; and (iv) generally ceasing non-essential functions.²

What is considered an emergency or essential matter varies by court, but essential matters have included, for example, at the state court level, certain criminal, family, mental hygiene, guardianship, conservatorship, and housing matters, temporary orders of protection, emergency election law applications, emergency applications related to COVID-19, and temporary restraining orders.³ As for

business disputes, courts have allowed judges to use their discretion in deeming other civil matters essential and warranting conferences, hearings, or emergency relief.⁴

Several courts have completely closed their courthouses, based on COVID-19 infections among staff or consolidation of operations into fewer courthouses, for example.⁵ The government's increasingly stringent self-isolation policies, such as the "stay-at-home orders" issued in March 2020 by several states, including New York, California, New Jersey, Connecticut, and Illinois, could push courts further toward ceasing non-emergency services and closing to the public, even though essential court functions will likely continue to be exempt.

Courts and state governments have also provided relief regarding deadlines and tolling periods, as discussed further below. As a possible further sign of things to come in courts around the country, the New York state court system recently limited civil litigation by: (i) discouraging the prosecution of pending civil matters (including discovery) in a manner that requires in-person appearances or travel, or otherwise requires actions inconsistent with prevailing health and safety directives; (ii) ordering that where parties are unable to meet discovery or other litigation schedules (including dispositive motion deadlines) for reasons related to COVID-19, the parties shall use best efforts to postpone proceedings by agreement for a period of up to 90 days; (iii) instructing that absent such agreement, "the proceedings shall be deferred until such later date when the court can review the matter and issue appropriate directives;" and (iv) advising that "participants in civil litigation [will not] be penalized if discovery compliance is delayed for reasons relating to the coronavirus public health emergency."⁶ New York's state trial courts have also stopped accepting non-essential filings, both paper and electronic, with New York's Chief Administrative Judge ordering that "no papers shall be accepted for filing by a county clerk or a court in any matter of a type not included on the list of essential matters."⁷ New York's state court system has indicated that: "[T]he list of essential proceedings includes 'any other matter that the court deems essential.' Consistent with the goal ... to limit new filings, this catch-all provision is designed to address the very rare cases where individual facts necessitate an immediate hearing notwithstanding current public health concerns; it will be interpreted restrictively."⁸

Court closures and restrictions are changing on a daily basis. The best source of information regarding a court's status and operations is its website, in particular any standing orders posted there related to COVID-19. In addition, a handy aggregate resource for tracking updates on court closures and restrictions can be found at Law360.com.⁹

2) How will reduced court operations impact cases?

Court operations are in a state of flux, with COVID-19 protocols constantly developing and changing as the crisis deepens. The full extent of the impact of courts' reduced operations on the progress of civil litigation remains to be seen and will vary by court. Even within each court there will be variations, as the civil case operations that do continue will largely proceed at the discretion of individual judges.¹⁰

In general, unless a particular court has prohibited filings for non-essential matters, as New York state courts have done,¹¹ reduced court functions will not prevent plaintiffs from filing new actions, nor should they prevent parties from moving forward with briefing in pending actions. Reduced court functions also should not prevent discovery from moving forward, consistent with previously-entered scheduling orders. But reduced court functions will slow down the progress of both new and pending cases.

In particular, to the extent that the prosecution of civil matters (including discovery) requires in-person appearances or travel, or otherwise requires actions inconsistent with prevailing health and safety directives, it will be strongly discouraged or not permitted.¹² This may complicate tasks like document collection, review, and depositions. We expect that courts will likely excuse failure to meet discovery or other deadlines, where based on COVID-19 hardship. In addition, we expect delays at junctures requiring court input, such as reaching decisions on motions and resolving scheduling or discovery disputes.

At the current level of court operations, we expect that judges (if not the assigned judge, then an *ex parte* judge on call) will be reasonably available in most courts, even if on a remote basis, for truly important, time-sensitive problems in large commercial cases. However, judges will apply heightened scrutiny in assessing whether problems rise to that level, as discussed further below, and litigants should too. And judges will be less responsive to problems that do not rise to that level, especially in courts that have expressly stated they will adjourn non-essential matters, like, for example, the New York Supreme Court,¹³ Los Angeles Superior Court,¹⁴ and D.C. Superior Court.¹⁵

Although courts could theoretically hear civil cases remotely (as discussed further below), as a practical matter, at this stage, in the midst of the crisis, with skeletal staff, and overburdened resources, it is unlikely that many will do so.

Looking ahead, even as some courts move their cases forward using remote technology, there will be a growing backlog of cases across the court system. Measures taken by courts in response to the virus—including cancelled oral arguments, postponed conferences, motions, and trials, reduced courthouse operations, workforce reductions, and court closures—will exacerbate an already burdened system. Judges will continue to work, but may prove less efficient working remotely, and, in any event, will prioritize the most critical cases, often over general commercial ones. In addition, as the crisis abates, the court system will be further burdened by a flood of COVID-19-related litigation.¹⁶

All of these factors make it increasingly difficult to be a litigant in this environment, as the rights you had only a few weeks ago are suddenly now less valuable because they are harder to timely enforce. However, even if a judge is not available to resolve a commercial dispute in a timely manner in the near term, there are still other paths that parties who want prompt resolution may take. For example, alternative dispute resolution (“ADR”), discussed further below, may be especially cost- and time-efficient in this environment. Parties can jointly agree to retain a private mediator or panel of arbitrators to help them resolve their dispute out of court, even if one or both of them previously sought to litigate their dispute in court. The pandemic may change the calculus for litigants in a way that creates new settlement opportunities to explore. In addition, where neither timely in-court relief nor private dispute resolution is an option, litigation counsel can use this time to help clients develop their cases and factual records, to bolster future claims.

3) Is emergency relief still available for commercial disputes?

Yes, relief is generally still available in commercial disputes for true emergencies, but on a more limited basis.

Protocols governing how emergency civil matters will be handled have been issued on a court-by-court basis. A number of key courts have confirmed that they will continue to handle emergency civil applications, such as temporary restraining orders, albeit sometimes on a more limited basis. For

example, the Southern District of New York has confirmed that a judge will be tasked with covering emergency applications and considering whether to hear arguments and to grant or deny relief during business hours on weekdays.¹⁷ The federal district courts in Chicago, Los Angeles, and San Francisco have similarly confirmed that civil litigants can still seek immediate relief.¹⁸ At the state court level, for example, the New York Supreme Court remains open for “essential functions,” defined to include those that “cannot be postponed without serious consequences to the parties involved.”¹⁹ Likewise, the Los Angeles Superior Court has included civil temporary restraining orders among the “time-sensitive, essential functions” that it will continue to hear.²⁰ State courts in Chicago, D.C., and Houston have also clarified that they will hear “emergency matters”²¹ and “temporary injunctions.”²²

Where courts determine that hearings on emergency civil applications are warranted, they are increasingly holding them remotely rather than in person. For example, the Southern District of New York has indicated that even emergency matters “should be conducted by teleconference or (if the presence of witnesses is required) videoconference if possible.”²³ The Central District of California has advised that “[a]ny hearings on emergency civil matters will proceed telephonically only.”²⁴ In addition, the New York County Supreme Court, Civil Branch, has advised our firm that in the case of an emergency application in a civil action, if an *ex parte* judge determines that the application is truly essential and that a hearing is warranted, such hearing will be conducted remotely by teleconference or Skype, with scheduling subject to staffing capabilities (including court reporters and IT staff).

While courts remain available to hear emergency applications even during this pandemic, litigants should be mindful that, given the constraints on court resources, applications that might be considered appropriate under normal circumstances could frustrate a judge today if she feels the circumstances are not sufficiently egregious. Litigants should carefully consider whether it is appropriate to burden courts with urgent requests related to business disputes and divert already-overburdened judicial resources during this time of crisis. This is especially so when litigating in the court systems of states hit hardest by COVID-19. For example, earlier this month, the Northern District of Illinois reprimanded a plaintiff in denying its request for a temporary restraining order related to products that allegedly infringed plaintiff’s trademarked drawings: “If there’s ever a time when emergency motions should be limited to genuine emergencies, now’s the time. ... The world is facing a real emergency. Plaintiff is not.”²⁵ The court further explained that (i) this “was a bad time to hold a hearing on the motion” given concerns for “the health and safety of our community, including counsel and this Court’s staff;” (ii) “a hearing—even a telephonic one—would take time and consume valuable court resources,” at a time when “resources are stretched and time is at a premium;” and (iii) “[p]hone conferencing is [only] available in emergency situations and where resources permit.”²⁶

4) What flexibility is there for deadlines?

As a result of COVID-19, some courts have issued automatic blanket extensions, while others have expressed willingness to grant case-by-case extensions for good cause.

In recognition of the disruptions caused by COVID-19, several courts have, on their own initiative, issued administrative orders providing automatic relief from certain deadlines in all civil cases. For example, the U.S. Supreme Court extended the deadline to file a petition for writ of certiorari from 90 days after judgment to 150 days.²⁷ The Second Circuit Court of Appeals issued a 21-day extension on all deadlines found in the Federal Rules of Appellate Procedure, its Local Rules,

and its orders that would otherwise fall before May 17, 2020.²⁸ The Northern District of Illinois issued a similar 21-day extension for all Rules and orders-based deadlines throughout the district.²⁹ By way of further example, the state court for Cook County, Illinois, which covers Chicago, continued all matters across the board for 30 days from the original schedule.³⁰ The D.C. Court of Appeals ordered that “[a]ll filing deadlines are suspended/tolled/extended until May 31, 2020,” and that parties will have 30 days to submit any required filings once the tolling periods is lifted.³¹ All four Departments of New York’s Appellate Division have suspended appeals deadlines under their own rules (found at 22 NYCRR parts 600, 603, and 1245) indefinitely.³² And New York state trial courts have suspended all non-essential filings (both electronic and paper) at this time.³³ (Generally not included in these extensions are deadlines for filing notices of appeal, as courts usually do not have authority to extend deadlines for notices of appeal, which are set by statute and are jurisdictional, as opposed to other appeal-related deadlines.³⁴)

Beyond these automatic extensions, parties may seek further relief from deadlines on a case-by-case basis.³⁵ Given the present lack of judicial resources, it will be especially important to courts that litigants attempt to meet and confer and resolve scheduling disputes amicably. This is reflected in a recent order from New York’s state court system that: (i) where parties are unable to meet discovery or other litigation schedules (including dispositive motion deadlines) for reasons related to COVID-19, the parties shall use best efforts to postpone proceedings by agreement for a period of up to 90 days; (ii) absent such agreement, “the proceedings shall be deferred until such later date when the court can review the matter and issue appropriate directives;” and (iii) “[i]n no event will participants in civil litigation be penalized if discovery compliance is delayed for reasons relating to the coronavirus public health emergency.”³⁶

Where agreement among the parties regarding litigation schedules is not possible, parties may seek relief from deadlines by application to the court. Judges will likely liberally grant reasonable requests for schedule changes and deadline relief. In fact, some courts have already indicated that they will allow certain extensions as a matter of course where needed due to difficulties related to COVID-19.³⁷

While courts have demonstrated a willingness to grant reasonable extensions required by COVID-19-related events, this outcome is never guaranteed, so litigants should proceed as if all case deadlines remain in place absent a court order specifically extending time limits. Further, as we adjust to the “new normal” of COVID-19 restrictions, courts may not be willing to extend schedules indefinitely, especially in light of the remote technology available to move cases forward (discussed further below). For example, the Southern District of Florida recently denied a plaintiff’s motion for an extension of the discovery cutoff, reasoning that “COVID-19 alone is not a sufficient basis for extension of pretrial deadlines or the trial date” because “[i]n today’s highly technological world, restrictions on movement and in-person interactions do not automatically preclude the parties from litigating their case,” and instructing that the parties should proceed with depositions remotely if needed.³⁸ While litigants, and perhaps plaintiffs in particular, may be (rightfully) concerned about the potential delays to case progress they are facing post-COVID-19, this precedent should provide comfort that judges may not tolerate dilatory litigation conduct, even in these difficult times.

5) Will statutes of limitations be tolled or extended?

Some states have already tolled or extended their statutes of limitations due to COVID-19, as discussed further below. Other states have not, nor has there been tolling at the federal level. In any event, businesses and individuals should plan to diligently pursue their claims, as any extensions to the applicable statutes of limitations are likely to be circumscribed to the immediate emergency, and any attempts to invoke “equitable tolling” without an express extension will require, at a minimum, a showing of diligent efforts to bring one’s claims.

States that have recently issued tolling orders include New York, where the governor tolled all statutes of limitations until April 19, 2020.³⁹ In addition, the Delaware Supreme Court extended any statutes of limitation deadlines falling before April 15, 2020 to April 21, while simultaneously clarifying that any deadlines that would fall after April 15 are *not* tolled or extended.⁴⁰ Massachusetts also tolled all statutes of limitations from March 17, 2020 through April 21, 2020, which has the effect of adding 35 days to statutes of limitations (with the potential for further tolling).⁴¹ California has taken a different approach to tolling, by ruling that the dates during emergencies are considered court holidays for statutory limitation and other deadline purposes; while these holiday dates are not *added* to otherwise applicable statutes of limitations, any filing that is due during this emergency can be filed on the as-yet-unknown first date following the court-declared holiday without being deemed untimely.⁴²

In addition to these tolling measures taken by certain states, federal courts generally recognize a doctrine of equitable estoppel that could provide relief to a litigant who is hindered from bringing a timely claim despite diligent efforts.⁴³ While federal courts have previously ruled that natural disasters can constitute “extraordinary circumstances” for these purposes, they have required that any delay be the “direct result” of those circumstances before extending relief.⁴⁴ Even where this doctrine is available, it requires a party to make every effort to file its claims in a timely manner. Thus, parties should not rely on the existence of the equitable tolling doctrine; instead, businesses and individuals with federal claims should plan to bring them under the normally-applicable statutes of limitations where possible.

Obviously, any decisions involving deferred filing of complaints in situations where a statute of limitations is about to run should be made with the assistance of skilled litigation counsel.

6) Can court conferences and oral arguments proceed on a remote basis?

Yes. Courts have already begun to use remote options for court conferences and oral arguments that they deem necessary due to COVID-19.

While many already-scheduled oral arguments have been cancelled in favor of a decision on the briefs without argument,⁴⁵ a number of courts have recently published standing orders providing for future conferences and arguments to occur by phone, and other courts have encouraged judges to conduct conferences and hearings by telephone or video conference rather than in person.⁴⁶ In-person proceedings in civil matters will likely soon grind to a halt across the country, in favor of telephone conferences.

For example, the Second Circuit announced that “effective Monday, March 23, 2020 and until the COVID-19 crisis passes, the Court will hear all oral arguments using a teleconference platform.”⁴⁷ The Northern District of California has indicated that “if the assigned judge believes a hearing is necessary [in a civil matter], the hearing will be by telephone or videoconference.”⁴⁸ New York’s Appellate Division, Second Department announced that commencing with the April 2020 Term and until further notice, all calendared matters will be decided on submission or oral argument by remote appearances through Skype.⁴⁹ New York’s state court system has generally used video and teleconferencing technology wherever possible, and officials are working to create virtual court parts. The Supreme Court of California has moved all arguments to videoconference or phone connections.⁵⁰ Delaware’s Chancery Court has likewise moved to remote hearings by telephonic or other electronic means.⁵¹

There is precedent for remote arguments and conferences even before COVID-19, but, until now, appearing in court remotely has generally been the exception rather than the rule. As one judge recently remarked, “Now our courts are unleashing the creativity, adaptability, and imagination of a MASH unit in times of war to figure out how to communicate to the public, answer questions, provide necessary guidance, and resolve matters by telephone, videoconference, and email that only a few weeks ago were resolved only in person in court.”⁵²

7) Can depositions proceed on a remote basis?

Yes. Depositions are increasingly being taken remotely, meaning by telephone or videoconference, with the witness in a different location than some or all of the counsel participating in the deposition.

Courts have encouraged remote depositions in the context of the present public health crisis. For example, in the Southern District of New York, Judge Cote’s Emergency Individual Practices in Light of COVID-19 require counsel to consider whether depositions, among other pretrial proceedings, “may be conducted through video conference or teleconference.”⁵³

There is ample precedent and authority for remote depositions even outside the context of COVID-19. Rule 30(b)(4) of the Federal Rules of Civil Procedure and similar state rules permit depositions to be taken “by telephone or other remote means,” upon stipulation of the parties or court order.⁵⁴ If the parties are not in agreement on taking depositions remotely, the party seeking remote depositions can request leave from the court. “Generally, leave to take depositions by remote means will be granted liberally.”⁵⁵ Courts have found that remote depositions are warranted by convenience, speed, and cost considerations.⁵⁶ “Holding a deposition by videoconference is ‘frequently a preferred solution to mitigate the burden of a deposition location inconvenient to one or both sides.’”⁵⁷ In the Southern District of New York, the standard is especially liberal, with Local Rules expressly providing that motions to take remote depositions will be “presumptively granted.”⁵⁸

Even in jurisdictions that do not have express statutory or rule-based authority for remote depositions, courts still frequently approve of remote depositions in appropriate circumstances. For example, New York’s Civil Practice Laws and Rules only permit remote depositions when both parties consent.⁵⁹ However, New York courts have recognized implicit authority to permit remote depositions—even over a party’s objection—where in-person depositions would prove inefficient,

unduly expensive, or otherwise prejudicial.⁶⁰ In fact, New York’s Appellate Division has held that it can be an abuse of discretion to deny a motion to take a deposition by remote electronic means.⁶¹

Remote depositions can generally be taken via telephone, videoconference, or other remote means, and may be recorded by any reliable audio or audiovisual means.⁶² This does not dispense with the requirements set forth in Fed. R. Civ. P. 30(b)(5), including that, unless the parties stipulate otherwise, the deposition be “conducted before an officer appointed or designated under Rule 28,” and that the deponent be placed under oath by that officer.⁶³ A deposition will generally be deemed to have been conducted “before” an officer so long as that officer attends the deposition via the same remote method (*e.g.*, telephone conference call or video conference) used to connect all other remote participants, and so long as all participants (including the officer) can clearly hear and be heard by all other participants.⁶⁴

Despite remote depositions being widely accepted by courts, for strategic reasons, many litigators still prefer taking depositions in person. However, in the present environment, remote depositions may become the new normal and, currently, are the only option for parties to complete discovery in a timely manner in many cases. Even so, timely completion of discovery may not always be possible in this environment. This pandemic will create unavoidable obstacles for some litigants requiring reasonable accommodations from even remote depositions and, as discussed above, some extensions in discovery in general and depositions in particular are likely to be granted based on COVID-19-related hardships. The crisis may also create opportunities for parties who do not require immediate resolution of their disputes to postpone case events. Litigants seeking to oppose remote depositions in perpetuity, or until they can be taken in person, should be mindful of the potential for accusations of gamesmanship and pretext, and they should carefully make the record for why they need additional time and why they would be unfairly prejudiced if remote depositions proceed.⁶⁵

8) Can trials proceed on a remote basis?

Yes. Courts have already permitted remote participation in trials due to COVID-19, and it is possible that entire trials may be conducted on a remote basis during this crisis.

Remote trial testimony has been permitted by at least one court as a result of COVID-19. In March 2020, a federal court in Minnesota completed a bench trial by taking live video testimony from remote witnesses, at Quinn Emanuel’s request, holding that “COVID-19’s unexpected nature, rapid spread, and potential risk establish good cause for remote testimony,” and reasoning that the use of “[c]ontemporaneous transmission” for remote testimony was preferable over “an attempt to reschedule the trial ... as postponing the trial for any length of time could merely postpone the possibility of infection at a later date, which itself might require additional delays.”⁶⁶ In addition, the same month, faced with COVID-19 concerns, a judge in the Southern District of New York allowed a juror who fell ill to deliberate with his fellow jurors via videoconference and thereby reach a verdict in a criminal trial, even over the prosecution’s objection.⁶⁷

Other courts have expressed a willingness to conduct trials remotely due to COVID-19. For example, the Eastern District of Texas has directed parties to “meet and confer regarding the appropriate means to conduct [impacted] ... trial[s]” and to “consider, among other things ... [w]hether video conferencing would be appropriate and effective.”⁶⁸ In addition, the Delaware Chancery Court has ordered that all trials shall be conducted only by telephonic or other electronic

means, except where the presiding judicial officer determines it is not practicable to conduct a trial in this manner, in which case it shall be continued.⁶⁹ California's Chief Justice, in an order suspending all jury trials in California's superior courts for 60 days from March 23, provided that "[c]ourts may conduct such a trial at an earlier date, ... through the use of remote technology, when appropriate."⁷⁰

Courts have authority to permit remote examinations of trial witnesses. The federal courts are expressly permitted, "[f]or good cause in compelling circumstances," to receive a witness's "testimony in open court by contemporaneous transmission from a different location."⁷¹ Historically, federal courts have been willing to use videoconference technology to hear from both non-party witnesses as well as parties who have sought permission to participate from afar.⁷² Circumstances as comparatively minor as the distance and expense of traveling to court have been deemed sufficiently compelling to merit remote testimony.⁷³ However, "Courts most frequently allow remote testimony in special circumstances, such as where a vital witness would be endangered or made uncomfortable by appearing in a courtroom."⁷⁴

There is also authority at the state level. In California, for example, although California's statutes and rules of court contain "no express statutory grant of authority permitting a witness in a civil trial to testify by live videoconference," such testimony "is within the permissible scope of the trial court's inherent power to control the course of litigation before it."⁷⁵ New York similarly allows remote testimony because although "there is no specific statutory authority evincing legislative policy proscribing televised testimony," "the Legislature has explicitly authorized the courts' use of innovative procedures where 'necessary to carry into effect the powers and jurisdiction possessed by the court.'"⁷⁶ Courts in other jurisdictions have similarly permitted witnesses to testify from outside of the courtroom.⁷⁷

Most "remote trials" to date have proceeded with all of the standard trial participants in the courtroom and a one-off witness giving testimony from afar. It is rarer, although not quite unprecedented, to have the *attorneys* not in the same room as the presiding judge. This situation has occurred (pursuant to express Congressional authorization) in immigration proceedings, however the Fourth Circuit has observed that such a set up places an advocate "in a 'Catch 22' situation," in which she must choose whether to be able "to privately advise and counsel his client" by appearing remotely alongside that client, or to "interact ... effectively with the IJ or his opposing counsel" by appearing in the courtroom.⁷⁸ Although seemingly unprecedented in recent decades, during the 1970s, certain state courts pioneered jury trials that consisted entirely of taped deposition testimony, with only opening statements and closing arguments presented live in the courtroom.⁷⁹ In the context of jury trials, while the remote testimony of witnesses has been permitted,⁸⁰ even over a party's objections,⁸¹ courts have raised concerns regarding whether non-incarcerated parties could be required to forego their traditional right to appear before the jury.⁸²

To the extent bench trials in civil cases proceed during this crisis, we expect remote trials to be on the table, and at the very least remote examination of witnesses to be permitted. Jury trials are not as likely to proceed during the crisis, but to the extent they do, we expect some remote technology to be utilized. While entirely remote trials, especially jury trials, remain difficult to envision, should the current crisis persist for a significant period of time, and courts begin to move forward with clearing their civil dockets, parties that seek to have their claims heard in a timely fashion may need to be open to wholly new methods of administering justice. Other countries that have experienced the same pandemic have turned to "[r]emote court trials ... conducted over video links" to work through the backlog of court cases and resume litigation even as health threats remain in place.⁸³

9) How are these issues playing out in the context of ADR?

Like the courts, ADR service organizations' business models have been rocked by COVID-19, but they are embracing remote technology to continue providing services during the pandemic.

For example, the American Arbitration Association (AAA) and its international division, the International Centre for Dispute Resolution (ICDR)—which provide services to individuals and organizations who wish to resolve conflicts out of court, including arbitrations and mediations—have announced that, although they have suspended “operations and all non-essential in-person activity” in their U.S. offices, and do not plan to hold hearings at their facilities until at least April 17, they otherwise remain operational to administer disputes despite COVID-19.⁸⁴ AAA-ICDR have reported that their alternative hearing arrangements include the use of video teleconferencing that will allow for remote participation in, and presentation of evidence at, hearings.⁸⁵ AAA-ICDR rules permit remote options for mediations and arbitrations.⁸⁶

By way of further example, JAMS—another provider of ADR services, including arbitrations and mediations—has likewise announced that it will continue to provide mediation, arbitration, and ADR services, albeit with staff working remotely.⁸⁷ JAMS has advised that it has capacity to host audio, video, and web conferencing for mediations and arbitration hearings.⁸⁸ JAMS rules permit remote options for mediations and arbitrations as well.⁸⁹

While conferences with arbitral panels on a remote basis is standard practice, and remote witness examinations where needed are not unusual, in-person, rather than remote, arbitration hearings, mediations, and settlement conferences have, until now, been the norm. Of these, mediations and settlement conferences should be easier to conduct on a remote basis than arbitration hearings, given their simpler format and smaller audience. For major, complex cases involving numerous participants, unless time is of essence, we suspect that the majority of parties and panels may opt to postpone the arbitration hearings to later in the year rather than conduct remote hearings in the near term. However, in especially time sensitive cases, parties can be expected to push for remote arbitration hearings in the near term.

10) What technologies are available to facilitate remote litigation?

Teleconferencing & Videoconferencing

Court conferences and oral arguments can generally be taken via telephone or videoconference. There are a variety of platforms available for remote conferencing that can be joined from anywhere, on any device with an internet connection or cell signal, and accommodate large groups of participants, such as Zoom, Webex, and Skype. Videoconferencing platforms require a webcam and generally allow each participant to see each of the other participants on the screen.

These basic talk and video platforms can also be used for events like mediations and settlement conferences. For example, in a remote mediation, the parties can use two separate videoconferencing lines, and the mediator can switch between them during the course of the day. Some ADR service providers have developed their own advanced technology, including video conferencing platforms

that feature multiple virtual “rooms” for parties’ private separate caucus sessions, as well as joint sessions.

Remote depositions are routinely conducted by live videoconference (rather than simply teleconference), so that the examining attorney can observe the deponent during questioning. While the videoconferencing systems discussed above can be used for remote depositions, attorneys would need to coordinate exhibit sharing and introduction independently (*e.g.*, by email or mailing of hard copy binders), which can create logistical problems. The logistics are complicated by the fact that, from a strategic perspective, it can be unwise to provide the witness and opposing counsel access to the full set of potential exhibits prior to the deposition. A lawyer deposing a witness generally will not want the witness or opposing counsel to see key documents too early, before they are introduced at the deposition, and have extra time to review, digest, and craft responses to them.

As a solution to this kind of problem, some vendors have created technology specifically designed for deposing remote witnesses by video. For example, TSG and Veritext have video conferencing deposition programs that can be connected through any device with a webcam and internet access, by numerous on-screen participants, which feature on-screen electronic exhibit sharing capabilities, allowing the person taking the deposition to control when the witness and opposing counsel may access each exhibit.

In addition to using these more advanced video technologies for depositions, they can also be used for remote witness examinations at trial, as well as preparation sessions with witnesses in advance of depositions or testimony. These types of technologies could also be used to facilitate other remote proceedings with evidentiary or demonstrative components, including entire trials and arbitration hearings. We will be monitoring how effective remote technology is for full-scale hearings involving multiple participants.

Remote Document Discovery

Vendors are also providing remote document discovery services. Some vendors offer remote and cloud-based options for document collection in response to COVID-19. For example, one such vendor, Epiq, can collect electronic documents from a client without physically being present at the client’s office, either by collecting cloud-based files from cloud-based data sources like email or Dropbox or working with clients to self-collect using do-it-yourself kits. In addition, document review vendors are shifting to remote review so that their contract attorney reviewers can work from home. This generally requires vendors to create remote work solutions with special security features that prevent reviewers from copying, saving, or printing documents, among other things.

11) What are the pros and cons of remote litigation?

In the context of a pandemic, remote litigation may be the only way to move cases forward in the near term, so long as the risk of infection persists and public health restrictions remain in place. The tools discussed above make it possible to collect and review documents, conduct conferences with the court, argue motions, examine witnesses, mediate disputes, and try cases without face-to-face contact, work outside the home, or travel. In addition, remote litigation can create time and cost efficiencies. For example, remote depositions eliminate the need for lawyers to fly across the country to witnesses, with boxes of hard-copy exhibits in tow.

Remote litigation does, of course, have shortcomings. As a practical matter, remote litigation relies on technology, which, of course, does not always work reliably. For example, poor internet connections or cell signals can make it difficult to hear participants or cause delays in video/audio.⁹⁰ The more complicated the proceeding at issue and the more participants involved, the more likely there are to be technological issues.

As a strategic matter, using remote technology can make it more challenging for a litigator to command attention, communicate effectively, read the room, and perceive non-verbal cues of the court, adversary, or witness. Because so much of a litigator's craft turns on her ability to communicate effectively and persuasively, the push toward remote proceedings is a significant game changer that those in the field must quickly adapt to. Courts have observed that "virtual reality is rarely a substitute for actual presence and ... even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it."⁹¹ Teleconferencing in particular restricts a litigator's means of communicating to voice, and may make an argument, no matter how impassioned, less impactful.

In terms of working with witnesses, a lawyer taking a deposition or examination remotely will lose some of the control she otherwise would have sitting across from the witness. Remote examination may also make it harder to effectively confront an evasive witness. In an examination by phone, important cues, from body language, to outside influence on the witness, may be difficult for the examining attorney to perceive. Even in the case of examination by video, courts have observed, "[c]ertain features of testimony useful to evaluating credibility and persuasiveness, such as the immediacy of a living person can be lost with video technology, and the ability to observe demeanor, central to the fact-finding process, may be lessened."⁹² That said, today's technology minimizes these concerns to a degree; in particular, "[t]he near-instantaneous transmission of video testimony through current technology permits the jury or, in a bench trial, the Court[,] to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, and his calmness or consideration."⁹³

In terms of ADR, many advocates believe that mediations and settlement conferences work best when all of the parties get together in a room and are empowered to make decisions during in-person negotiations. Again, videoconferencing can play an important role in making these negotiations as efficient as possible from afar.

* * *

These are only some of the myriad issues about civil litigation potentially posed by the spread of the novel coronavirus. If you have any questions about the issues addressed in this memorandum or otherwise, please do not hesitate to reach out to us.

¹ See, e.g., Notice to All Civil Litigants with Matters Currently Pending Before Chief Judge Hamilton (N.D. Cal. Mar. 12, 2020), *available at* <https://apps.cand.uscourts.gov/CEO/cfd.aspx?7138#Notes> (providing that case management conferences in the Northern District of California are to be held by phone; all oral arguments vacated and any that are necessary will take place by phone); In re: Coronavirus/COVID-19 Pandemic, 20 Misc. 154 (S.D.N.Y. Mar. 13, 2020), *available at* [https://www.nysd.uscourts.gov/sites/default/files/2020-03/20%20MISC%20154a%20\(002\)%20-](https://www.nysd.uscourts.gov/sites/default/files/2020-03/20%20MISC%20154a%20(002)%20-)

%20In%20Re%20Coronavirus-COVID-19%20Pandemic.pdf (continuing jury trials scheduled to begin in the Southern District of New York before April 27, 2020; strongly encouraging judges to hold proceedings by phone or video); In re: COVID-19 (Coronavirus) Pandemic, OE-144 (Mass. Mar. 13, 2020), *available at* <https://www.law360.com/articles/1253195/attachments/0> (continuing jury trials in Massachusetts state courts until April 21, 2020); Mem. of Chief Administrative Judge Marks (N.Y. Sup. Ct. N.Y. Cty. Mar. 15, 2020), *available at* <http://www.nycourts.gov/whatsnew/pdf/Updated-Protocol-AttachmentA3.pdf> (postponing trials in New York state courts until further notice; generally postponing all non-essential functions); Special Order H-2020-6 S.D. Tex. Houston & Galveston Divisions (S.D. Tex. Mar. 17, 2020), <https://www.txs.uscourts.gov/sites/txs/files/~Special%20Order%20H-2020-06%20Court%20Operations%20in%20Houston%20and%20Galveston%20During%20COVID-19.pdf> (continuing jury trials in the Southern District of Texas through May 1, 2020); Announcement (Del. Mar. 18, 2020), *available at* <https://courts.delaware.gov/forms/download.aspx?id=120398> (“All oral arguments scheduled through the end of May 2020 before the Supreme Court of Delaware are cancelled.”); Judicial Council of California, Statewide Order (Cal. Mar. 23, 2020), https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/Statewide%20Order%20by%20the%20Chief%20Justice-Chair%20of%20the%20Judicial%20Council%203-23-2020.pdf (suspending jury trials in California’s superior courts for 60 days).

² See *supra* n.1; see also, e.g., In re: Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic (D.D.C. Mar. 16, 2020), *available at* <https://www.dcd.uscourts.gov/sites/dcd/files/Court%20Operations%20Standing%20Order%2020-9.pdf> (postponing federal jury trials in D.C. scheduled to commence through May 11, 2020; clarifying that the district court remains open only to support essential functions; providing that judicial officers are to conduct proceedings remotely where possible); Standing Order No. 20-9 (BAH), Alternate Schedule (Tex. D. Ct. Harris Cty. Civ. Div. Mar. 16, 2020), <https://www.justex.net/JustexDocuments/0/News%20Items/News%202020/Civil%20Division%20Alternate%20Schedule%2016MAR2020.pdf> (cancelling non-essential hearings in Harris County, Texas district courts, civil division); Administrative Order of the Presiding Judge re: COVID-19 Pandemic (Cal. Super. Ct. L.A. Cty. Mar. 17, 2020), *available at* <http://www.lacourt.org/pdf/2020-GEN-004-00AdministrativeOrderofPJreCOVID-19-031720.pdf> (closing courtrooms in Los Angeles superior courts through April 16, 2020, except for certain listed “time-sensitive, essential functions”); Order of the Superior Court of The District of Columbia (D.C. Super. Ct. Mar. 19, 2020), *available at* <https://www.dccourts.gov/sites/default/files/Order-Attachment-PDFs/Order-3-19-20.pdf> (listing the limited operations that will go forward in D.C. superior court, which do not include trials).

³ See, e.g., Administrative Order AO/78/20, N.Y. State Court System (Mar. 22, 2020), <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>; Administrative Order of the Presiding Judge re: COVID-19 Pandemic (Cal. Super. Ct. L.A. Cty. Mar. 17, 2020), *available at* <http://www.lacourt.org/pdf/2020-GEN-004-00AdministrativeOrderofPJreCOVID-19-031720.pdf>; D.C. Superior Court Order Suspending Additional Court Proceedings (D.C. Sup. Ct. Mar. 19, 2020), *available at* <https://www.dccourts.gov/sites/default/files/Order-Attachment-PDFs/Order-3-19-20.pdf>.

⁴ See, e.g., Administrative Order of the Presiding Judge re: COVID-19 Pandemic (Cal. Super. Ct. L.A. Cty. Mar. 17, 2020), *available at* <http://www.lacourt.org/pdf/2020-GEN-004-00AdministrativeOrderofPJreCOVID-19-031720.pdf>; Special Order H-2020-6 S.D. Tex. Houston & Galveston Divisions (S.D. Tex. Mar. 17, 2020), <https://www.txs.uscourts.gov/sites/txs/files/~Special%20Order%20H-2020-06%20Court%20Operations%20in%20Houston%20and%20Galveston%20During%20COVID-19.pdf>; Amended Gen. Order No. 20-02, In re: Coronavirus Public Emergency (C.D. Cal. Mar. 17, 2020), *available at* <https://www.cacd.uscourts.gov/sites/default/files/general-orders/GO%2020-02%20Amended.pdf>; Standing Order, In re: Court Operations Under the Exigent Circumstances Created by COVID-19 (D. Del. Mar. 18, 2020), *available at* <https://www.ded.uscourts.gov/sites/ded/files/news/StandingOrder-3-18-20-Court%20Operations.pdf>; Administrative Order, N.Y. State Court System (Mar. 22, 2020), <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>; Mem. to S.D.N.Y. Bar re: COVID-19 Protocols (S.D.N.Y. Mar. 20, 2020), *available at* <https://www.nysd.uscourts.gov/sites/default/files/2020-03/COVID%20Memorandum%20-%20FINAL.pdf>.

⁵ See, e.g., Standing Order No. 20-3, In re: Closing of the Harrisburg Division (M.D. Pa. Mar. 18, 2020), *available at* <https://www.pamd.uscourts.gov/sites/pamd/files/general-ordes/2020-003.pdf> (“the United States Courthouse in Harrisburg, Pennsylvania is closed until further notice,” where a federal law enforcement agent resident in the Harrisburg Courthouse tested positive for COVID-19); Sarah Jarvis, *Coronavirus: The Latest Court Closures And Restrictions*, Law360 (Mar. 12, 2020) (last updated Mar. 23, 2020), *available at* <https://www.law360.com/articles/1252836> (listing court closures in federal and state courts in California, Delaware, and Illinois, among other jurisdictions).

⁶ Administrative Order AO/71/20, N.Y. State Court System (Mar. 19, 2020), *available at* <https://www.nassaubar.org/wp-content/uploads/2020/03/AO-71.pdf>.

⁷ Administrative Order AO/78/20, N.Y. State Court System (Mar. 22, 2020), *available at* <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>.

⁸ Alert, Administrative Order: Limiting Court Filings, N.Y. State Court System (Mar. 22, 2020), <http://www.courts.state.ny.us/limited-filings.shtml>.

⁹ Sarah Jarvis, *Coronavirus: The Latest Court Closures And Restrictions*, Law360 (Mar. 12, 2020) (last updated Mar. 23, 2020), *available at* <https://www.law360.com/articles/1252836>.

¹⁰ See, e.g., Special Order H-2020-6 S.D. Tex. Houston & Galveston Divisions (S.D. Tex. Mar. 17, 2020), <https://www.txs.uscourts.gov/sites/txs/files/~Special%20Order%20H-2020-06%20Court%20Operations%20in%20Houston%20and%20Galveston%20During%20COVID-19.pdf>; Amended Gen. Order No. 20-02, In re: Coronavirus Public Emergency (C.D. Cal. Mar. 17, 2020), *available at* <https://www.cacd.uscourts.gov/sites/default/files/general-orders/GO%2020-02%20Amended.pdf>; Standing Order, In re: Court Operations Under the Exigent Circumstances Created By COVID-19 (D. Del. Mar. 18, 2020), *available at* <https://www.ded.uscourts.gov/sites/ded/files/news/StandingOrder-3-18-20-Court%20Operations.pdf>; Mem. from Edward Friedland, District Executive S.D.N.Y. Bar re: COVID-19 Protocols (S.D.N.Y. Mar. 20, 2020), *available at*

<https://www.nysd.uscourts.gov/sites/default/files/2020-03/COVID%20Memorandum%20-%20FINAL.pdf> (“Civil Case Operations will proceed at the discretion of the individual Judge.”).

¹¹ Administrative Order AO/78/20, N.Y. State Court System (Mar. 22, 2020), <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>.

¹² See Administrative Order AO/71/20, N.Y. State Court System (Mar. 19, 2020), *available at* <https://www.nassaubar.org/wp-content/uploads/2020/03/AO-71.pdf>.

¹³ COVID Mem., N.Y. State Court System (Mar. 19, 2020), *available at* <https://www.nycourts.gov/whatsnew/pdf/covid-memo-031920.pdf>.

¹⁴ Administrative Order of the Presiding Judge re: COVID-19 Pandemic (Cal. Super. Ct. L.A. Cty. Mar. 17, 2020), *available at* <http://www.lacourt.org/pdf/2020-GEN-004-00AdministrativeOrderofPJreCOVID-19-031720.pdf>.

¹⁵ Order Suspending Additional Court Proceedings (D.C. Super. Ct. Mar. 19, 2020), *available at* <https://www.dccourts.gov/sites/default/files/Order-Attachment-PDFs/Order-3-19-20.pdf>.

¹⁶ See Message from Chief Judge DiFiore on Coronavirus Emergency (N.Y. Mar. 20, 2020), <http://www.courts.state.ny.us/whatsnew/pdf/Transcript-Message320.pdf> (“[W]e will have our hands full once this crisis is over. If there is one thing we’ve learned over the years, --it’s that the economic consequences and legal fallout of any societal crisis,--especially one of this magnitude,--will be manifested and felt in our court dockets.”).

¹⁷ COVID-19 Protocols (S.D.N.Y. Mar. 20, 2020), *available at* <https://www.nysd.uscourts.gov/sites/default/files/2020-03/COVID%20Memorandum%20-%20FINAL.pdf>.

¹⁸ See, e.g., Important Notice Regarding COVID-19 and General Orders 72 & 73 (N.D. Cal. Mar. 17, 2020), *available at* <https://cand.uscourts.gov/notices/information-regarding-covid-19/> (“The intake desks at the San Francisco, Oakland, and San Jose Divisions remain open during normal hours.”); General Order 20-0014 in re: Coronavirus COVID-19 Public Emergency Clerk’s Office Operations (N.D. Ill. Mar. 20, 2020), *available at* https://www.ilnd.uscourts.gov/_assets/_documents/Coronavirus%2020-0014%20March%202020.pdf; COVID-19 Notice (C.D. Cal. Mar. 21, 2020), *available at* <https://www.cacd.uscourts.gov/news/covid-19-notice>.

¹⁹ COVID Mem., N.Y. State Court System (Mar. 19, 2020), *available at* <https://www.nycourts.gov/whatsnew/pdf/covid-memo-031920.pdf>.

²⁰ Administrative Order of the Presiding Judge re: COVID-19 Pandemic (Cal. Super. Ct. L.A. Cty. Mar. 17, 2020), *available at* <http://www.lacourt.org/pdf/2020-GEN-004-00AdministrativeOrderofPJreCOVID-19-031720.pdf>.

²¹ General Administrative Order 2020-01, Re: COVID-19 Emergency Measures (Ill. Cir. Ct. Cook Cty. Mar. 13, 2020), *available at*

[http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/articleid/2737/Default.aspx?dnnprintmode=true&mid=934&SkinSrc=\[G\]Skins%2F_default%2FNo+Skin&ContainerSrc=\[G\]Containers%2F_default%2FNo+Container](http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/articleid/2737/Default.aspx?dnnprintmode=true&mid=934&SkinSrc=[G]Skins%2F_default%2FNo+Skin&ContainerSrc=[G]Containers%2F_default%2FNo+Container); Order of the Superior Court of The District of Columbia (D.C. Super. Ct. Mar. 19, 2020), *available at* <https://www.dccourts.gov/sites/default/files/Order-Attachment-PDFs/Order-3-19-20.pdf>.

²² Alternate Schedule (Tex. D. Ct. Harris Cty. Mar. 16, 2020), <https://www.justex.net/JustexDocuments/0/News%20Items/News%202020/Civil%20Division%20Alternate%20Schedule%2016MAR2020.pdf>.

²³ COVID-19 Protocols (S.D.N.Y. Mar. 20, 2020), *available at* <https://www.nysd.uscourts.gov/sites/default/files/2020-03/COVID%20Memorandum%20-%20FINAL.pdf>.

²⁴ COVID-19 Notice (C.D. Cal. Mar. 21, 2020), *available at* <https://www.cacd.uscourts.gov/news/covid-19-notice>.

²⁵ *Art Aske Agency v. Anonymous*, No. 20-cv-1666, Dkt. 27 (N.D. Ill. Mar. 18, 2020).

²⁶ *Id.* (internal quotation marks omitted).

²⁷ Order List, 589 U.S. (U.S. Mar. 19, 2020), *available at* https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

²⁸ Order of Chief Judge Katzmman (2d Cir. Mar. 16, 2020), *available at* <http://www.ca2.uscourts.gov/docs/Order%20-%20RAK%20Extending%20Filing%20Dates%20FINAL%2031620.pdf>.

²⁹ In re: Coronavirus COVID-19 Public Emergency (N.D. Ill. Mar. 17, 2020), *available at* https://www.ilnd.uscourts.gov/_assets/_documents/AMENDED%20GENERAL%20ORDER%2020-0012.pdf.

³⁰ General Administrative Order 2020-01, Re: COVID-19 Emergency Measures (Ill. Cir. Ct. Cook Cty. Mar. 13, 2020), *available at* http://www.cookcountycourt.org/Portals/0/Chief%20Judge/General%20Administrative%20Order%20No_%202020-01.pdf?ver=2020-03-14-082153-053.

³¹ Order (D.C. Ct. App. Mar. 23, 2020), *available at* <https://www.dccbar.org/about-the-bar/news/upload/ORDER-In-re-COVID-19.pdf>.

³² *See, e.g.*, Order, In the Matter of the Temporary Suspension of Perfection, Filing and other Deadlines During Public Health Emergency (N.Y. App. Div. 1st Dep't Mar. 17, 2020), *available at* <http://www.courts.state.ny.us/courts/ad1/PDFs/Temporary%20Suspension%20Order.pdf>.

³³ Administrative Order AO/78/20, N.Y. State Court System (Mar. 22, 2020), <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>; Order ADM 2020-0317.2 (N.Y. App. Div. 2d Dep't Mar. 17, 2020), *available at*

<http://www.courts.state.ny.us/courts/ad2/pdf/ADM%202020-0317.2%20-%20Emergency%20extensions.pdf>; Order (N.Y. App. Div. 3d Dep't Mar. 17, 2020), *available at* http://www.nycourts.gov/ad3/homepage_docs/order%20extending%20filing%20and%20perfection%20deadline.pdf; Order (N.Y. App. Div. 4th Dep't Mar. 17, 2020), *available at* <https://ad4.nycourts.gov/press/notices/5e73e56ca52d6c750412f7b0>.

³⁴ See Fed. R. App. P. 26(b). The Supreme Court confirmed this restriction last year in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019), in which it held that an appellate court lacked the authority to excuse such a deadline. See *id.* at 715; see also *Bowles v. Russell*, 551 U.S. 205, 211-12 (2007) (rule against extension applies with particular force to appellate deadlines found in statutes, as opposed to court rules). New York's highest court has similarly held that the judiciary lacks authority to extend time to appeal, even where the parties consent. See *Ocean Accident & Guarantee Corp. v. Otis Elevator Co.*, 291 N.Y. 254, 255 (1943). California's Rule of Court 8.104(b) generally prohibits extending appeal deadlines, but Rule 8.66 does permit the Chief Justice to extend such deadlines in the event of a public emergency; to date, Chief Justice Cantil-Sakauye has not yet exercised this authority.

³⁵ See, e.g., *DeVine v. XPO Logistics Freight*, No. 18-cv-1264, 2020 WL 1275087, at *2 (N.D. Ill. Mar. 17, 2020) (ordering a specific protocol for depositions of doctors because "the current COVID-19 public health emergency takes courts, litigants, and medical treater witnesses into uncharted territory in terms of managing discovery in a time of a public health emergency").

³⁶ Administrative Order AO/71/20, N.Y. State Court System (Mar. 19, 2020), *available at* <https://www.nassaubar.org/wp-content/uploads/2020/03/AO-71.pdf>.

³⁷ For example, the United States Supreme Court has both extended filing deadlines for petitions for review and directed that other extensions will be granted "as a matter of course" if the request has to do with "difficulties relating to COVID-19," provided "the length of extension requested is reasonable under the circumstances." Order List: 589 U.S., *available at* https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf. Similarly, New Jersey's federal courts have indicated that while deadlines set under federal or local rules or by court orders generally remain in effect, unless modified by the judge assigned to the case, judges may be flexible and accommodating to requests for adjustments in filing or scheduling that are necessitated by travel considerations, health or safety concerns, or directives from public officials. See *In re: Court Operations Under the Exigent Circumstances Created By COVID-19*, Standing Order 20-02 (D.N.J. Mar. 16, 2020), *available at* <https://images.law.com/contrib/content/uploads/documents/399/40372/StandingOrder2.pdf>.

³⁸ See *Apple Inc. v. Corellium, LLC*, 19-cv-81160-RS, Dkt. 248 (S.D. Fla. Mar. 18, 2020) (denying motion to extend fact discovery and invoking possibility of remote depositions).

³⁹ Exec. Order No. 202.8 (N.Y. Mar. 20, 2020) ("any specific time limit for the commencement, filing, or service of any legal action ... is hereby tolled from the date of this executive order until April 19, 2020"), *available at* <http://nycourts.gov/whatsnew/pdf/EO-202.8-ocr.pdf>.

⁴⁰ Administrative Order No. 3, *In re COVID-19 Precautionary Measures* (Del. Mar. 22, 2020), *available at* <https://courts.delaware.gov/forms/download.aspx?id=120578>.

⁴¹ See Order in re: COVID-19 (Coronavirus) Pandemic (Mass. Mar. 17, 2020), *available at* <https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-order-limiting-in-person-appearances-in-state#order>.

⁴² See Administrative Order of the Presiding Judge re COVID-19 Pandemic (Cal. Super. Ct. L.A. Cty. Mar. 17, 2020), *available at* <http://www.lacourt.org/pdf/2020-GEN-004-00AdministrativeOrderofPJreCOVID-19-031720.pdf>.

⁴³ This doctrine is only available for certain types of statutes of limitations, and unfortunately the distinction is not easily recognizable. The question is “whether equitable tolling is consistent with Congress’ intent in enacting the statutory scheme”—a determination that turns on the statutory purpose, the level of detail Congress used in setting the relevant limitations periods, the administrative difficulty of recognizing exceptions, and other indications of Congress’s intent. *Aciermo v. Barnhart*, 475 F.3d 77, 81 (2d Cir. 2007). Where equitable tolling is permissible under this statute-by-statute analysis, a litigant seeking the exception must establish both “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016) (internal citation omitted).

⁴⁴ See, e.g., *McCreary v. Nicholson*, 19 Vet. App. 324, 332 (Vet. Cl. App. 2005) (holding that, while “it is obvious that a hurricane is a type of extraordinary circumstance that is beyond the appellant’s control,” because any delay was only an indirect result of the storm and appellant failed to demonstrate due diligence in pursuing his appeal, equitable tolling was inapplicable).

⁴⁵ See, e.g., Order (D.C. Ct. App. Mar. 23, 2020), *available at* <https://www.dcbar.org/about-the-bar/news/upload/ORDER-In-re-COVID-19.pdf> (cancelling oral arguments in the D.C. Court of Appeals through May 31, 2020).

⁴⁶ See, e.g., Notice to All Civil Litigants with Matters Currently Pending Before Chief Judge Hamilton (N.D. Cal. Mar. 12, 2020), *available at* <https://apps.cand.uscourts.gov/CEO/cfd.aspx?7138#Notes> (case management conferences in the Northern District of California to be held by phone; oral arguments vacated and any that are necessary will take place by phone); Emergency Individual Rules and Practices in Light of COVID-19, Judge Furman (S.D.N.Y. Mar. 19, 2020), *available at* https://nysd.uscourts.gov/sites/default/files/practice_documents/JMF%20Furman%20COVID-19%20Emergency%20Rules%20and%20Practices_0.pdf (“Unless otherwise ordered by the Court, all conferences and proceedings in civil cases will be held by telephone.”).

⁴⁷ Oral Arguments at the Second Circuit, Announcements (2d Cir. Mar. 19, 2020), *available at* <http://www.ca2.uscourts.gov/>.

⁴⁸ Important Notice Regarding COVID-19 and General Orders 72 and 73 (N.D. Cal. Mar. 17, 2020), *available at* <https://cand.uscourts.gov/notices/information-regarding-covid-19/>.

⁴⁹ Notice Regarding Oral Argument Before Court (N.Y. App. Div. 2d Dep’t Mar. 13, 2020), *available at* http://www.courts.state.ny.us/courts/ad2/Notice_Regarding_Oral_Argument_3-14-20.pdf (inviting counsel scheduled to argue before the Court to request oral argument by videoconference).

⁵⁰ Admin. 2020-03-13 (Cal. Sup. Ct. Mar. 13, 2020), *available at* https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/supreme%20court%20order.pdf; *see also* Calif. Code of Civ. Proc. § 367.5(b)(7) (parties may appear by phone at any “hearing, conference, or proceeding if the court determines that a telephone appearance is appropriate”).

⁵¹ Standing Order No. 2 Concerning COVID-19 Precautionary Measures (Del. Ch. Mar. 16, 2020), *available at* <https://courts.delaware.gov/rules/pdf/Court-of-Chancery-Standing-Order-No2.pdf> (“[A]ll hearings and trials shall be conducted only by telephonic or other electronic means. If it is not practicable [to do so] . . . , the hearing or trial shall be continued.”).

⁵² Letter from Supreme Judicial Court Chief Justice Ralph D. Gants to the Bar (Mass. Mar. 19, 2020), *available at* <https://www.mass.gov/news/letter-to-the-bar-from-supreme-judicial-court-chief-justice-ralph-d-gants>.

⁵³ Emergency Individual Practices in Light of COVID-19, Judge Denise Cote (S.D.N.Y. Mar. 18, 2020), *available at* https://www.nysd.uscourts.gov/sites/default/files/practice_documents/DLC%20Cote%20COVID-19%20Emergency%20Practices.pdf%20-%20March%2018%2C%202020.pdf; *see also, e.g., Morgan Art Foundation Limited v. McKenzie et al.*, 18-CV-4438, Dkt. No. 243 (S.D.N.Y. Mar. 17, 2020) (Judge Moses ordering that “all depositions in this action may be taken via telephone, videoconference, or other remote means”).

⁵⁴ *See also, e.g.,* Cal. Civ. Pro. § 2025.310(a) (“A person may take, and any person other than the deponent may attend, a deposition by telephone or other remote electronic means.”); Del. Ch. Ct. R. 30(b)(7) (“the Court may upon motion order that a deposition be taken by telephone or other remote electronic means”); Fla. R. Civ. P. 1.310(b)(7) (“On motion the court may order that the testimony at a deposition be taken by telephone.”); N.Y. CPLR § 3113(d) (“The parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically.”); Tex. R. Civ. P. 199.1(b) (“A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so.”).

⁵⁵ Federal Civil Rules Handbook, 855.

⁵⁶ *See Wei Su v. Sotheby’s, Inc.*, No. 17-CV-4577, 2019 WL 4053917, *1 (S.D.N.Y. Aug. 28, 2019) (“An analysis of cost, convenience and litigation efficiency is the appropriate standard under which to evaluate the motion.”).

⁵⁷ *Alpha Capital Anstalt v. Real Goods Solar, Inc.*, 323 F.R.D. 177, 179 (S.D.N.Y. 2017) (quoting *SEC v. Aly*, 320 F.R.D. 116, 119 (S.D.N.Y. 2017)).

⁵⁸ S.D.N.Y. Local Civ. R. 30.2 (“The motion of a party to take the deposition of an adverse party by telephone or other remote means will presumptively be granted.”).

⁵⁹ N.Y. C.P.L.R. § 3113(d) (“The parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically.”).

⁶⁰ See *Chen v. Zhi*, 81 A.D.3d 818, 818 (N.Y. 2d Dep’t 2011).

⁶¹ *Id.* at 819.

⁶² See *Morgan Art Foundation Limited v. McKenzie et al.*, 18-CV-4438, Dkt. No. 243 (S.D.N.Y. Mar. 17, 2020) (ordering that “all depositions in this action may be taken via telephone, videoconference, or other remote means, and may be recorded by any reliable audio or audiovisual means;” “[t]his Order does not dispense with the requirements set forth in Fed. R. Civ. P. 30(b)(5), including the requirement that, unless the parties stipulate otherwise, the deposition be ‘conducted before an officer appointed or designated under Rule 28,’ and that the deponent be placed under oath by that officer”; and “a deposition will be deemed to have been conducted ‘before’ an officer so long as that officer attends the deposition via the same remote means (*e.g.*, telephone conference call or video conference) used to connect all other remote participants, and so long as all participants (including the officer) can clearly hear and be heard by all other participants”).

⁶³ *Id.*

⁶⁴ *Id.*; see also Emergency Individual Practices in Light of COVID-19, Judge Denise Cote (S.D.N.Y. Mar. 18, 2020), available at https://www.nysd.uscourts.gov/sites/default/files/practice_documents/DLC%20Cote%20COVID-19%20Emergency%20Practices.pdf%20-%20March%2018%2C%202020.pdf (similar).

⁶⁵ Cf. *Apple Inc. v. Corellium, LLC*, No. 9:19-cv-81160, Dkt. No. 248 (S.D. Fla. Mar. 18, 2020) (denying motion for extension of time of discovery cutoff filed by plaintiff, and reasoning that “COVID-19 alone is not a sufficient basis for extension of pretrial deadlines or the trial date” because “[i]n today’s highly technological world, restrictions on movement and in-person interactions do not automatically preclude the parties from litigating their case,” and instructing that, as needed, “the parties shall utilize video conferencing or other remote means” for depositions).

⁶⁶ *ResCap Liquidating Tr. v. Primary Res. Mortg., Inc.*, No. 13-cv-3451, 2020 WL 1280931, at *3-4 (D. Minn. Mar. 13, 2020).

⁶⁷ See Stewart Bishop, *SDNY Judge Lets Sick Juror Deliberate Via Videoconference*, Law360 (Mar. 16, 2020), available at <https://www.law360.com/whitecollar/articles/1253726/sdny-judge-lets-sick-juror-deliberate-via-videoconference>. In a similar vein, another judge of the same court has permitted grand jurors, who weigh the validity of criminal charges before they are brought, to participate from any of the District’s courthouses and deliberate with one another by videoconference. See Pete Brush, *Grand Jurors in SDNY Get Video Option Amid Virus Outbreak*, Law360 (Mar. 21, 2020), available at <https://www.law360.com/articles/1255774>.

⁶⁸ Standing Order Regarding the Novel Coronavirus (E.D. Tex. Marshall Div. Mar. 3, 2020), available at http://www.txed.uscourts.gov/sites/default/files/judgeFiles/Standing%20Order%20re%20COVID-19_signed.pdf.

⁶⁹ Standing Order No. 2 Concerning COVID-19 Precautionary Measures (Del. Ch. Mar. 16, 2020), available at <https://courts.delaware.gov/rules/pdf/Court-of-Chancery-Standing-Order-No2.pdf>.

⁷⁰ Judicial Council of California, Statewide Order (Cal. Mar. 23, 2020), https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/Statewide%20Order%20by%20the%20Chief%20Justice-Chair%20of%20the%20Judicial%20Council%203-23-2020.pdf (statewide order suspending all jury trials in California’s superior courts for 60 days).

⁷¹ Fed. R. Civ. P. 43(a).

⁷² See, e.g., *Thomas v. Anderson*, 912 F.3d 971, 977 (7th Cir. 2018); *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010).

⁷³ See *Scott Timber, Inc. v. United States*, 93 Fed. Cl. 498, 500 (Fed. Cl. 2010).

⁷⁴ See *ResCap Liquidating Tr. v. Primary Res. Mortg., Inc.*, No. 13-cv-3451, 2020 WL 1280931, at *3-4 (D. Minn. Mar. 13, 2020) (quoting *Eller v. Trans Union, LLC*, 739 F.3d 467, 478 (10th Cir. 2013)).

⁷⁵ *Kim v. Regents of Univ. of Calif.*, No. A155073, 2019 WL 6267422, *4 (Cal. Ct. App. Nov. 21, 2019) (unpublished); see also, e.g., *People v. Sekhorn*, 26 Cal. App. 5th Supp. 26, 33 (Cal. App. Div. 2018) (“the advent of major developments in videoconferencing equipment, including the use of high definition technology, allow a judge to see the most detailed observations of a witness, almost eliminating any concerns of a judge not being physically present in the same courtroom”).

⁷⁶ *People v. Wrotten*, 14 N.Y.3d 33, 37-38 (2009) (internal brackets omitted).

⁷⁷ See, e.g., *McLeod v. McLeod*, No. N11C-03-111, 2015 WL 1593622, *1 (Del. Sup. Ct. Apr. 6, 2015) (allowing expert to testify by videoconference); *Nat’l Shopmen Pension Fund v. Stamford Iron & Steel Works, Inc.*, 999 F. Supp. 2d 229, 233 (D.D.C. 2013) (“Witnesses may also testify in this Court at trial via live videoconference.”).

⁷⁸ See *Rusu v. INS*, 296 F.3d 316, 323 (4th Cir. 2002) (“Therefore, under either scenario, the effectiveness of the lawyer is diminished; he simply must choose the least damaging option.”); see also Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 Univ. New Hampshire L. Rev. 59, 59 (2006) (noting that in some proceedings, the Immigration Judge is in one place, the attorneys are in another, and the petitioner is in a third, all connected by videolinks).

⁷⁹ See Gordon Berman, *The Development & Significance of Courtroom Technology: A Thirty-Year Perspective In Fast Forward Mode*, 60 N.Y. Univ. Ann. Suv. Am. L. 621 (2005) (describing such trials in Ohio and California).

⁸⁰ See, e.g., *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010) (jury trial with remote testimony from plaintiffs).

⁸¹ See *Thornton v. Snyder*, 428 F.3d 690, 693 (7th Cir. 2005) (“At trial, Thornton [the plaintiff] and the defense counsel appeared via videoconference and were not physically present in the courtroom with the jury. In addition, all the witnesses testified by videoconference, save one that testified by telephone.”).

⁸² See *Perotti v. Quinones*, 790 F.3d 712, 727 (7th Cir. 2015) (holding it is not “obvious that the district court could have compelled them to appear by video over their own objections, when they were not incarcerated as Perotti is and required no writ to secure their own presence”).

⁸³ See *China Moves Courts Online Due to Coronavirus, Following Classes and Offices*, South China Morning Post (Feb. 17, 2020), available at <https://www.scmp.com/tech/article/3050998/china-moves-courts-online-due-coronavirus-following-classes-and-offices> (“The Shanghai High Court recorded a 63 percent increase in online court cases compared with the same period last year, state media reported. In addition to handling court case filings online, the court is using online platforms to handle payments, contact with judges, material submissions and other litigation services. Remote court trials are conducted over video links. Online court technology is also being used in other parts of the country, but not everything is going smoothly.”); see also Hugo Miller, Ellen Milligan, and Gaspard Sebag, *U.K. Courts Carry on While Virus Halts EU Cases, Lawsuits*, Bloomberg (Mar. 16, 2020), <https://www.bloomberg.com/news/articles/2020-03-16/virus-closes-european-courts-but-can-t-stop-u-k-tradition> (indicating that U.K. courts might increase reliance on video and phone technology in an effort to limit the spread of the virus).

⁸⁴ COVID-19 Update, Am. Arbitration Assoc. (Mar. 17, 2020), available at <https://go.adr.org/covid19.html>.

⁸⁵ *Id.*

⁸⁶ See, e.g., AAA M-7 (“The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.”); R-10 (“At the request of any party or upon the AAA’s own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives.”); R-21 (“The parties should be invited to attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.”); P-2 (at preliminary hearing, the parties and the arbitrator should address “(xiv) whether, at the arbitration hearing, (a) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means”); ICDR Rules Med. Art. 7 (“The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person, or otherwise.”); Arb. Art. 20 (“In establishing procedures for the case, the tribunal and the parties may consider how technology ... could be used to increase the efficiency and economy of the proceedings.”); Arb. Art. 23 (“The tribunal may direct that witnesses be examined through means that do not require their physical presence.”); Arb. Art. 6 (in context of application for emergency relief, “[t]he emergency arbitrator shall ... establish a schedule ... [which] shall provide a reasonable opportunity to all parties to be heard and may provide for proceedings by telephone, video, written submissions, or other suitable means, as alternatives to an in-person hearing”); Arb. Art. E-9 (in the context of expedited proceedings, “[h]earings may take place in person or via video conference or other suitable means, at the discretion of the arbitrator”).

⁸⁷ JAMS, Coronavirus (COVID-19) Advisory for JAMS Visitors (Mar. 17, 2020), [https://www.jamsadr.com/news/2020/coronavirus-\(covid-19\)-advisory-for-jams-visitors](https://www.jamsadr.com/news/2020/coronavirus-(covid-19)-advisory-for-jams-visitors).

⁸⁸ *Id.*

⁸⁹ *See, e.g.*, JAMS Streamlined R. 13(c) (“The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute.”); R. 17(g) (“The Hearing, or any portion thereof, may be conducted telephonically or videographically with the agreement of the Parties or at the discretion of the Arbitrator.”); Comprehensive R. 17 & 22 (same); Int. R. Art. 23.1 (“Such preliminary conference may be conducted in person, by telephone or by videoconference, at the discretion of the Tribunal.”); Int. R. Art. 3.2 (where emergency relief is requested, “[i]f a hearing is required, such hearing may, at the Emergency Arbitrator’s discretion, take place at the seat of the arbitration, and the parties may attend by videoconference or other remote location.”).

⁹⁰ *See* Erin Coe, *Technical Difficulties: Courts Face COVID-19 Learning Curve*, Law360 (Mar. 23, 2020), <https://www.law360.com/articles/1256124>.

⁹¹ *ResCap Liquidating Tr. v. Primary Res. Mortg., Inc.*, No. 13-cv-3451, 2020 WL 1280931, at *2 (D. Minn. Mar. 13, 2020).

⁹² *Id.* (internal quotation marks and brackets omitted).

⁹³ *Id.* (internal quotation marks and brackets omitted).