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Best Practices For Managing Litigation During Pandemic

By **Heather Kliebenstein and James Beard** (April 23, 2020, 3:34 PM EDT)

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Over the last few months, any normalcy in our daily lives has been upended by the COVID-19 outbreak sweeping across the globe. Beginning with the first known cases in China, COVID-19 has made its thus far inexorable march, leaving tragedy and widespread disruption in its wake.

Since before the first stay-at-home orders issued in California, families and companies alike have worked tirelessly to adapt. Courts have also been impacted, issuing blanket extensions to civil matters, resetting deadlines set by scheduling order and federal rules alike, and taking trials entirely off calendar.

Nearly all district courts have expressly or effectively continued all civil trials, with all but a handful of the remainder leaving it to the discretion of individual judges. The U.S. District Court for the Northern District of Illinois, for example, has already issued orders extending deadlines by a combined 49 days.[1]

Continuances will surely grow before courts can resume something akin to normal operations. But even then, companies cannot expect matters to resume on a normal calendar. Some courts have already suspended procedural deadlines put in place to formalize the Sixth Amendment's requirement for a speedy trial.

The U.S. Court of Appeals for the Ninth Circuit, for example, already suspended the deadlines for criminal cases imposed by the Speedy Trial Act of 1974 for the U.S. District Courts for the Southern and Central Districts of California and is considering a request from the U.S. District Court for the Eastern District of California to relax the same rules.[2]

Given this ever-increasing backlog of criminal trials, the spillover delays for civil litigation promises to grow. These measures ensure the health and safety of judges, clerks, staff and parties, but that does not mean that parties can sit idly.

The Litigation Landscape

With the finality of trial delayed months (or years), companies already engaged in litigation may find a suddenly more-receptive audience for settlement discussions, or a new willingness to engage in alternative dispute resolution processes. For companies considering or threatened with litigation, it may

also mean fruitful presuit negotiations. In this context, court shutdowns may lead to efficiencies and resolution of disputes.

The same factors may well cause an uptick in litigation aimed at extracting nuisance-value settlements. Lawsuits filed by the proverbial (if pejorative) patent trolls (and other nonpracticing entities) may try to leverage companies' heightened interests in avoiding litigation expenditures to obtain early settlements.

But, by way of silver lining, the same limitations apply to these plaintiffs as to any other litigants: With the bandwidth of courts directed to essential operations, nuisance suits may move slowly through the initial stages and be unusually vulnerable to motions to dismiss.

Takeaway

Potential plaintiffs and defendants alike may find presuit discussions unusually productive, especially when guided by detailed and thoughtful conversations with counsel to explore whether there's a path to litigate to a win-win instead of litigating to trial. Disputes between competitors may still be resolved through such guided discussion and negotiation, and nuisance suits may be subject to early motion practice.

Is It Really an Emergency?

But what happens if litigation is unavoidable? An early element of some matters includes a request for a temporary restraining order, preliminary injunction, or other early relief from the court. In other cases, parties file emergency motions to resolve disputes before deadlines or scheduled depositions. Here too, companies are well advised to consider their goals and determine whether the same relief could be obtained in whole or part without motion practice.

A handful of orders on such motions for emergency relief have caught the attention of attorneys around the country. In a now famous order from the Northern District of Illinois, U.S. District Judge Steven Seeger denied a motion to reconsider a scheduling order with scathing commentary.

Noting that "the Clerk's office is operating with 'limited staff[,]'" the court advised that "[i]f there's ever a time when emergency motions should be limited to genuine emergencies, now's the time. ... The world is facing a real emergency. Plaintiff is not."[3]

In the U.S. District Court for the Southern District of Florida, U.S. Magistrate Judge Jonathan Goodman issued a similar paperless order on a motion for a protective order filed by the defendant in C.W. v. NCL (Bahamas) Ltd., which took the parties to task for failing to resolve a "routine discovery dust-up" without the intervention of the court.[4]

Judge Goodman's order did not mince words, opining that "[i]f all the issues we are currently facing were to be organized on a ladder of importance, this deposition-scheduling dispute would not even reach the bottom rung of a 10-rung ladder."[5] In closing, Judge Goodman announced that a hearing would be scheduled to "require the attorneys to explain their behavior in context of the far-more-important issues this court (and the entire world) is facing."[6]

Takeaway

Clients are well served by fully discussing the importance of a planned motion with their attorneys. Ask

yourself (and discuss with counsel) what business interests are served by the motion, what the impact of a ruling might be on your case, and whether there are any other mechanisms available to accomplish the same goals.

And be mindful of the other pressures on the courts — the last thing you want is for the court, turning to your motion with daylight waning and countless other pressing matters set aside to deal with your emergency motion, to disagree with that characterization.

Have You Really Met and Conferred?

If you do decide the motion is necessary, make sure you have done everything you possibly can to narrow, if not wholly eliminate, the scope of any dispute. While slightly less likely to draw the ire of the court than a mistitled emergency motion, litigants should take special care to avoid bringing a motion to the court before they have adequately met and conferred.

Such was the case in another matter before Judge Goodman,[7] which drew harsh words from the court. In an order regarding a motion for extending time in the schedule, issued before the nonmovant even filed a response, Judge Goodman noted incredulously that the defendant appeared to have "objected to what appears to be a realistic and common sense motion to reschedule the trial and other deadlines."[8]

Judge Goodman ordered a response from the nonmovant, inviting the defendant to "brush up on the concepts or karma, goodwill, grace, compassion, equity, charity, flexibility, respect, spirituality, selflessness, kindness, public spirit, social conscience, and empathy."[9]

While such admonitions demonstrate the importance of a reasonable meet and confer process, the motion is notable for another reason: The response, complete with screenshots of emails and communications between counsel, demonstrated that the motion was based on (at best) a misunderstanding of any remaining dispute between the parties. Effective communication between the parties is critical for properly staging motions for the court.

Takeaway

Discuss your goals with your attorney, so that they can engage in a meaningful meet and confer that can reduce the scope of any motion to the smallest possible scope. Here, it is important to remember the purpose of the meet and confer process: The attention of the court should not be a substitute for reasonable compromises.

A dispute that would have been resolved by reasonable discussion between parties, or at the very least significantly narrowed, taxes the court's resources. At the very least, this will help your attorney demonstrate to the court that the parties are at a true impasse — and that you took every effort to be reasonable.

Does Your Deposition or Hearing Really Need to Be in Person?

For midstream cases, litigants may feel like they may (or even must) slow down discovery (including depositions) or seek postponement of hearings because moving them forward remotely is not customary.

Slowing down the litigation train, however, risks letting the train get completely off the tracks. In some districts, parties are warned by judges that schedule extensions will not be granted absent exigent circumstances beyond the pandemic.

A backlog of trial dates may exist on the other side of COVID-19, but the vast majority of cases do not go to trial. Parties that independently choose to stall litigation risk crossing discovery and expert deadlines without obtaining necessary evidence. Trial preparation and summary judgment success may be jeopardized in the long run.

Takeaway

Consider keeping litigation on track (and possibly under budget) by using remote technology for court appearances and depositions. Document collections can also continue many stay-at-home orders consider information technology staff essential and permitted on business property. By using different tools to maintain case progression, litigants will avoid being boxed into positions where settlement is the only option.

Business Attention Is Elsewhere, Anywhere but the Lawsuit

In turbulent times, business focus (and budgets) have moved from litigation to moving business forward. Employees may be furloughed. Securing supply chains and distribution channels is a higher priority than document collection. For essential businesses, focus is on expanding business to meet customer demand. Litigation takes the back burner or is settled in haste.

However, pulling the plug on a case can have ripple effects in the future. For plaintiffs, a low monetary settlement or lenient coexistence agreement will set the bar for future negotiations. On the defense side, conceding too much ground can hamper a company's ability to sell its business down the road or foreclose abilities to expand in the future, such as into different product lines.

Takeaway

Consider other strategies to conserve capital resources, both human and monetary. Cut down on product costs by objecting to overly broad and irrelevant discovery requests; in times of a pandemic and economic slow-down, the burden of production may outweigh the need. Use artificial intelligence review options.

Avoid time crunches (and elevated fees/costs that come with expedited services) by outlining document collection and expert strategy months before due dates. Consider use of junior expert witnesses and trial attorneys who are often well prepared and well trained, but half the price.

Engage contract lawyers or negotiate in-house placement of trusted outside counsel at reduced rates. Finally, if a litigant has been shut down by COVID-19 or resources are 100% diverted elsewhere, such as in health care, consider seeking a stay of your particular case.

Adjusting litigation posture to account for COVID-19 depends upon the particular facts of each case, including the parties' goals and posture. The environment created by COVID-19 is certainly new, but its impacts can be managed by companies with a clear understanding of their litigation and business goals. Much of litigation occurs outside the courtroom anyway, and discovery can create a forum for more informed negotiations and business solutions.

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[1] See In re Coronavirus COVID-19 Public Emergency, Second Amended General Order 20-0012 (Amended Mar. 30, 2020).

[2] See In re Approval of Judicial Emergency Declared in the Southern District of California, Judicial Council of the Ninth Circuit (Apr. 2, 2020), available at https://cdn.ca9.uscourts.gov/datastore/opinions/2020/04/02/Judicial%20Council%20So%20Cal%20Emergency%20Decl.4-2-20_rev2.pdf; In re Approval of Judicial Emergency Declared in the Central District of California, Judicial Council of the Ninth Circuit (Apr. 9, 2020), available at https://cdn.ca9.uscourts.gov/datastore/opinions/2020/04/10/JC%20Order%20and%20Report%20re%20Judicial%20Emergency%20in%20CA-C.pdf; and see Letter, Hon. Kimberly Mueller to Chief Judge Sidney Thomas (Apr. 8, 2020), available at http://www.caed.uscourts.gov/caednew/assets/File/JudicialCouncil_EasternDistrictofCalifornia_3174Request.pdf.

[3] Art Ask Agency v. The Individuals, Corporations, Limited Liability Companies, Partnerships, and Unincorporated Associations Identified on Schedule A Hereto, Case No. 1:20-cv-01666, Dkt. 27 (Mar. 18, 2020).

[4] C.W. v. NCL (Bahamas) Ltd, Case No. 1:19-cv-24441, Dkt. 38 (S.D.F.L. Mar. 21, 2020) (“Moreover, defense counsel certified that this routine discovery dust-up is so important that it merits "emergency" status. No, it doesn't.”).

[5] Id.

[6] Id.

[7] Magistrate Goodman’s opinions have been uniquely forthright and quotable about the impact of SARS-CoV-2 on the Court’s operations, but the factors consider in the Court’s orders apply broadly across all jurisdictions.

[8] Based on what may be a mischaracterization of or miscommunication in the meet & confer process, the authors are omitting the name of the case in deference to the attorneys and firms involved.

[9] See note 8.