

Litigation in the Age of Social Distancing

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Perhaps one of the most commonly known legal maxims is that “justice delayed is justice denied.” In civil litigation to promote and not to delay justice means to efficiently and expeditiously pursue claims and defenses.

Ordinarily this process involves numerous social tasks where face-to-face contact is required. Court reporters sit close to deponent and attorney. Mediations bring people together from all over the country to one room to try to hash out their differences. In the courtroom, the ultimate venue for civil litigation, lawyers stand in front of judges to argue legal motions and stand in front of jurors as evidence is presented.

In the age of social distancing, civil litigation as we know it must adapt or effective and efficient justice will be denied. Over the last several weeks we have seen this occur. Below we provide some insight on how litigation can continue to be pursued efficiently and expeditiously amid new social distancing guidelines.

Courthouses Remain Open

On March 14, 2020, the Supreme Court of Georgia issued its first order declaring a statewide judicial emergency. That order has now been continued twice and is not set to expire until June 12th. Practically, for matters in civil litigation, the order extends, tolls or stays nearly all deadlines, including all applicable statutes of limitation. However, there are serious questions as to whether this order extends contractual periods of limitation and deadlines set by private tolling agreements.

On May 11, 2020, the Georgia Supreme Court explicitly prohibited all courts from summoning new trial jurors until further order. A COVID-19 task force has been set up to assist with providing guidance on the resumption of in-person proceedings, including jury trials. That does not mean all courthouse functions have ceased.

Importantly, the Georgia Supreme Court has required all courts to remain open to handle essential court services. This means courts are available and accessible to those seeking redress – particularly for those whose rights are in immediate jeopardy. The Georgia Supreme Court instructed lower courts to continue to use and increase the use of technology to conduct remote judicial proceedings. As an example, arguments before the Georgia Supreme Court have continued nearly on schedule throughout the crisis via web-based video conference.

Our experience has shown that courts are willing to schedule telephonic hearings quickly in such exigent circumstances, and once scheduled, technology allows for submission of most evidence electronically. An

executive order issued by the Governor of Georgia on April 9 provides a mechanism for remote notarization of affidavits and other documents, making the process of submitting evidence electronically that much simpler.

If you face mounting damages that may require injunctive or other equitable relief, do not assume the problem can wait until after guidelines no longer encourage social distancing. As the courts often say, “equity favors the diligent and not those who sleep on their rights.”

Much has been put on hold over the past several months, but this much remains the same: if you face an immediate legal problem that would call for quick action under normal circumstances, explore your legal options now.

New Technology Is Allowing Cases to Proceed

Outside of the courtroom, technology is providing an alternative to most litigation functions. Very quickly the legal community has adopted online virtual meetings to allow work on cases to proceed. This includes conducting anything from depositions through mediations through video conferences.

One court reporting service provides more than a video connection to assist with remote depositions. The service provides a web-video connection and has an additional platform for exhibits to be introduced and to be shown to a witness. The process allows the attorney taking the deposition, just like an in-person deposition, to not disclose which documents are going to be presented to the witness until they are used in the deposition. This provides flexibility on what is to be introduced and the sequence of exhibits.

Remote depositions require unique notices and special stipulations. For example, there must be a stipulation that no one will communicate with the witness during the deposition through any means including chat messages, emails, texts or social media. While we are all familiar with attorneys who might kick their client under the table, they need to be stopped from texting an answer. This relies on the integrity of those promising to abide by the stipulation, but a violation could result in sanctions.

Remote mediations, on the other hand, require just the opposite. Attorneys and clients in mediation need the ability to confidentially communicate during mediations. At least one web-based video conference service allows mediators to place participants in separate breakout “rooms.” When using this service, it’s important to keep a list of all participants in the “room” visible so that you always know who can listen in on conversations. We have found that it is also good practice to have a backup channel for attorney and client conversations. Providing for private counsel offline from whatever platform is being used for the video mediation allows you to ensure confidentiality.

In our experience video conferences can work well for both depositions and mediations, so long as all participants are familiar with the technology and dedicated to ensuring it works well.

Use Caution as your Guide

Continuing litigation amid social distancing requires extra caution. A courier sent to file a last-minute pleading may find the door to the clerk’s filing counter closed. Ask a state insurance department when a complaint was served on an insurer, and your answer (after three or four days) may be, “We’re not there,

and we're way behind on handling incoming paper, so give us another week or so." Read the court's "exigency order" about deadlines and try to decide if they are "extended," "continued," or "tolled," and then calculate when you or the other side will need to act. (Hint: if you, by the earliest arguable deadline; if the other side, don't count on holding them to the same standard.)

One consistency we've seen is that the impact of social distancing guidelines on litigation varies by court and judge. One judge might push back all case activities, another eagerly embraces technology and forges ahead virtually.

Stay alert, inquisitive, and adaptable during these most uncertain of times.