A Proposal For Efficient Post-Pandemic Justice In New York

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Originally published in Law360 on April 26, 2020

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As part of its response to the COVID-19 pandemic, New York has pressed pause on its state court system. Gov. Andrew Cuomo has now twice tolled all deadlines and limitations periods under the New York Civil Practice Law and Rules. Chief Administrative Judge Lawrence Marks has strictly curtailed what papers can be submitted in existing cases and barred outright the filing of new nonessential matters.

While both are reasonable responses to the pandemic, they have ensured a huge litigation backlog once the courts are fully back in session. For litigants whose cases are halted — or who are denied access to the courts altogether for several months — this means that justice will be delayed, or even denied, without drastic action. And for the most pressing matters, that could mean the difference between a job and the unemployment line, a home or homelessness, solvency or bankruptcy.

The New York State Bar Association has taken preliminary steps to address this problem. It announced on April 15 that it had convened a COVID-19 Recovery Task Force, led by former Chief Judge Jonathan Lippman, to help connect those impacted by the pandemic with pro bono counsel.[1] This is a very good idea that unfortunately does not go far enough — it gets people representation to litigate, but it does not help get litigation resolved expeditiously, or sufficiently address the burden post-pandemic litigation will place on court dockets.

That challenge, however, can be met by substantially increasing the number of forums in which COVID-19-related disputes can be resolved. This means efficient alternative tribunals and specialized adjudicators. While this challenge will without question also exist at the federal level, the sheer volume of cases heard by state courts makes this all the more pressing for them. In fact, being a leader in the expeditious resolution of disputes will help New York maintain its preeminent position as a global center for finance and law.

What makes crafting such a program difficult, however, is that the New York Constitution limits the ways in which the state can exercise its judicial powers. Even if the political branches wanted to create an emergency tribunal from the ground up, they would quickly run into a jurisdictional brick wall.

Thankfully, we already have three examples of creative solutions — small claims courts, alternative dispute resolution programs, and judicial adjuncts such as special masters and referees — that lessen the burden on state court judges without violating the constitution. How these solutions work can inform what a viable post-pandemic tribunal might look like.

Small Claims Courts

The New York State Unified Court System is notoriously complex. Article VI of the state constitution creates several statewide courts, including the Supreme Court in each county, plus family courts, surrogates' courts and county courts.[2] It vests the Supreme Court with "general original jurisdiction in law and equity" to hear cases that are not otherwise subject to the exclusive jurisdiction of one of the other specialized courts.[3]

Article VI also contains special provisions for New York City, recognizing the need for a separate court to handle the sheer volume of smaller commercial cases likely to be brought by its residents. It directs the Legislature to create a "single court of citywide civil jurisdiction" whose judges are elected for 10-year terms.[4]

The New York City Civil Court has jurisdiction over actions where the amount in controversy, or the value of real property at issue, is $25,000 or less, exclusive of interest and costs.[5] Judges are elected and must be attorneys with at least five years of experience (compared to 10 years for Supreme Court justices).[6]

The state Legislature created this court, and defined its rules and jurisdiction, via the New York City Civil Court Act. Most importantly — at least for present purposes — the act set aside "one or more parts of the [civil] court in each county for the hearing of small claims."[7] As of December 2019, "small claims" are defined as causes of action where the amount in controversy does not exceed $10,000, and where the defendant lives or works in New York City.[8]

The goal of small claims court is to do "substantial justice between the parties according to the rules of substantive law [without being] bound by statutory provisions or rules of practice, procedure, pleading, or evidence."[9] Discovery is typically not permitted, and dismissal motions are only allowed where "clear legal principles require it."[10]

Appeal rights are limited.[11] In short, small claims courts provide quick justice in cases where the cost of normal litigation would vastly outstrip the amount in controversy.

ADR Programs

State courts themselves have also found creative, constitutionally acceptable solutions for managing their caseload. The Office of Court Administration currently oversees alternative dispute resolution programs within courts statewide.

This includes creating Community Dispute Resolution Centers, or CDRCs, in each county, encouraging court-sponsored and judicially referred mediation of all kinds of disputes (commercial, family, matrimonial, appeals, etc.) and, in small claims court, providing the opportunity for same-day arbitration and mediation.[12] An ADR advisory committee appointed by Chief Judge Janet DiFiore in 2018 found last year that CDRCs settled 74% of the cases they handled, at a cost to taxpayers of less than $300 per case.[13]

Based on the recommendation of that same advisory committee, Chief Judge DiFiore announced a new "presumptive ADR" program in May 2019. Its purpose is to direct "a broad range of civil cases, from personal injury and matrimonial cases to estate matters and commercial disputes" toward ADR programs, "with a focus on court-sponsored mediation," as the "first step in the case proceeding in court."[14]

Since these dispute resolution programs are not binding unless each party agrees, they do not involve the extraconstitutional exercise of judicial authority. The precise details of "presumptive ADR" are still being ironed out, and the state has made a variety of tools available to local courts to develop their programs.[15]

Judicial Adjuncts

Once a case moves forward, New York state judges have broad authority from the Legislature to appoint judicial adjuncts, such as special masters, referees or hearing

officers, to help them resolve cases. For example, state law empowers the "Chief Administrator of the Courts [to] authorize the creation of a program for the appointment of attorneys as special masters in designated courts to preside over conferences and hear and report on applications to the court."[16]

The First Department utilizes a special master program, staffed by experienced attorneys and former judges, to help parties reach a settlement before proceeding with their appeals.[17] And the Commercial Division of the Supreme Court for New York County implemented a pilot program a few years ago to determine whether special masters were helpful in resolving the intricate discovery disputes that often attend complex commercial cases.[18]

While special masters are able to report back to judges with recommendations on specific disputes, they have no authority to decide issues themselves. Referees, however, do. Section 4001 of the CPLR permits a court to "appoint a referee or determine an issue, perform an act, or inquire and report in any case" as permitted by law.[19]

While the parties must consent to submitting most issues to a referee, a court may appoint referees with decision-making authority without the parties' consent in two scenarios: first, to "determine a cause of action or an issue where the trial will require the examination of a long account ... or to determine an issue of damages separately triable and not requiring a trial by jury; or where otherwise authorized by law,"[20] and second, when the referee is a judicial hearing officer (i.e., a former judge).[21]

By statute, the chief administrator of the courts appoints qualified applicants to lists of potential referees that courts may then select; the statute contemplates, but does not require, that applicants be attorneys — just that they be qualified.[22]

How to Craft a Post-Pandemic Tribunal

These examples of nontraditional avenues to justice suggest a few key principles that any architect of a post-pandemic emergency tribunal should follow.

First, the judicial power can only be exercised in a manner consistent with Article VI of the New York State Constitution. This means that any emergency tribunal should be one the state government can create by right, rather than through the amendment process.

Second, it should prioritize getting parties to consent to use this alternative track. Plaintiffs always want fast justice, but defendants can be wooed by the reduced costs of streamlined proceedings. Moreover, findings on consent are more defensible than findings imposed by fiat.

Third, it should focus on resolving those disputes where thorough discovery and expansive motion practice is not cost-justified (i.e., disputes of a few hundred thousand dollars or less), or where portions of big-dollar matters can be resolved expeditiously (i.e., motions and discovery disputes in insurance cases).

And fourth, it should recognize that while every case is different, those that arise out of the pandemic will probably share a good number of similarities.

With these principles in mind, a tribunal could be structured as follows:

First, the state Legislature should pass a bill creating the tribunal and appointing someone

— probably a former judge — to oversee it. Let's call that person the chief response judge.

Second, the chief response judge would appoint deputies to oversee cases in each practice area the tribunal would hear, such as employment, landlord-tenant and commercial law. The deputies would be responsible for streamlining procedure and creating mechanisms to encourage early resolution of cases.

These could include providing summaries of substantive law to parties, or generating lists of documents that would be presumptively discoverable. The guiding principle would be that while there is little overlap between different areas of law, cases that arise within those areas as a result of the pandemic probably have a good deal in common.

Third, each deputy would appoint special masters or referees, within the bounds set by law, as hearing officers to oversee cases in each county that fall within their subject area. These hearing officers would apply substantive New York law, and use the streamlined procedures drafted by the deputies to decide or mediate disputes as necessary.

Fourth, the hearing officers should be drawn from as diverse a pool as possible. Preference should be given to experienced lawyers, but members of the business community whose experience and ethics could not be gainsaid should be included in the mix. Not only would this increase the pool of potential hearing officers, having representatives of the business community involved would make the tribunal more credible in the eyes of defendants and encourage broader participation.

Fifth, state court judges should refer whatever cases they can to this tribunal. In courts like the New York City Civil Court, where the Legislature controls their jurisdiction, referral of pandemic-related cases for final resolution should be mandatory. For other courts, where the Legislature does not have that degree of control, the state judiciary should require judges to refer cases to the tribunal for mandatory ADR. If ADR fails, the hearing officer could then supervise discovery and make a report or recommendation to the judge on how to dispose of the case.

Conclusion

If the goal of litigation is the swift, orderly and fair resolution of disputes, state courts will almost certainly be unable to meet that goal after the pandemic subsides. Ingenuity, informed by creative approaches that have worked in the past, should be the order of the day.

Since the bar and the business community have already begun to move mountains to help people impacted by COVID-19, it is safe to assume that at least some portion of them will be happy to participate in a process like this out of a sense of civic duty or pride. And the more that do so, the faster life can return to something approaching normal.

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[1] See Susan DeSantis, "COVID-19 Recovery Task Force Appointed to Oversee Pro Bono Network," NYSBA Latest News (April 15, 2020), available at https://nysba.org/covid-19-recovery-task-force-appointed-to-oversee-pro-bono-network/.

[2] N.Y. Const. Art. VI § 1.a;

[3] Id. § 7.a.

[4] Id. § 15.a

[5] Id. § 15.b; N.Y.C. Civil Court Act §§ 201-203.

[6] N.Y. Const. Art. VI § 20.a.

[7] N.Y.C. Civil Court Act § 1802.

[8] N.Y.C. Civil Court Act § 1801.

[9] N.Y.C. Civil Court Act § 1804.

[10] N.Y.C. Civil Court Act § 1804, Practice Commentaries.

[11] N.Y.C. Civil Court Act § 1807.

[12] Interim Report and Recommendations of Chief Judge's ADR Advisory Committee, at 6-9. (Feb. 12, 2019)

[13] Id. at 7.

[14] Press Release, "Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases." (May 14, 2019).

[15] See http://ww2.nycourts.gov/ip/adr/index.shtml.

[16] 22 NYCRR 202.14.

[17] See http://www.nycourts.gov/courts/AD1/committees&programs/specialmasters/.

[18] See https://www.nycourts.gov/LegacyPDFS/RULES/comments/orders/AO120-SpecialMasters.pdf.

[19] N.Y. C.P.L.R. § 4001.

[20] N.Y. C.P.L.R. § 4317.

[21] N.Y. Jud. L. § 850; see New York State-Federal Judicial Council, Program Materials, "The Judicial Role in Appointment of Masters, Monitors, Fiduciaries and Other Judicial Adjuncts," at 4, available at https://www.nycourts.gov/LegacyPDFS/RULES/comments/orders/AO120-SpecialMasters.pdf (Nov. 16, 2015).

[22] 22 NYCRR 36.3.