
Avoiding the Post-Lockdown Courtroom Gridlock

By Rachael A. Frawley-Panyard and Corinne S. Rockoff

In the wake of the coronavirus epidemic, the future ramifications on our court system remain unclear. While we don't have a crystal ball, the legal community is already seeing indications that as lockdowns begin to lift and courts return to full capacity, courtrooms will be backlogged. All parties involved in litigation can expect to see delays to scheduled motion hearings, unwelcome scheduling order extensions, and extended discovery due to social distancing and logistical issues created by COVID-19. Some courts foresee backlogs that may last up to eighteen months, as judges grapple with changes like plexiglass dividers between jurors and witnesses unwilling to step into a courtroom. While these concerns weigh on the minds of attorneys and their clients, some solutions already exist to help parties avoid the backlog.

Like many businesses in the last few months, some courts have employed video and telephonic technology to advance pending litigation and conduct business as close to usual as possible. Judges have made some technological accommodations, including conducting Zoom hearings that parties and counsel can attend from home. Some courts are simply sending out notices of hearings that require appearances via videoconference, while others are unwilling to suggest this option but may accept it where the parties stipulate their agreement. Unsurprisingly, however, many jurisdictions have been slow to implement such practices and are instead operating with skeleton crews to only handle matters deemed essential.

The most effective way to avoid the litigation traffic jam may be to stay out of the courtroom entirely. As with many aspects of the economy, COVID-19 has accelerated pre-existing trends. The legal profession is likely no different. Over the past two decades, there has been a growing preference by litigants and courts for alternative dispute resolution (ADR) such as mediation, arbitration, and the use of special masters. It is likely that this trend will be accelerated either through court direction, or the decision of the parties themselves, to resort to ADR in an effort to avoid a deluge of prolonged and costly litigation and to assist in clearing the court backlog.

Moreover, the profession is witnessing increasing innovation within existing ADR mechanisms such as mediation. Mediators are often afforded more flexibility than the court system itself has traditionally allowed. As such, mediators are conducting a growing number of remote video mediations allowing parties to avoid increased risk of COVID-19 exposure while also reducing travel time and costs. Parties can be confined to separate video conferencing “rooms,” and just like in-person mediation, mediators can shuttle back and forth as they attempt to work out a solution. Not every mediation will lead to resolution, but at the very least, they can allow parties to better understand one another’s positions in preparation for trial.

Despite the fascinating melding of necessity and technology relating to remote mediations, it can certainly be said that no one has relished the experience of living through a pandemic. However, as Albert Einstein once said, “In the midst of every crisis lies great opportunity.” That opportunity for the legal system may end up being an acceleration in the trend of using non-judicial creative means to resolve cases. Only time will tell.

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