

Litigation Strategies in the Age of the Coronavirus (COVID-19)

A Lexis Practice Advisor® Practice Note by Jim Wagstaffe and The Wagstaffe Group



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This article discusses the increasing importance of implementing strategies and locating resources for navigating the challenges posed for litigators by the novel coronavirus (COVID-19). Managing a busy litigation practice is tough enough in normal times but requires even greater vigilance and creativity in a world where courts, clients, and opposing parties are implementing their own ever-evolving strategies for coping.

Beyond the obvious and overwhelmingly serious health implications, the coronavirus has caused massive disruptions to everyday life throughout the United States, including impacts on the legal industry. For litigators, these disruptions can threaten to upend your case and create an array of practical issues concerning your effective representation of your clients.

With many states imposing shelter-in-place or social distancing orders, carrying out even the most basic litigation tasks has become increasingly complicated, if not downright impossible. The coronavirus pandemic has left many attorneys wondering how they can meet litigation deadlines and continue moving their cases forward considering these movement and gathering restrictions. The strategies discussed below may allay some of these concerns and offer creative solutions to problems the legal industry—and society as a whole—has never before seen.

For additional practical guidance on the novel coronavirus (COVID-19) covered in many practice area offerings in Lexis Practice Advisor, see [Coronavirus \(COVID-19\) Resource Kit](#).

Know Your Deadlines

The coronavirus has upended the schedules and routines of nearly everyone across the globe. Health, societal, and economic concerns of the moment are understandable personal distractions. Accordingly, you must be vigilant in making sure your calendar reflects all upcoming litigation deadlines over the next several months. Regularly ensuring your calendar is up to date not only will encourage you to follow some semblance of a routine but also will guard against a potential malpractice claim for a missed deadline.

However, what's even more important is to closely monitor the constantly changing practices of courts and individual judges when it comes to cancellations, closures, and rescheduling. In addition to posted communications on courts' websites and individual case-related emails, there are multiple resources available that provide updates. See, e.g., [Coronavirus: The Latest Court Closures and Restrictions](#) on Law360 to track court closures.

To be sure, filing, hearing, and trial deadlines are in constant flux. Here are the steps to monitor:

- First, if these deadlines are not automatically reset, be sure to enter into stipulations thereto with opposing counsel.
- Second, be on alert to rescheduling of the rescheduled dates (and how extended dates may pile up with already-scheduled matters).

- Third, be aware if—as in California, for example—the governing authorities are automatically excluding these intervening days as holidays for purposes of calculating filing and response deadlines.

Handling Physical Appearances

As the coronavirus situation develops throughout the country, virtually every state has imposed restrictions on the number of people allowed for in-person gatherings. See, e.g., [Iowa Public Health Proclamation 202-3-17](#); [Alabama Social Distancing Order](#); [M.A. COVID-19 Order No. 13](#); [Michigan S. Ct. A.O. 2020-2](#). In fact, many states have banned nonessential gatherings completely. See, e.g., [Vermont EO-01-20, Addendum 6](#); [N.Y. EO-202.8](#). And, importantly, as this crisis lingers for weeks and perhaps months, hearings and trials will simply be put entirely on hold as courthouses close to gatherings of any size.

Before scheduling any in-person meetings in your litigation, be sure to check your state's guidance to see if there are restrictions on public gatherings. If you practice in an affected jurisdiction, these mandates will impact your ability to conduct routine litigation tasks requiring a physical appearance.

However, various creative solutions may help you keep your in-person litigation tasks on track as best as possible. With now-commonly accessible video conferencing and remote access resources (e.g. Zoom, FaceTime, Skype, Microsoft Teams, Google Meetings, etc.), attorneys will be able to conduct:

- Depositions
- Court appearances, including:
 - Conferences
 - Oral arguments
 - Trials
- Client meetings
- Witness preparation sessions –and–
- Mediations and settlement conferences

Depositions

Many jurisdictions routinely allow parties to conduct depositions remotely, via telephone or video conference. See, e.g., Ohio R. Civ. P. 30(b)(6); N.Y. C.P.L.R. 3113(d). In fact, the Federal Rules of Civil Procedure (Federal Rules) authorize remote depositions by stipulation or court order. See Fed. R. Civ. P. 30(b)(4). If you are in a jurisdiction with shelter-in-place or in-person meeting restrictions, consider

using one of these methods—where feasible—to keep discovery moving forward in your litigation.

In fact, given the extraordinarily widespread use of remote communications during this crisis, it is quite likely that attorneys and judges will be even more amenable to the testimony of witnesses through virtual presentation technology. While underutilized, Federal Rule of Civil Procedure 43(a) has long authorized the presentation of testimony in this fashion—even at trial. See J. Wagstaffe, [Innovatively Presenting Witnesses Virtually in 21st Century Trials](#), LexisNexis, August 2019; TWG Practice Guide: Fed. Civ. Proc. Before Trial § 36-III[A][5][b].

However, you must be cautious when using telephone or video conferencing to conduct depositions. Laws in some jurisdictions may prohibit or limit the use of these types of creative solutions. For example, California's court rules normally require party deponents to appear in person at a deposition and be in the presence of the deposition officer. See Cal. Rules of Court 3.1010. However, California has recently adopted emergency rules temporarily suspending this requirement. See [Cal. Rules of Court, Temp. Emergency Rule 11](#). If your jurisdiction has similar prohibitions and has not yet relaxed those requirements, consider seeking an extension of your applicable deadlines to avoid running afoul of your local rules. See [Stipulated Extensions in Tolling Deadlines](#).

If your jurisdiction permits remote depositions, keep in mind the following considerations to preserve the testimony's integrity:

- Have the court reporter physically present with the witness following the six-foot distance guidance
- Note for the record anyone else physically present in the room with the witness (e.g., interpreter, videographer, etc.)
- Instruct the witness to leave all cellphones, tablets, or other computing devices outside the deposition room to avoid improper communications with counsel or anyone else during the deposition
- Make sure all participants can clearly see the witness on the video stream
- Send all deposition exhibits (clearly organized and pre-marked) to the court reporter in advance of the deposition

By using these best practices, your remote deposition will be as effective as an in-person deposition. More importantly, these efforts will protect you and others from possible exposure to the coronavirus. But the bottom line is that litigation business can go on, uninterrupted, with

an open mind about the use of existing technologies and rules. See, e.g., *In re Actos (Pioglitazone) Products Liability Litig.*, 2014 U.S. Dist. LEXIS 2231 (W.D. La. Jan. 8, 2014) (use of remote testimony allowed because court “open to re-examination of old habits and routines which might have . . . created the types of Gordian knots that can lead to the stasis this Court and the parties seek to avoid”).

Court Appearances

As the coronavirus spreads throughout the country, state and federal judiciaries have taken swift action to close courthouses or prohibit appearances. Be sure to check your court’s website for the most up-to-date information on court closures and restrictions. Many courts that have closed or barred in-person appearances are:

- Extending deadlines
- Postponing hearings
- Conducting virtual hearings
- Postponing trials

If your court system has not issued formal guidance concerning its operations during the coronavirus pandemic, consider emailing or calling your judge’s chambers to determine whether he or she will:

- Entertain appearances by telephone or video conference
- Extend critical deadlines
- Adjourn upcoming trial dates or allow remote testimony

Today’s judges know that every smartphone can connect people almost anywhere in the world through two-way video conferencing using free services—fundamentally altering the ability to be present. As few as 20 years ago, video conferencing was expensive and technologically challenged as it typically required the use of closed-circuit television transmission. Now, such technology is inexpensive and part of everyday life. See *Taylor v. FedEx*, 2017 U.S. Dist. LEXIS 12 (E.D. Cal. Dec. 20, 2017) (live time testimony inexpensive, practical, and easy to set up). In fact, the Federal Rules contemplate the use of remote testimony at deposition or trial under compelling circumstances. See Fed. R. Civ. P. 43(a); see also M. Hindman, [FJC Research Appendix E: Review of Case Law Related to Witness Testimony by Remote Transmission Under Federal Rule of Civil Procedure 43 \(2017\)](#).

Using the Federal Rules as a guide, courts often consider multiple factors when analyzing whether to use remote testimony, including the need to bypass the normal in-court testimony paradigm. See *In re Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liability Litig.*, 2016 U.S. Dist. LEXIS 195409 (N.D. Tex. Sept. 20, 2016) (court

allows remote testimony in multidistrict litigation calling for flexibility and appropriate safeguards). Accordingly, federal courts have found “good cause in compelling circumstances” to permit remote testimony in situations applicable to the coronavirus pandemic, where the witness:

- Was unable to attend due to an illness or medical condition (see *Humbert v O’Malley*, 303 F.R.D. 461, 465 (D. Md. 2014)) –or–
- Had travel-related difficulties (see *F.T.C. v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000))

In the age of the coronavirus, “good cause” is even more apparent where physical isolation and social distancing is critical to ensure the public’s health and safety.

Even if your court system has gone virtual, judiciaries across the country caution that you should expect significant litigation delays. As courts transition to remote operations, there undoubtedly will be technical issues and limited bandwidth to conduct daily proceedings. These delays may give you and your adversary time to explore a possible resolution of the dispute under the circumstances.

Preserving Evidence

Unfortunately, prolonged delays in your litigation may mean that certain physical evidence may materially change before trial. For example, a plaintiff’s injuries may heal, or the condition of real property may deteriorate. To mitigate these effects, you should promptly:

- Take photographs
- Inspect a location (while practicing social distancing)
- Schedule evaluations (e.g., mental, physical) by video conference

Similarly, delays can exacerbate fading witness memories. Encourage your witnesses to write down pertinent details and notes on events that will later form the basis of their testimony at deposition or trial. See TWG Practice Guide: Fed. Civ. Proc. Before Trial § 33-IV[A] (CHECKLIST–Duty to Preserve Evidence).

You should also keep in mind that the coronavirus pandemic will likely lead to significant litigation arising out of parties triggering force majeure clauses and business interruption insurance policies. If you or your client anticipate a force majeure clause or business interruption insurance dispute, your client will need to preserve all evidence under its control that may be relevant to a future litigation. See, e.g., *Silvestri v. GMC*, 271 F.3d 583, 591 (4th Cir. 2001); *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

Be aware that if your corporate client has instructed its employees to work remotely during the pandemic, you may need to collect and preserve communications made over video conferencing services, such as Skype and Zoom. These types of communications present preservation challenges that you must work through with your client's IT department as soon as possible to avoid potential evidence spoliation.

Tolling Deadlines

As the coronavirus outbreak forces people around the world to suspend business as usual, litigators still face deadlines, whether imposed by a judge, a set of rules, or a statute. If you have a looming filing or service deadline and are concerned the coronavirus will impact your ability to meet that deadline, you may be able to toll your deadline. In some jurisdictions, state governments or courts have issued executive or administrative orders tolling deadlines for commencing, filing, or serving:

- Legal actions
- Notices
- Motions
- Other processes or proceedings

See, e.g., [New York EO-202.8](#); [Iowa Judicial Branch Operations Summary](#); [Louisiana Proclamation No. GBE-30](#); [Massachusetts Standing Order 2-20](#); [Oklahoma SCAD No. 2020-24](#); [Michigan S. Ct. A.O. 2020-3](#); [Cal. Rules of Court., Temp. Emergency Rules 9, 10](#).

In the absence of executive, legislative, or judicial action, you should ask your adversary to enter into a tolling agreement or stipulation to extend time.

Tolling Agreements

A tolling agreement suspends the period of time in which parties must legally file a claim. Generally, parties enter into a tolling agreement to extend the applicable statute of limitations while they negotiate a potential resolution of their dispute before filing suit.

In the current climate, you should consider using a tolling agreement to toll the statute of limitations if you are concerned the coronavirus will impact your ability to timely file your action. Given the uncertainty surrounding the coronavirus and its lasting impact on the judiciary, consider negotiating a period of at least a few months to provide sufficient time to file your action.

For a selection of model tolling agreements, see [Coronavirus \(COVID-19\) Resource Kit \(Civil Litigation\)](#).

Stipulated Extensions

If you need to extend a deadline—not toll a statute of limitations—you should ask your adversary to enter into a stipulation to extend time. Under ordinary circumstances, parties can—and frequently do—agree to extend most deadlines without prior court permission, such as extensions for:

- Filing an answer
- Responding to interrogatories
- Responding to document requests
- Responding to motion papers

If all parties agree to your extension request, you should prepare a stipulation containing all the terms of your agreement, including:

- The new deadline
- Any other dates adjusted by the new deadline
- A description of the reasons for needing the extension (e.g., complications arising out of shelter-in-place orders)

Counsel for all parties should promptly sign the stipulation. Many jurisdictions do not require court approval of a stipulation. For example, the Federal Rules generally do not require court approval unless the requested extension will interfere with:

- The court's discovery completion date
- A motion hearing –or–
- Trial

See Fed. R. Civ. P. 29(b).

As a practical matter, many attorneys file stipulations extending time with the court even if the extension will not interfere with a court-imposed discovery completion, hearing, or trial date. To determine if you must file or obtain court approval of your stipulation, be sure to consult your:

- Jurisdiction's procedural rules
- Court's applicable local rules
- Judge's individual rules and standing orders

Remote Office Considerations

If you must work from home or another remote location during the pandemic, you should make a list of your active cases and the tasks you must complete in those cases over the next few months (e.g., serve or respond to discovery, take or defend a deposition). Since it is unclear how long shelter-in-place or social distancing orders will remain in effect, this list will enable you to anticipate your immediate and long-term remote office and technological needs.

Ensure your workspace is equipped to handle your daily litigation tasks, including:

- Conducting video and telephone conferences
- Drafting documents
- Electronically filing documents with the court

Accordingly, make sure you have access to the following:

- A computer with internet connectivity
- A webcam with microphone
- A printer
- Flash drives or a portable hard drive to back up important documents
- A scanner
- Audio and video conferencing software, such as Skype, Zoom, Slack, and Google Hangouts
- Word processing software
- Software to create PDF documents
- Software to read PDF documents
- General offices supplies, such as:
 - Note pads
 - Folders and redwelds
 - Pens
 - Highlighters

- Stapler (and extra staples)
- Printer paper
- Extra printer ink/toner
- Post-it notes
- Post-it flags
- Extension cords and chargers

Even when working from a remote location, you have an ethical duty to maintain the confidentiality of your client's communications and information. Upholding this duty can become challenging under the circumstances. As you prepare your remote office space, take steps to ensure that the following are secure:

- Computer network
- Telephone systems
- Physical files

Note that with many people currently working from home, high-speed internet service in parts of the country will be under tremendous strain. Plan for broadband outages or disruptions by identifying an alternate device you can use for connectivity, such as a smartphone or tablet you can use as a hotspot.

As you shift to a remote working environment, implementing these best practices will ensure your virtual legal office is a success.

Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, which includes embedded videos directly within the content on Lexis Advance. As one of the nation's top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.

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