

MASSACHUSETTS Lawyers Weekly

Litigators give emergency court ops passing grade

But crisis confirms federal bench enjoys big tech edge

By: Pat Murphy © June 4, 2020

Trial attorneys say they feel pretty good about how well the state and federal courts have performed in the face of the challenges posed by the COVID-19 health emergency.

However, litigators point out that the crisis has exposed certain shortcomings in the state's Trial Court, saying the federal courts enjoy a clear advantage in terms of the availability of technology to conduct proceedings remotely as well as the comfort level federal judges have in using that technology to its fullest potential.



Says complaints over e-filing are fair

They also say that the availability of a uniform electronic case management and filing system has made conducting business in the U.S. District and Bankruptcy courts infinitely more convenient.

Worcester personal injury attorney Kathy Jo Cook says the state trial courts faced a number of obstacles to resuming operations after their March 16 closure. The president of the Massachusetts Academy of Trial Lawyers credits the Trial Court for overcoming those early obstacles.

"I feel like the court is pretty well up and running now," Cook says. "I don't foresee a lot of problems in the next few months with hearings and moving cases along, except for trial. Nobody really knows at the present time how that's going to be handled."

John R. Felice, an insurance litigator in Boston, agrees that, overall, the courts have responded well to the crisis.

"Obviously, the biggest challenge was technology, and the federal courts are much more advanced in terms of technology as compared to the state courts," says Felice, president of the Massachusetts Defense Lawyers Association. "But the state courts have begun to get up to speed."

Virtual hearings

Bryn A.M. Sfetsios, a Boston employment attorney, says she is finding judges to be increasingly amenable to virtual hearings, having had a recent positive experience arguing a summary judgment motion in a Norfolk Superior Court telephonic hearing.

"It helped that the judge directed his questions and told the lawyers when to speak," Sfetsios says. "Of course, in some cases it's more desirable to appear in person. But this worked out well and I'd do it again."

Carlos A. Maycotte, co-chair of the Family Law Section of the Boston Bar Association, says lawyers may be disappointed by the level of commitment to technology by some of the state's judges.

"There is a uniform level of commitment to try to have as many virtual hearings as possible, either by telephone or, increasingly, by videoconference, but the success of that implementation varies from court to court and, quite frankly, from judge to judge," Maycotte says.



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— Carlos A. Maycotte, Boston



Cook recently participated in a Hampshire County Superior Court status conference conducted telephonically.

"Basically, it was like being in court," Cook says. "They called the session at 2 o'clock, with all the lawyers and all the various cases. Then you waited your turn just like if we went there."

Cook was impressed by the fact that the status conference took only 15 minutes of her time.

"Before, it would have taken me half a day to drive to Hampshire County and drive back," she says.

For more important proceedings, Cook says state judges need to become more comfortable with videoconferencing technology.

"I have a summary judgment [hearing] in the same court in a few weeks, and I'm a little concerned about that," Cook says. "I'd feel much more comfortable if we were doing that by Zoom or some means where I can see the judge and see counsel. It's just easier to read the room and know when to start [talking] and when to stop."

Some criminal defense attorneys have found the response to the COVID-19 crisis in state court falls short of the performance of the U.S. District Court by a wide margin.

"Comparatively, in state court the practice has been very chaotic," says Boston attorney Victoria Kelleher, president of the Massachusetts Association of Criminal Defense Lawyers. "It's been very hard for defense lawyers to figure out some very practical things, such as where to go for an arraignment if you have a 'duty day.' Do you go to the police station or call in?"

According to Kelleher, attorneys are concerned if it's safe for the lawyer and the client if the proceeding is conducted in person. On the other hand, defense lawyers are concerned about the security of their communications with clients.

"Can we speak with the client confidentially while maintaining social distancing?" Kelleher says. "[If the communication is by phone,] is the client being brought to a room where they are alone and can speak confidentially? Is the phone call being recorded?"

Quick turnaround

The public health emergency gave the state trial courts little time to pivot to remote operations.

"We shut down for two days and then we were back up doing things remotely," Trial Court Chief Justice Paula M. Carey says.

From the start of the crisis, Carey says the courts managed to handle emergency matters, including criminal arraignments, 209(A) domestic violence restraining orders, and Chapter 258(E) harassment prevention orders.

"We were doing most of those cases by audioconference," she says.

Last month, the courts in Carey's department began hearing non-emergency matters again. She says the court is transitioning to greater use of videoconferencing, having purchased a number of Zoom licenses with heightened security features.

Carey says she sees great potential in videoconferencing going forward. For example, in family law cases, videoconferencing technology would permit parties to participate in hearings remotely without having to miss significant time at work.

Videoconferencing technology has also proved to be a revelation in the Probation Department, according to Trial Court Administrator Jonathan S. Williams.

"Because of social distancing concerns, we rapidly issued smartphones to all of our probation officers," Williams says. "They were able to shift over to FaceTime contacts with probationers and conduct those regular checks-ins remotely either by telephone or video. When we get past this, I don't think we will ever go back to 100 percent face-to-face monitoring."

Meanwhile, Carey says the bar's complaints regarding state courts' limited e-filing capability are fair.

"We've been slow to get e-filing," Carey acknowledges. "This pandemic has given us the impetus to move forward much more quickly."

According to Williams, there is a bill pending in the Legislature that would authorize \$160 million in bond financing to help modernize the Trial Court's technology infrastructure. The aim, he says, is have a "paperless" court system.

Williams notes that each Trial Court department currently provides some level of e-filing in civil cases. The main problem is that only three of the Superior Courts—in Barnstable, Middlesex and Worcester counties— have that capability.

In order to encourage greater use of e-filing during the pandemic, Williams says the Trial Court recently announced changes to its fee structure, effective June 1.

"Now, only the person filing the complaint or petition pays a fee," Williams says. "There are no charges for respondents and subsequent filings."

With the pandemic closing the public counters at clerks' offices, lawyers have relied on filing by mail.

Maycotte isn't so sure practitioners will embrace e-filing in state court until there's a platform comparable to the federal court's PACER electronic filing and case management system.

"They're encouraging e-filing, but not a lot of lawyers are familiar with it," Maycotte says. "[The state system is] not the most flexible."

Smooth sailing at federal court?

Robert M. Farrell, clerk for the U.S. District Court, says while the public counters are closed to those seeking to file, the court's electronic case filing system has worked well during the course of the emergency.

"We've made additions to it to adapt to sealed filings, Farrell says. "Those used to be done in person. They are now handled through a secure system that is an add-on to our [case management/electronic filing system]."

Farrell says the court has made great strides in terms of fulfilling the need for virtual hearings, with every one of the court's judges having used videoconferencing to conduct hearings.

"If you had told me in January that 90 percent of our court hearings would be by videoconference, I would have laughed," Farrell says. "We have tools in place with every detention facility that we work with."

L. Jed Berliner, a Springfield bankruptcy attorney, says the U.S. Bankruptcy Court entered the pandemic with a strong foundation that has helped minimize the impact of courthouse closures during the pandemic.

"The Bankruptcy Court is already well-adapted," Berliner says. "It has electronic filing from anywhere in the world. The changes made for COVID have to do with telephonic hearings instead of in-person hearings. Certain judges already held a lot of telephonic hearings, and now they're all telephonic."

Berliner sees pluses and minuses to teleconferencing. On the one hand, he says lawyers don't have the benefit of visual cues to know when the other side has stopped talking and it's time to begin argument or respond. On the other hand, telephonic hearings have made it more convenient for clients to listen into a proceeding they otherwise might have been unable to attend.

One big change in bankruptcy practice, Berliner adds, is that telephonic trustee meetings are now the norm whereas they were a rarity before the pandemic.

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ONE COMMENT

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June 8, 2020 at 2:41 pm

There remain issues with respect to the treatment of those evictions still permitted under the Eviction Moratorium (Ch. 65 of the Acts of 2020), whereby District Court Standing Order 6-20 (“DCSO 6-20”) does not take the opportunity to now deem those evictions excepted by the Moratorium as emergent and entitled to a reasonably scheduled hearing (trial) by teleconference. Instead, judicial discretion, without any guidance, permits Judges to bar even the filing of such Summary Process actions! The bar to justice violates clear provision of The Massachusetts Declaration of Right ensuring access to the courts. Moreover, what are Landlords to do? They can get service on commercial tenants who have no protections under the Moratorium, but are barred from filing. Without even a case number to appeal to the Appellate Division of the District Court, only review by the SJC in a G.L. c. 211 §3 petition, an enormous and costly undertaking and not necessarily “summary” in any event, would seem to be the only relief. I urge Judge Dawley to immediately address this shortcoming and amend DCSO 6-20 to include evictions which are not otherwise barred by the Eviction Moratorium to be included within the list of emergency hearings that must be made accessible. Please. Best, Benjamin Lambert Hall, Jr., Esq. Edgartown, Massachusetts

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