

The Pandemic Brought Some Welcome Innovations to the Justice Process, but Also Many New Challenges

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Takeaways

- Courts and litigators have become increasingly comfortable with remote proceedings, and they are likely to be used more frequently after the pandemic subsides than they were before.
- Where jurors participate remotely, it can be challenging to keep their attention and maintain communication.
- For the foreseeable future, case and trial backlogs and delays are likely to remain a problem.

The COVID-19 pandemic is hardly the first emergency to test the resilience of the judiciary. Following the September 11 terrorist attacks, federal courts enhanced security and testing for biological weapons, and in response to Hurricane Katrina, Congress passed legislation that allowed federal courts to temporarily host proceedings in adjacent judicial districts.

In many respects, however, the operational disruptions from COVID-19 have been unprecedented — and remain unrelenting. Jury and bench trials and in-person appellate arguments began their comeback in 2021, but each new wave of the virus appears to reset expectations and demand flexibility.

With parallel state and federal court systems, and some rules and procedures set locally, it is difficult to make general observations about the courts' response to the pandemic. Even within the federal system, responses have varied district to district and circuit to circuit. Some circuits that had begun holding in-person arguments again have now reverted to virtual format — others have stuck to traditional, in-person appearances.

Still, here are some observations and reflections gleaned from nearly two years of litigating in the shadow of COVID.

Expect That Many Technology Changes Are Here To Stay

Like many work environments, the practice of civil litigation may never return to the "old normal." Courts and lawyers

were forced to break with tradition and innovate in ways that may make litigation more efficient.

For example, it was confirmed that some aspects of litigation do not have to be conducted in person.

- Telephonic court conferences and remote depositions might not become the norm when the pandemic risk subsides, but they will certainly be far more commonplace than they had been before. In a recent Thomson Reuters poll, 49% of the state judges and court professionals surveyed felt that virtual hearings made access to the justice system easier. For more complex cases, with witnesses and counsel in many locations, litigants may want to avail themselves of these tools even when the health risks recede.
- Recent juror interviews from cases we tried in person in 2021 revealed that jurors were not bothered by watching witnesses appear on video. In some instances, they even preferred viewing witnesses on a big screen to observing them from across a large courtroom. This ran counter to pre-pandemic accepted wisdom.

The federal judiciary's investments in response to the pandemic may lay the foundation for permanent changes. The federal courts expanded public and media remote access to proceedings, obtained equipment and licenses necessary to support remote communication platforms and strengthened their IT infrastructure.

The more courts innovate, the more momentum will build to use technology at all levels of the justice system.

In many respects, these changes are overdue and — especially in the context of complex multidistrict or cross-border disputes — could reduce some litigation costs. Companies with large litigation portfolios should view remote technology not as a temporary response to a public health crisis, but as a lasting change in how they access the courts.

Trials With Jurors Participating From Home Are Challenging

Not every innovation was an unqualified success. Our experience trying cases with jurors participating remotely from home showed that there was a significant risk of distractions. With two-way video links, for example, jurors were seen participating in voir dire while driving, playing a video game on a second monitor, and receiving a delivery during the proceedings.

For lawyers, the most challenging part of a virtual jury trial might be the inability to connect with jurors. Since our job is to respond to jurors, who are not allowed to talk to us during trial, that means making eye contact, reading body language, and observing actions like note-taking. These critical parts of our practice are almost impossible in a virtual courtroom.

Despite these difficulties, post-pandemic, we expect some courts to remain receptive to trying cases with jurors participating remotely.

What To Watch For

Changing court protocols. With the most recent variant of the virus, some courts are imposing stricter masking requirements and other precautions. As pandemic conditions evolve in different regions of the country, we expect more changes in these protective measures. Companies with geographically dispersed litigation portfolios will need to track court requirements on an ongoing basis.

Anticipate further delays in civil trials.

Time to trial in civil cases may be another casualty of the latest pandemic surge. Some courts have begun to postpone jury selection and delay trials. These developments will likely compound trial backlogs, especially if criminal trials receive priority as public health restrictions ease. Companies planning and budgeting for complex civil litigation should consider the possibility of an even longer timeline to reach a jury or bench trial. Alternative dispute resolution mechanisms like mediation or expedited arbitration may become an attractive option for some time-sensitive conflicts.