



PROGRAM MATERIALS

Program #30103

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Litigating Through the Coronavirus: An Aggressive Litigator's Guide to Moving Your Cases During the Pandemic

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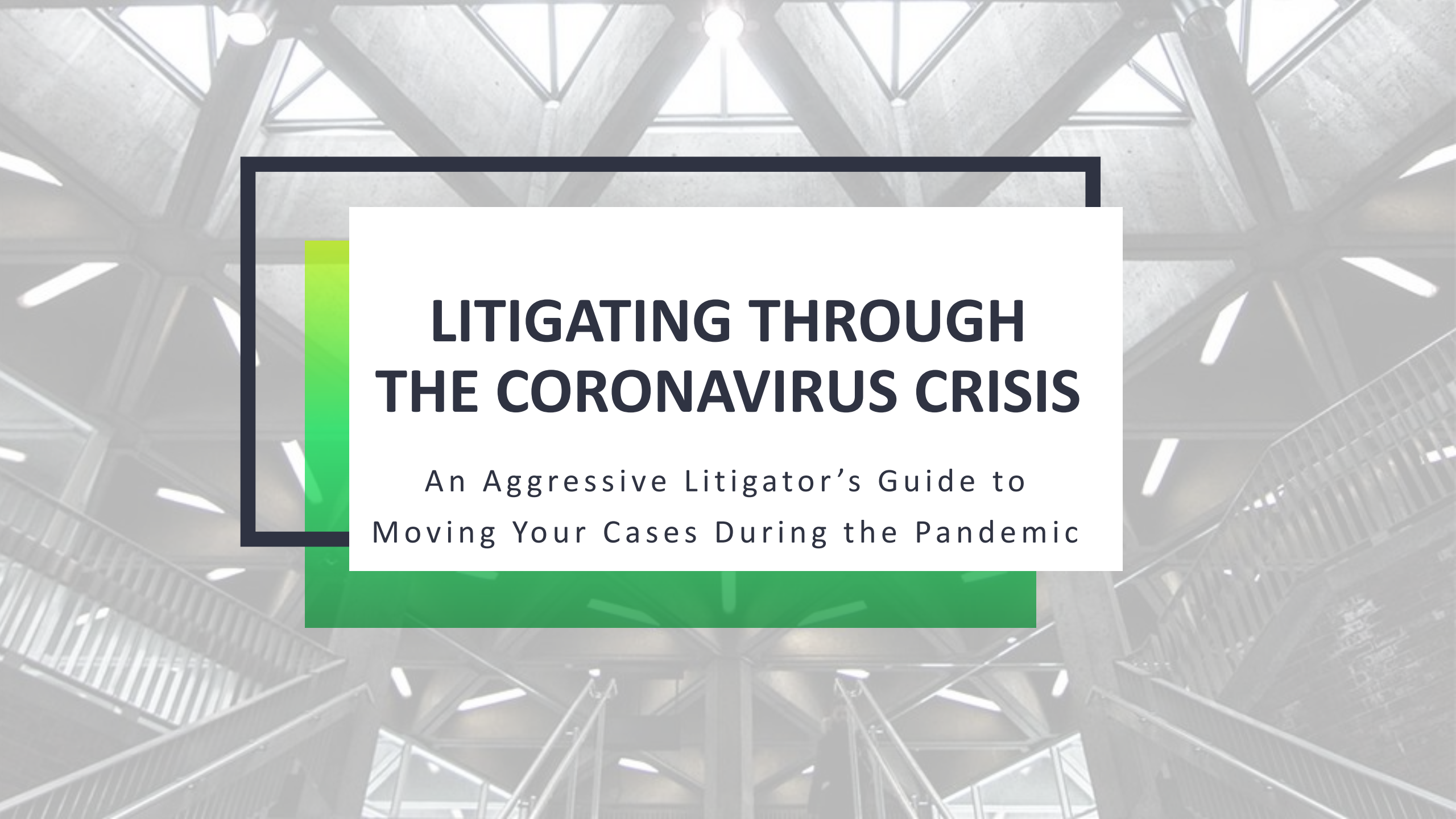
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LITIGATING THROUGH THE CORONAVIRUS CRISIS

An Aggressive Litigator's Guide to
Moving Your Cases During the Pandemic

ABOUT ME

J o s h u a W u r t z e l

- [Commercial litigator](#) with Manhattan litigation boutique [Schlam Stone & Dolan LLP](#)
- Former associate at Weil Gotshal & Manges LLP
- Schlam Stone runs the [Commercial Division Blog](#)
- Focus on aggressive representation in most cost-efficient way
- Published recent [article](#) in New York Law Journal about how to litigate aggressively during this pandemic





COVID 19'S IMPACT ON THE COURTS

FEDERAL COURT CLOSURES

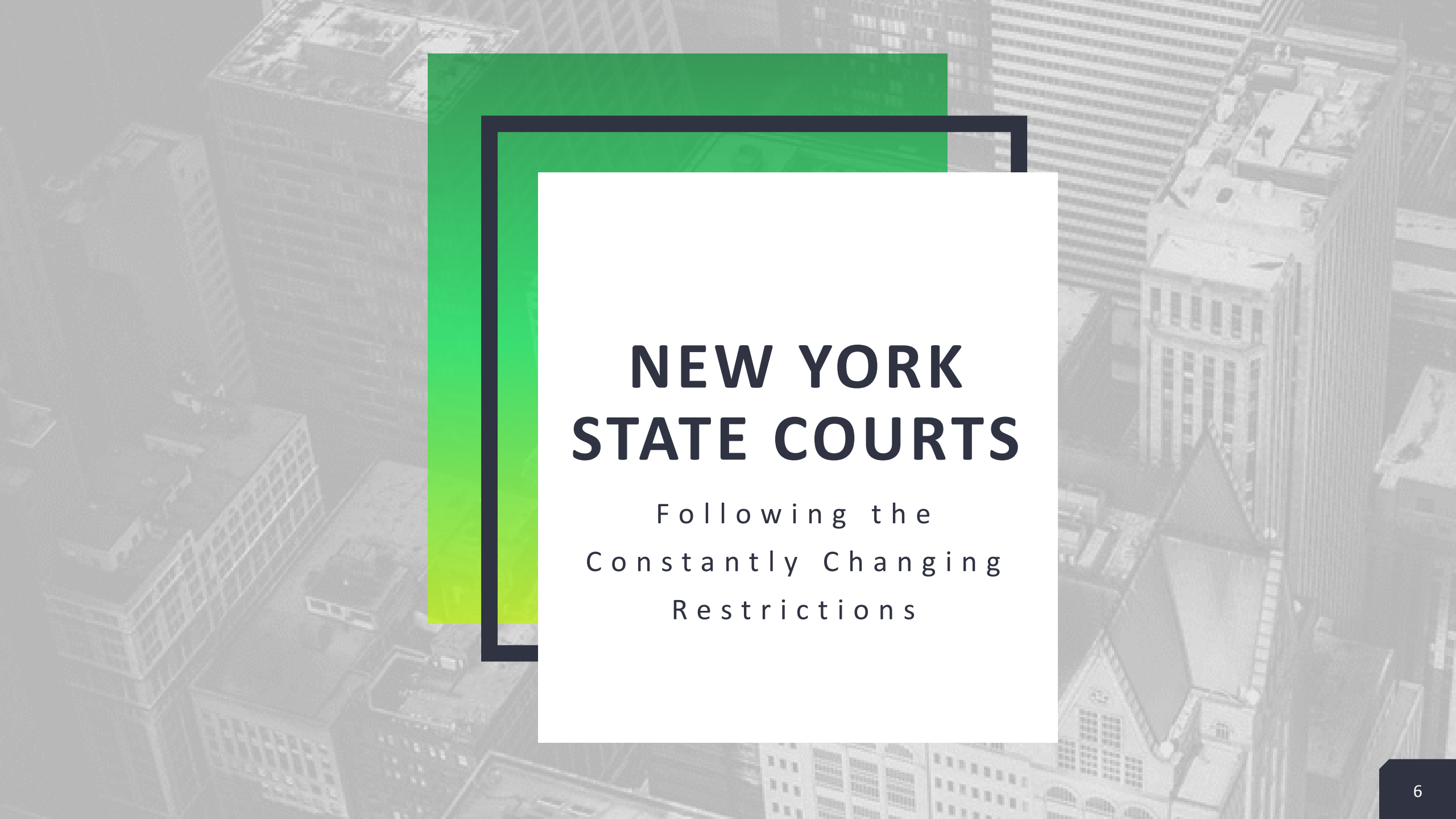
- Most federal courts remain open on a limited basis and continue to accept electronic filings
- Most judges and law clerks continue to work remotely
- **S.D.N.Y.:**
 - Under [March 30 order](#), 500 Pearl open, but only to hear urgent criminal matters and TROs
 - Individual judges may have temporary rules for specific matters



STATE COURT CLOSURES

- Varies by state
- Ability to move cases often turns on access to courts and clerks
- NY State court system is almost entirely shut down



An aerial, grayscale photograph of a dense urban landscape, likely New York City, featuring numerous skyscrapers and buildings. The image is partially obscured by a green and white graphic overlay on the left side.

NEW YORK STATE COURTS

Following the
Constantly Changing
Restrictions

MARCH 13, 2020

- Chief Administrative Judge issued a [memo](#) directing that conferences be adjourned on consent or held by Skype or telephone, and that motions be taken on submission or argument heard by Skype or other remote means



MARCH 15, 2020

- Chief Administrative Judge issued another [memo](#) further limiting the matters that courts would hear in person, but saying nothing specific about e-filed applications



MARCH 19, 2020

- Chief Administrative Judge issued an [order](#) that “strongly discouraged” the prosecution of pending civil matters in a way that would require “in-person appearances or travel,” and stating that civil litigants would not be penalized if their discovery compliance were “delayed for reasons relating to the coronavirus public health emergency.”



MARCH 19, 2020

- New York County Courthouse limited functions within the courthouse, but stated that motions in “paperless parts”—meaning parts that do not rely on the Motion Support Office to ferry hard copies of the submitted papers to them—would be marked fully submitted for the assigned judge to handle



MARCH 20, 2020

- Governor Cuomo issued [Executive Order No. 202.8](#), which, among other things, tolled any time limit for the “commencement, filing, or service of any legal action, notice, motion, or other process or proceeding” for 30 days
- On its face, this order did not toll the time to respond to a complaint or a motion, unless “other process or proceeding” could be interpreted to include these types of responses (a poor reading of these terms, but likely within the spirit of this order)
- But you’d be hard pressed to find a judge who will later default a party for missing deadlines in reliance on this order



MARCH 22, 2020

- Chief Administrative Judge issued [order](#) prohibiting parties from making any filings in any state court
- Limited exceptions for “essential matters”:
 - Urgent criminal-, family-, and housing-court matters
 - Some Mental Hygiene Law hearings and applications
 - Emergency guardianship applications
 - Temporary orders of protection
 - Emergency Election Law applications
 - Extreme risk protection orders
 - Emergency applications related to the coronavirus
 - “[A]ny other matter that the court deems essential”



ADMINISTRATIVE GUIDANCE ON NO-FILING RULE

- NYS Courts issued [guidance](#) on no-filing rule
- Limited to trial courts; Appellate Divisions still accept filings
- Does not address discovery or service of process, but expectation is that parties will adjourn and cooperate
- Catch-all provision “designed to address the very rare cases where individual facts necessitate an immediate hearing notwithstanding current public health concerns,” and “will be interpreted restrictively”; to apply for catch-all relief, must “apply to the court for this designation by emergency application by order to show cause, including a detailed explanation of the applicant’s rationale”





POSSIBLE REOPENINGS SOON?

- On March 30, Chief Judge DiFiore [announced new developments](#)
- NYS courts are now going virtual for “essential” matters
- Chief Judge DiFiore has “begun discussing” with leaders of the tort, commercial matrimonial, and criminal bars how to “incrementally expand court access for those cases”

INSTITUTIONAL FORCES AT PLAY

- Despite e-filing, some courts rely on paper pushes (NYS is perfect example)
- Some electronic functions require in-court personnel
- Courts are slow to embrace changes or adapt to new technology
- Many practitioners expect courts to function how they always have, and courts are reluctant to upset those expectations





USING TECHNOLOGY TO YOUR ADVANTAGE

TECHNOLOGY YOU MUST USE

- Videoconferencing (Skype, Zoom, even Facetime)
 - Deposition programs
- Hands-free, good-quality phone service
 - Consider investing in a good Bluetooth speaker or AirPods
- Second monitor or screen
- Fast wifi connection
 - Consider getting an extender if you have a big house or work from outside
- Electronic documents vs. paper copies
 - Consider getting to used to using a tablet for document management





KEEP YOUR CASES MOVING

Balancing between
being a zealous
advocate and
a realist



DELAY IS A DEFENDANT'S FRIEND

- A party trying to maintain the status quo (usually a defendant) benefits from delay
- May believe they have carte blanche to delay
- May believe party trying to move case has little recourse

ADJOURNMENTS

- Adjournments and extensions are inevitable
- Cannot operate like it's business as usual
- Court will expect adjournments and extensions to be on consent
- But keep deadlines on a short leash!
- Avoid agreeing to indefinite extensions; ask for a set date, even if you are likely to have to adjourn again





COURT CONFERENCES

- Some courts are automatically converting appearances to phone or video, rather than just adjourning
- Ask to hold conference by phone or video, even if court doesn't offer it

DEPOSITIONS

- Video, video, video!
- Skype and Zoom work well
- For-fee programs and services exist as well (Esquire)
- Court reporter can join remotely
- Share screen or make documents available electronically in advance
- State agreement to conduct remote deposition on the record
- Can use phone for audio if necessary
- Make sure witness has good wifi, access to documents, and a quiet space





ALTERNATIVE DISPUTE RESOLUTION

- Private ADR can replace closed courts
- Video mediations
- Video arbitrations

STAND UP AGAINST DELAY MONGERS

- Don't accept blanket requests for delay
- Ask for specific reasons supporting an adjournment
- Don't be afraid to go to the court
- Many state-court clerks are available by e-mail
- Follow the judge's [temporary rules](#)





DON'T STRIVE FOR PERFECTION

- Assume things won't return to normal for at least several months
- Resist the temptation to sit on the sideline
- Adapt to the current challenges and encourage others to do the same
- Ethical duties to clients
- This is an opportunity!

CONTACT ME

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