

The State of Litigation Under COVID-19



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The fluidity of the COVID-19 crisis and its impact on the legal profession increases the need for those involved in or anticipating litigation to stay informed about how courts are addressing the need for “just, speedy, and inexpensive determination”^[1] of disputes. Certainly, today’s challenging circumstances force all who are involved in litigation to effectively balance that need while also adhering to crucial health and safety measures. The necessity of striking the correct balance presents a unique opportunity to innovate and reassess the rules, practices, strategies, communications, and technologies. To do so, understanding the crisis’s impact on litigation and how courts are addressing legal matters during the first several weeks of this crisis—which current trends suggest will last many more—is critical to assisting clients in navigating these new and difficult waters.

We surveyed the litigation landscape nationally to provide information to help understand the impact and navigate this unprecedented time in our nation’s history. Because the situation is changing daily and there is no bright-line answer for all situations, it is critically important to stay abreast of developments, including by conferring regularly with experienced, informed litigators.

Changes to Court Operations

In-person court proceedings in many of the country’s most populous jurisdictions are substantially limited or are not taking place at all: the United States Supreme Court closed its doors for the first time since 1918, numerous federal courts of appeals have postponed oral arguments,^[2] and trial courts, which normally see a far greater volume of traffic than their appellate counterparts, have also postponed trials and other pretrial deadlines.^[3] In New York, state courts have stopped accepting all filings except in cases deemed “essential,” such as those involving criminal or domestic relations matters.^[4] To avoid undue prejudice to litigants that could result from such restrictions and closures, some jurisdictions also have suspended or tolled applicable statutes of limitations.^[5] And to the extent court proceedings are held at all, they are largely held remotely, either by video conference or telephone.

Impact on Litigants

Parties that were actively litigating before the outbreak, particularly at the trial level, likely will experience delays in court resolution of their cases regardless of the stage of litigation. Early pre-discovery motions at the trial level might be possible where making such motions does not require any in-person interaction with a court or where a hearing can be easily held telephonically. But reduced court staffing might delay rulings regardless of the need to have an oral argument on such a motion.

Pretrial discovery similarly could proceed in a normal manner, though court restrictions will impact a party’s ability to have a court dispose of even customary discovery disputes. Moreover, limitations on a population’s physical movement imposed by state and local governments, separate from judicially-imposed court closures, may make the collection of information, and thus responding to discovery requests, difficult or impossible. That, in turn, may drive courts to extend discovery schedules in response.^[6] Conducting in-person depositions during the current crisis could result in increased risk

of harm to public health and might run afoul of applicable state or local shelter-in-place orders.^[7] In short, any litigation activity, even where the activity does not directly depend on physical access or rely on court personnel, will be impacted.

Whether and How to Press Forward

Restrictions and delays caused by an ongoing crisis do not necessarily imply that all court-related business ceases, however. For many reasons, courts must, and will, continue to play an important role in protecting and vindicating the rights of litigants even during such a crisis, particularly where unscrupulous parties seek to exploit the situation or use it as cover for engaging in wrongful conduct.

^[8] Parties suffering harm from such conduct might find waiting to seek redress until the fog of the crisis clears truly impractical. Moreover, as one federal court recently noted when explaining its denial of a joint request to extend all pretrial deadlines by 60 days, putting all activity on hold will “create an overwhelming backlog that the court will not be able to address once the coronavirus emergency abates.”^[9]

Courts and lawyers alike are increasingly relying on technology to help them conduct their daily business. Thankfully, audio and video conferencing technology is well established and can allow judges to conduct court proceedings, such as oral arguments or witness examinations, and lawyers to take and defend depositions without introducing any added public health risks. For example, the Supreme Court of Texas gave lower courts expanded power to consider as evidence sworn statements made via video conference or other means. The court in Texas’s Nueces County did just that in a recent order, which expanded the use and potential validity of depositions by video conference.^[10] Similarly, the Florida Supreme Court recently ordered that notaries and other qualified people may “swear a witness remotely by audio-video conference,” including witnesses who are not located in Florida.^[11] Though remote proceedings of any kind might not be ideal for litigants and their lawyers, and the potential for technical issues remains,^[12] remote proceedings likely are the best means for litigants to keep their cases moving forward.

Nevertheless, parties should consider carefully whether their circumstances rise to the level of the above examples and warrant encumbering a court’s already-strained resources, even with remote proceedings. As we discussed earlier, pragmatism is essential, and courts are less likely than ever to tolerate claims of urgency where none truly exists.^[13] As one federal judge in Illinois recently stated in response to a plaintiff’s repeated requests for a prompt hearing on a temporary restraining order—relief that, even in normal times, requires clearing a high bar—“[i]f there’s ever a time when emergency motions should be limited to genuine emergencies, now’s the time.”^[14] While courts are embracing the use of technology and encouraging remote participation in proceedings via telephone or video, the parties’ willingness and ability to use such technologies alone does not change the fact that, for example, “a hearing—even a telephonic one—would take time and valuable court resources.”^[15]

Courts are expecting parties and their counsel to be sensible,^[16] so litigants (or potential litigants) and their lawyers must evaluate carefully whether immediate action is truly necessary, or whether a modest delay will not be substantially prejudicial.

The same is true for party resources outside of court. Remote video deposition technology already exists, and is currently used where minimizing costs is a priority. That technology can be just as useful during the current crisis,^[17] though parties should consider how current circumstances might impact a witness’s ability to sit even for a remote deposition before insisting on one. For example, another federal judge in Illinois required parties to seek leave to conduct depositions of healthcare professionals and weigh any undue burden imposed on a potential deponent against the importance of the deponent’s testimony to the case—a balancing that Federal Rule 26 mandates regardless of circumstances, but which parties should take particular care not to overlook now.^[18] In that case, the

judge noted that the crisis is uniquely burdening healthcare professionals, who are often working in “all hands on deck” situations, and thus calling on such professionals to sit for depositions would likely constitute undue burden because “[a]ll hands cannot be on deck if some of them are at a law office sitting for a deposition in a tort lawsuit.”^[19] The “all hands on deck” nature of this crisis is not necessarily limited to healthcare professionals; it is certainly conceivable that courts would view seeking discovery from workers who play a role in the food supply chain, in the design and manufacture of medical devices or safety equipment, or in the development of pharmaceuticals, similarly. Nevertheless, under certain circumstances, that balance might weigh in favor of a deposition, such as where a legitimate risk of a witness’s recollection of key events fading exists, or the destruction or loss of physical evidence is imminent and cannot be stopped.

Given the fluid nature of the current crisis, courts are reevaluating their operational changes frequently based on local needs and circumstances; many courts have revised their orders in response to the crisis multiple times over the past two weeks.^[20] Trial continuances may persist for longer than originally anticipated. Current and potential litigants should regularly consult with counsel to stay abreast of any developments not only in their own jurisdictions, but elsewhere as well, as jurisdictions likely will adopt successful or necessary practices and procedures from those who made changes earlier. Additionally, to the extent that there are forum selection or venue issues to be addressed, understanding the broader treatment by courts and practitioners is valuable.

Conclusion

All are working as diligently as possible to adapt to the sudden, sweeping, and unprecedented changes to the court system and rules. These changes require sophisticated consideration of legal strategies, priorities, expectations, and practice. Jenner & Block litigators have counseled and litigated a wide range of matters in past times of crisis and continue to appropriately represent clients in litigation matters during these times. Please reach out to us if you or your client could use our assistance in addressing dispute counseling and litigation matters.

[1] Fed. R. Civ. P. 1.

[2] See, e.g., Chris Villani, *1st Circ. Cancels April Oral Arguments Amid Outbreak*, Law360 (Mar. 16, 2020), available at <https://www.law360.com/articles/1253935/1st-circ-cancels-april-oral-arguments-amid-outbreak>; Public Advisory Regarding Operating Procedures (4th Cir.), available at <http://www.ca4.uscourts.gov/docs/pdfs/publicadvisorycovidoperatingprocedures.pdf>.

[3] See, e.g., General Administrative Order 20-03, (Cook Cty., Ill. Mar. 23, 2020), available at [http://www.cookcountycourt.org/Portals/0/Law Divison/General Administrative Orders/GAO 20-3-03222020222942.pdf](http://www.cookcountycourt.org/Portals/0/Law%20Divison/General%20Administrative%20Orders/GAO%2020-03222020222942.pdf); First Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9042, 20-007 (Tex. March 13, 2020), available at <https://www.txcourts.gov/media/1446056/209042.pdf>.

[4] See generally our earlier coverage specific to New York, which as of now, has among the highest rates of infection in the United States, available at <https://jenner.com/library/publications/19714>

[5] E.g., First Emergency Joint Order Regarding the COVID-19 State of Disaster, SCAD No. 2020-24 (Okla. Mar. 16, 2020), available at <https://www.oscn.net/images/news/SCAD-2020-24.pdf>; Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, Executive Order No. 202.8 (N.Y. Mar. 20, 2020), available at https://mauricewutscher.com/wp-content/uploads/2020/03/EO-202.8-ocr_NY.pdf.

[6] See *In Re Volkswagen “Clean Diesel” Marketing, Sales Practice, & Prods. Liability Litig.*, MDL No. 2672 CRB (JSC) (N. D. Cal. Mar. 18, 2020) (extending the pretrial schedule based on the parties’ inability to access necessary information).

[7] See *Volkswagen*, *supra* n.7.

[8] The Department of Justice successfully convinced a Texas federal court to issue a temporary restraining order shutting down a website for allegedly fraudulently selling coronavirus vaccines. See *Justice Department Files Its First Enforcement Action Against COVID-19 Fraud*, available at <https://www.justice.gov/opa/pr/justice-department-files-its-first-enforcement-action-against-covid-19-fraud>.

[9] *Rigby v. Crosscheck Servs, LLC*, 2020 WL 1492893, at *1 (W.D. Wis. Mar. 27, 2020). But see *Kleiman v. Wright*, 2020 WL 1472087, at *2 (granting plaintiffs' request for extension of pretrial schedule over defendant's opposition); *Libutan v. MGM Grand Hotel LLC*, 2020 WL 1434440, at *2 (D. Nev. Mar. 24, 2020) (granting joint request to stay all discovery and proceedings until June 1, 2020).

[10] Nueces County Order Regarding Remote Participation in Videoconferenced Depositions and/or Those Telephonically Recorded. (Nueces County, Tex. Mar. 18, 2020).

[11] Emergency Procedures for the Administrative of Oaths via Remote Audio-Video Communication Equipment, Administrative Order 20-16 (Fla. Mar. 18, 2020), available at <https://www.floridasupremecourt.org/content/download/632105/7182680/AOSC20-16.pdf>.

[12] Jacqueline Thomsen, *'It's Kind of a Mess': Phone Arguments Get Rocky Debut at DC Circuit During COVID-19 Pandemic*, Law.com (March 20, 2020), available at <https://www.law.com/nationallawjournal/2020/03/20/its-kind-of-a-mess-phone-arguments-get-rocky-debut-at-dc-circuit-during-covid-19-pandemic>.

[13] See *supra* n.5.

[14] *Art Ask Agency v. The Individuals, Corporations, Limited Liability Companies, Partnerships and Unincorporated Associations Identified on Schedule A Hereto*, 2020 WL 1427085, at *2 (N.D. Ill. Mar. 18, 2020); see also *C.W. v. NCL (Bahamas) Ltd.*, 2020 WL 1492904, at *1–*2 (S.D. Fla. Mar. 21, 2020) (characterizing “emergency” designation of dispute over deposition scheduling as “incorrect” and “reckless,” and ordering parties’ counsel “to appear for a hearing at some point” “to explain their behavior in context of the far-more-important issues this Court (and the entire world) is facing”).

[15] *Art*, 2020 WL 1427085, at *1.

[16] See *id.* at *2 (“About half the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.”) (quoting 1 Jessup, Elihu Root 133 (1938)).

[17] See, e.g., *Sinceno v. Riverside Church in the City of New York*, 2020 WL 1302053, at *1 (S.D.N.Y. Mar. 18, 2020) (ordering that “all depositions in this action may be taken by telephone, videoconference, or other remote means, and may be recorded by any reliable audio or audiovisual means”).

[18] See *DeVine v. XPO Logistics Freight*, 2020 WL 1275087, at *2 (N.D. Ill. Mar. 17, 2020).

[19] *Id.* at *3; see also *Elsherif v. Mayo Clinic*, 2020 WL 1441959 (D. Minn. Mar. 24, 2020) (“[P]ressing ahead with depositions next week over a request to postpone them is simply unnecessary” because “the defendant offers no evidence that there will be any meaningful prejudice caused by a postponement of [the depositions].”)

[20] See, e.g., Second Amended General Order 20-0012 In Re: Coronavirus COVID-19 Public Emergency (N.D. Ill. Mar. 30, 2020), available at https://www.ilnd.uscourts.gov/assets/documents/New_AMENDED_GENERAL_ORDER_20-0012.pdf (extending all civil case deadlines by an additional 28 days where first amended order extended deadlines by 21 days); Amended General Administrative Order 20-01 (Cook Cty, Ill. Mar. 30, 2020) (revising scheduling order to limit continuances to 30 days from originally scheduled date or from May 18, 2020, whichever is later), available at https://courts.illinois.gov/Administrative/covid/033020-Cook_AO.pdf; General Order 20-13 –

Supplemental Order Concerning Jury Trials And Related Proceedings (D. Mass. Mar. 30, 2020), available at [http://www.mad.uscourts.gov/general/pdf/announce/Gen_Order_20-13 - Coronavirus - Supp. Order Concerning Jury Trials and Other Proceedings - March 30 2020.pdf](http://www.mad.uscourts.gov/general/pdf/announce/Gen_Order_20-13_-_Coronavirus_-_Supp_Order_Concerning_Jury_Trials_and_Other_Proceedings_-_March_30_2020.pdf) (continuing all jury trials set to begin on or before May 29, 2020 “pending further order of the Court” and noting that “[t]he Court may issue other orders concerning future continuances as necessary and appropriate”).

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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