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Litigation Forecast 2021

What Corporate Counsel Need to Know
for the Coming Year

COVID and the Courts

COVID and the Courts

Since 2013, Crowell & Moring has started each year by publishing a *Litigation Forecast* focused on what we expected would affect our clients' approach to litigation in the months to come. But this volume is different. As with so many aspects of our lives, COVID-19 has changed the way that litigation is conducted, in ways that will be with us forever.

This past year challenged both courts and litigants to adapt—constantly—to changing circumstances. Courts were closed, reopened, and closed again. Hearings and depositions went remote. Technology achieved an unprecedented prominence.

Some of these changes are permanent; many are clearly beneficial: Both courts and litigation proceedings, for example, are likely to be more efficient. This means fundamental changes in the art of preparing your case and presenting your arguments.

Our *Forecast* this year provides a guide to the future of litigation. Informed by 2020, it looks ahead to the many ways in which litigants must now adapt to meet a future that's coming faster than ever before.

Mark Klapow
Partner, Crowell & Moring
Editor, *Litigation Forecast 2021*

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Crowell & Moring LLP
Creator and Editor: Mark Klapow

Leverage Media LLC
Editorial Director: Mike Winkleman
Design Director: Dean Abatemarco
Writer: Peter Haapaniemi
Copyeditors: Jerry Goodbody, Sue Khodarahmi

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How COVID Is Changing Litigation—Today and Tomorrow

Keeping the wheels of justice turning during the pandemic has required innovative practices, which may become routine.

LIKE MANY AMERICANS, courts and attorneys in 2020 found themselves having to take a crash course in how to use technology to work remotely during the COVID-19 crisis. For courts in particular, this has been an especially challenging period, as they have had to upend traditional practices and find innovative ways to keep the wheels of justice turning while ensuring the health and safety of everyone involved.

These changes have prompted many to wonder how much of "the new normal" will be remembered as a short-term response and how much will become permanent. If anything, the past year has shown how difficult it is to predict the future. But a look at three key areas—trials, hearings, and depositions—highlights how the pandemic has reshaped courtrooms and litigation and points to the ways in which some of these changes may well become embedded in how courts and counsel work.

Trials: Finding a way forward

After COVID caused most courts to shut down their normal operations entirely, they typically adopted one of two approaches moving forward: shift to virtual trials, or try to resume live trials with extensive safety precautions.

Not long ago, a virtual trial was simply unheard of. But in early May, the Collin County District Court in suburban Dallas held such a trial—reportedly the first in the country—which proved that it could be done, even if the process had many shortcomings. Needing to find a way to move cases forward, many courts also adopted the virtual model for civil jury trials and bench trials. These have run relatively well.

That's not to say there haven't been problems. Technical glitches have been common, and some courts have established "remote bailiffs" to provide technology support. But other issues have emerged. For example, judges have had to remind jurors to remove pets and other distractions from the room. As Crowell & Moring partner Valerie Goo notes, "How can you adequately monitor juror conduct and control distractions?"

In an asbestos case in Alameda County Superior Court in California, the judge was removed after making comments about his own possible asbestos exposure while he was unmuted during a Zoom session. In another virtual asbestos trial, also in Alameda County, a jury awarded the plaintiff $2.5 million. During the trial, the defendant made several motions for mistrial, saying that remote jurors were exercising, lying down, or using other computers during the proceedings and pointing to the fact that the plaintiff talked directly to jurors while the judge and attorneys were in a separate video chatroom. These motions were denied, but they highlighted the challenges of conducting virtual trials.

Perhaps more importantly, recent jury research indicates that remote jurors who are physically separated from one another are less likely to reach a verdict. And many observers have questioned the fairness of using remote jurors because this can result in excluding significant numbers of

people who are not able to afford the technology needed to participate.

Courts that resumed live jury trials have run into their own challenges. To keep participants safe, some have relocated to larger venues, such as high school gymnasiums or fire stations, to enable social distancing. Some are bringing small groups of potential jurors into the courtroom in waves and using prescreening juror questionnaires to limit the amount of time people are gathered for jury selection. The pandemic has also required other changes to live jury trials such as requests to stipulate to a reduced number of jurors, limiting the number of attorneys in the courtroom, and, of course, wearing masks.

It has also been difficult to find people willing to serve on juries during the pandemic. A recent study found that in September 2020, 71 percent of potential jury pool members said they would be likely to ignore a jury duty summons because of COVID, and the courts are seeing this trend as well. Research has suggested that those who are least inclined to serve include young people, low-wage earners, and ethnic minorities, potentially skewing the demographic makeup of juries. This problem will probably abate as infection rates decline, but until the pandemic is over, it is likely to remain a factor.

As courtroom safety measures continue into 2021, courts and counsel will need to weigh their effect on strategies and trials. With widely spaced, mask-wearing participants, says Goo, "it is harder for jurors and judges to read facial expressions and body language and for counsel to assess the attitudes of individual jurors. If witnesses are far from the jury, or even testifying remotely, can that be prejudicial? Should counsel consider challenging such practices?"

Many have speculated that the courts' recent experience with technology will lead to the widespread use of virtual trials after the pandemic is over. But trial attorneys and courts generally don't seem to share that view. "Most of the virtual trials have been smaller bench trials," Goo says. "A handful have been smaller jury trials. But large, complex civil trials, whether bench or jury, have either gone forward in person with COVID restrictions or have been postponed. I don't think we will see a shift to virtual trials as the new norm."

Both the trial lawyers and the courts are eager to get back to in-person trials, says Goo. Even as courts have closed, reopened, and then reclosed, they have continued to schedule and reschedule in-person trials. "Courts are continuing to set trial dates and send out jury summons," she says. "They want to be ready to go the minute they can."

Virtual oral arguments: A new normal?

While virtual civil trials are likely to be rare post-pandemic, virtual oral arguments are another story. When the pandemic started, many courts had already been using telephonic hearings for oral arguments on motions to dismiss, summary judgments, and so forth to accommodate out-of-area litigants and lawyers. As courts closed, that practice spread—in May 2020, the U.S. Supreme Court began hearing oral arguments via teleconference for the first time—and many courts soon turned to virtual video hearings. Some, such as the technologically advanced Ninth Circuit, were quick to make the shift, while others were slower to change. But within months, "most courts had moved hearings onto video platforms, and that became fairly standard," says Amanda Shafer Berman, a partner at Crowell & Moring.

Virtual hearings have played an important role in keeping proceedings moving forward while physical courts are closed, but they have also presented attorneys with something of a learning curve. "You are not in the courtroom, of course, and you're sitting, rather than standing

"It is harder for jurors and judges to read facial expressions and body language and for counsel to assess the attitudes of individual jurors. If witnesses are far from the jury, or even testifying remotely, can that be prejudicial? "

Valerie Goo

and moving around. So you have to adjust the performance element of your presentation," says Berman. She also notes that she has seen attorneys "forget that the video format is still very much a hearing and you need to remain very formal. There is no reason to relax the consideration that you would normally give to the court," she says. "And judges definitely don't appreciate it when attorneys do so.

"It's a different medium, and what works in person may not work in the virtual world," Berman continues. To assess the difference, she says, companies "need to hold at least one video moot in advance of a video hearing. That gives arguing counsel a chance to interact with a virtual judge, even if it's a fake one, and have other attorneys provide feedback about what works and what doesn't in the virtual format."

Such practices may continue to be important over the long term. Berman says that virtual hearings are expected to be the norm for at least the first half of 2021—and that they may well become permanent in many courts. "District courts in particular may be more open to virtual hearings after the pandemic is over," she says. That will, of course, vary by court and the type of hearing, but many district courts' previous use of telephonic hearings reflects an openness to electronic interactions that has likely only increased as virtual hearings have become standard practice.

In addition, experience has made many courts more comfortable with the virtual setting. "Certainly, there are judges who were averse to using technology before all this happened," Berman says. "But now that all judges have basically been forced by the pandemic to adopt virtual hearings, it may absolutely make sense to continue. Why have out-of-town counsel hop on a plane for five hours for a hearing that may not last long? Courts may be more willing to allow companies to forgo those costs, particularly for procedural matters and status conferences."

The same may not be true with appeals courts, however. While they have made use of virtual hearings during the pandemic, most will likely return to holding in-person hearings as soon as they feel it is safe to do so. To a great extent, that's because of the mechanics of how those courts work. "As an advocate, you're trying to have a conversation with the judge where you are really locking in and figuring out what their concerns are, listening carefully, and responding to both explicit and implicit questions," says Berman. "So much of it is about establishing a connection with the panel through eye contact, reading the room to figure out which issues to follow up on, and assessing on the fly how each panel member is reacting. That is much tougher to do in a virtual setting, even when there is a video feed." In addition, appeals court judges on a panel often interact with one another during hearings—something that is obviously more difficult, if not impossible, when they are in separate locations and interacting only on a computer screen.

More broadly, appeals court judges tend to view in-person arguments as a time-honored tradition. "It's really seen as a key part of our appellate system," Berman says. "If something is hotly debated in oral argument, that exchange of ideas plays a very important role and can shape the decision."

> "[Some attorneys] forget that the video format is still very much a hearing and you need to remain very formal. There is no reason to relax the consideration that you would normally give to the court."
> *Amanda Shafer Berman*

Virtual depositions: How will they work in trials?

Video depositions shot in legal offices with a host of witnesses have been available for a long time. COVID forced many courts and litigants to take things a step further and embrace fully remote depositions. In these depositions, all participants—the opposing and deposing counsel,

court reporter, and witness—are all in separate locations. And the witness is left on their own to handle the technical details on their end.

Prior to the pandemic, these fully remote depositions were rare, largely because deponents had to be sworn in in person, deponents preferred to have their counsel present in person, and the other side did not want to be left out. As COVID emerged, a number of state and federal courts, state legislatures, and governors took steps to allow oaths to be administered remotely—and remote depositions were soon used across most courts.

However, the use of fully remote video depositions is new. "There haven't been many instances where we've seen how they play out in an actual trial," says Nathaniel Bualat, a partner at Crowell & Moring. And that leaves some open questions. "How will the layers of disconnect resulting from a lack of in-person interactions affect the way judges and juries assess the veracity and temperament of witnesses?" he asks.

With deponents having to manage their own video technology, some depositions are bound to be of better quality than others. "What will happen when judges and juries are seeing 10 different remote video depositions and four of them are especially bad, with people having poor sound, being backlit, or looking like a phantasm floating around?" asks Bualat. "How will that affect how judges and juries interpret the testimony?"

Nevertheless, the upside of using remote depositions has proven to be significant—so much so that courts are expected to continue using them in a post-COVID world, especially for minor, less critical witnesses. "The cost savings are pretty clear," says Bualat. Attorneys on both sides don't have to travel to do a deposition, which often means going across the state or the country. Corporate in-house counsel can avoid travel as well, and they can be easily included in key limited portions of depositions. "If outside counsel is doing a direct of a key witness, they can have their client appear for that portion just by clicking a link," he says.

For companies that want to take advantage of this trend, making sure that videos are of high quality will be key to making points in court. "Companies should institute practices that help their personnel come off well in their remote depositions," Bualat says. "If they are involved in regular litigations, it may be worthwhile to prepare 'deposition packs' that can be shipped out to witnesses." These packs could include good cameras and microphones, tripods, lighting equipment, and static backgrounds as well as instructions on using the equipment effectively. Companies can also prep their employees—who will not have their attorneys in the room with them during a deposition—about having the right mannerisms and behavior.

Such efforts will be more and more important as we go forward. "When COVID came on the scene, everyone understood that there would be challenges with remote depositions, because they were new," Bualat says. "But over time, as more people get better at it, there will be less tolerance in courts for poor quality."

The past year has shown that remote depositions can work well, but that doesn't mean that they are right for every situation. Ultimately, companies need to weigh the costs and convenience benefits against the question of effectiveness.

"With important witnesses in particular, companies have to consider how well they will come off on screen in court," says Bualat. "This is especially true for a corporate defendant who is being compared to an individual plaintiff who is appearing in person in court." Overall, he says, remote depositions should not be seen as an automatic default but rather as "one more tool in a litigation tool kit."

"When COVID came on the scene, everyone understood that there would be challenges with remote depositions. But over time, as more people get better at it, there will be less tolerance in courts for poor quality." *Nathaniel Bualat*

New Litigation Frontiers, Brought to You by COVID

To make sense of the uncertainty that COVID has injected into business relationships, companies have frequently turned to litigation.

AS IT SWEPT ACROSS THE U.S. and the world, the COVID-19 pandemic left a wide swath of disruption that cut across geographic and industry boundaries—and its effects were felt quickly by businesses everywhere.

The pandemic has put a great deal of stress on business relationships, and it has put companies in a difficult position as they work to keep their employees and customers safe while trying to keep the business up and running. This has fostered numerous COVID-related lawsuits, and companies have started going to court. Still, we are in the early stages of COVID-driven litigation, with more on the way. Much of this has focused on three fundamental legal areas: commercial leases, commercial contracts, and tort liability.

Commercial leases: The details are more important than ever

COVID has affected a broad range of industries, but early on, government orders issued to limit social gatherings and restrict the activities of non-essential businesses hit retailers, movie theaters, and restaurants especially hard. With tenants facing restrictions on the use of leased premises for their normal business operations, commercial leases were soon at the forefront of COVID-related legal issues.

The experience of retailers was especially dramatic, but it illustrates how commercial leases in general have been affected by the pandemic. In May and June of last year, roughly 40 percent of national retailers did not make their lease payments to landlords, according to Datex Property Solutions. "The impact on the retail industry was instantaneous," says Allyson McKinstry, a partner at Crowell & Moring. "Many large retailers with locations all across the country were overwhelmed, and most started with a triage approach, focusing on analyzing high-value leases or those for critical locations."

At the same time, many tenants tried to negotiate with landlords to get rent abatements or other adjustments, but those efforts were not always successful. By the end of 2020, many disputes had gone into litigation. "We've seen an uptick in breach of contract litigation from both sides," says McKinstry. "There's also an ever-increasing number of tenants who are taking preemptive actions seeking declaratory relief before the landlord does." Many of these lawsuits involve force majeure arguments—with some leases, a tenant may be able to invoke the provision as a basis to abate rent, but more often these provisions favor the landlord and are being relied on by landlords to excuse performance of different lease obligations.

In the relatively few cases that have been decided, no clear pattern has emerged. For example, force majeure arguments have prevailed in some instances, but not others. Several courts have shown that they are looking beyond force majeure principles and common law doctrines, and instead are heavily focused on the lease language and location-specific facts, as well as the law in the forum in question.

Retailers and other commercial lease holders should "take the time to really understand their leases,"

McKinstry says. That may sound basic, but large retailers, for example, may have leases for hundreds or even thousands of locations that they haven't reviewed in depth for some time. Even if they have, they have probably not looked at them in light of how the pandemic has affected their business. For example, "co-tenancy provisions are front and center given the large number of COVID-driven vacancies in many malls," she says. How do you calculate co-tenancy if other retailers are operating at reduced hours? Retailers need to start analyzing their lease language through a new lens."

companies can engage only in limited operations, with limited numbers of customers in a store or curbside pickup for retail customers, how might that affect arguments about an abatement of rent or co-tenancy rent? Or, if there are further waves of shutdowns in the coming year, what will it mean to companies that negotiated abatements at the beginning of the pandemic—will that affect their ability to revisit those issues or open the door to negotiating new lease terms? Overall, McKinstry says, "we are in a different world, and a broader understanding of what your rights and

Machina analytics.

Perhaps most prominent, however, are the disagreements involving supply chain partners. Supply chains around the world were severely disrupted by the pandemic as plants, transportation networks, and even large geographic regions were suddenly shut down. "There is no question that contracts and commercial relationships have been strained—there's a lot of pain, and we are seeing litigation up and down the supply chain," says Crowell & Moring partner Luke van Houwelingen.

Force majeure has been a part of these arguments, but as with com-

"Co-tenancy provisions are front and center given the large number of COVID-driven vacancies in many malls. How do you calculate co-tenancy if, for example, other retailers are operating at reduced hours? Retailers need to start analyzing their lease language through a new lens." *Allyson McKinstry*

In looking at leases, McKinstry says, "force majeure may be the start of your analysis, but it should not be the end." Instead, tenants need to understand all of the lease provisions, such as casualty, use, and contingency clauses; abatement and termination rights; and even provisions dealing with hazardous materials, which could include COVID as the science about the virus and how it is transmitted develops. This analysis is valuable, she says, because "key provisions vary widely in commercial leases. And you may have language in your contract that is surprisingly helpful."

Companies should also look at their leases with an eye toward a still-evolving future. For example, if changing pandemic rules mean that

obligations are under your portfolio of leases is essential to making business decisions and navigating current and future government restrictions."

Commercial contracts: Sorting out supply chain disruption

The pandemic has strained business relationships and led to commercial contract disputes over everything from service agreements to IP licenses, advertising, event-venue rentals, and even mergers and acquisitions. Between March and November 2020, the pleadings in more than 2,400 contract cases filed in federal courts involved COVID, and 438 invoked force majeure—twice as many as in the same period in 2019, according to Lex

mercial leases, resolution depends on the specific contract language, and courts have focused on the traditional elements of a claim, a defense, and contract interpretation. As a result, says van Houwelingen, "the pandemic has made a lot of lawyers think a great deal about provisions that have usually been considered boilerplate, like force majeure, as well as common law defenses such as impossibility, impracticability, and frustration of purpose."

These defenses raise a number of questions, he continues. "At heart, they are about who assumed the risk of unexpected, extraordinary circumstances. Did the contract identify the pandemic as a risk that would result in an excused performance? Does the force majeure clause identify condi-

tions like a pandemic, public health emergencies, government orders, acts of God and nature? Can labor disruptions excuse performance? Is there catchall language about unforeseeable conditions beyond the party's control—and where in the clause does that language fall? Because even that can matter in how a court will interpret the contract. And then there's causation—what was the performance that was required, and how was that performance impacted?"

These types of questions were easier to answer early on in the pandemic, when comprehensive, government-mandated shutdowns made the issue much clearer. With businesses reopening, van Houwelingen says, "the effects of the pandemic are more diffuse and less concrete, but still real. Operations are permitted, but things are still not normal, and certainly not what parties likely envisioned when they contracted." Courts tend to interpret force majeure clauses narrowly. That means that situations such as being unable to source materials, worker shortages from illness, or a decline in customer demand may be seen depending on the contract language, context, and governing law—as traditional and somewhat predictable economic changes that companies need to adapt to, rather than as unforeseeable events. Sorting through this next stage of COVID-driven business challenges, he says, "is going to be a big part of commercial contract litigation in the future."

In the coming months, and perhaps years, companies will need to make sure that the ongoing uncertainty created by the pandemic is reflected in new contracts. "You'll need to address that uncertainty directly in the language of the contract. Courts are going to assume that parties writing a contract at the beginning of 2021 knew about the pandemic and its impact," van Houwelingen says. This will mean doing more than adding the term "pandemic" to force majeure clauses. "Force majeure is for the risk of unanticipated contingencies that parties otherwise didn't allocate," he says. And while it may be hard to predict precisely what will happen, it should not be hard to recognize the possibility of further pandemic-driven disruption. "Just because something is uncertain doesn't mean that it's unforeseeable," he says.

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>
> *Luke van Houwelingen*

COVID and new sources of tort litigation

Beyond the disruptions to contracts and leases, 2020 opened the door to a range of liability lawsuits tied to COVID-19. As a result, companies now face a changing landscape "where they need to think strategically about how to mitigate the risk of pandemic-related litigation," says Chalana Damron, counsel at Crowell & Moring.

In particular, Damron continues, companies need to consider the increased risk of exposure litigation in which plaintiffs allege that the companies they work for or visit have been negligent and have not done enough to protect them from the virus. Many of these lawsuits have been directed at companies hit most heavily in the early stages of the pandemic, such as nursing homes and cruise lines. But they are reaching more and more industries.

In negligence cases, the key defense, of course, is showing that the company used a reasonable standard of care in its operations—but doing so presents some special challenges in the cases arising out of the global pandemic. "COVID is unique in that the standard of care is somewhat amorphous and evolving," says Damron. Through much of 2020, companies saw differing and shifting mandates from various federal organizations, and different states and municipalities produced a patchwork of ever-changing COVID restrictions—rules that were often voluntary and sometimes reflected political priorities as much as public health considerations.

"With constantly changing guidance, companies are wondering how to comply, and how they'll justify today's decisions about standard of care a year or two from now," Damron says.

New Litigation Frontiers, Brought to You by COVID

For example, she points out that in April of last year, few areas mandated the use of masks in stores, but by the beginning of 2021, "companies almost universally had a mask policy in place. And when they're getting sued in 2021, plaintiffs are going to hold them to that newer standard—or whatever the new standard is at that point." The main takeaway, says Damron, is that companies should document the current standard of care and their rationale for implementing corresponding policies and countermeasures. "Creating 'good' contemporaneous documents can certainly reduce the risk that jurors, who may not remember the standard of care in, say, April 2020, may hold companies to a heightened standard of care that did not exist during the relevant time period," she says.

The standard of care for dealing with COVID is starting to be hammered out in litigation, and Damron says it will be instructive to watch what happens in exposure lawsuits against cruise lines and the meatpacking industry. In the meatpacking lawsuits, plaintiffs' lawyers are suing on behalf of employees and claiming companies failed to take appropriate steps to prevent the spread of COVID. Typically, they are alleging gross negligence, which can make it a torts issue rather than a workers' compensation issue. That opens the door to punitive damages and the possible negation of liability waivers and any COVID-related legal immunity laws that might be in place—not to mention decades of potential litigation from the plaintiffs' bar. "Plaintiffs' lawyers are outlining a laundry list of issues, like failing to implement contact tracing, install physical barriers, or require employees to wear masks," she says. "These cases should give us a clearer indication of what the courts and juries will take into account for actions to be considered gross negligence with COVID."

In the cruise line cases, Damron continues, negligence lawsuits have involved situations where passengers have contracted and recovered from COVID, as well as those in which they died. More recently, courts have seen "cases where a person was exposed but did not get COVID, but they are arguing that they were mentally distressed knowing that they could have been infected," she says. Overall, cruise line litigation may not only help define the standard of care, it may also shed light on issues such as standing, what constitutes recoverable injuries, and how far plaintiffs' lawyers can stretch claims.

To help mitigate the risk of exposure litigation, companies should consider waivers and other ways to acknowledge the potential COVID-related risks to employees and customers and call attention to the impossibility of eliminating all risk. Companies should also get out in front of governments and their often-mixed messages and look for more concrete sources to understand the standard of care.

"Given the uniqueness and cloudiness of the situation, looking at regulatory guidance may not be enough," Damron says. "It may be better to base your case and decisions on science and the recommendations from health care organizations." At the same time, she says, "remain flexible. With COVID, policies that are reasonable today may not seem so reasonable in a few months."

At the same time, companies should keep an eye on other tort litigation frontiers being opened up by the pandemic. Courts are seeing some product liability cases in which plaintiffs have challenged claims for the virus-killing qualities of hand sanitizers. In addition, Damron says, "plaintiffs are now making the argument that makers of e-cigarettes should have known that their products increase the likelihood of suffering serious complications from COVID." Looking ahead, she continues, "we may see lawsuits involving employees who have a reaction to COVID vaccines required by employers, and even liability lawsuits involving problems from the increased use of telemedicine devices. More and more, plaintiffs, and their lawyers, are viewing liability through the lens of COVID."

"Given the uniqueness and cloudiness of the situation, looking at regulatory guidance may not be enough. It may be better to base your case and decisions on science and the recommendations from health care organizations." *Chalana Damron*

Courts Reopen—or Try To

With no national standards, unpredictable pandemic spikes, and mounting litigation, courts are struggling with an increasing backlog.

IN MID-2020, AS COVID-19 shutdown orders began to ease, courts were anxious to return to normal. Many began reopening—but that turned out to be a complicated process.

While there were guidelines for reopening, "there really was no national standard," says Andrew Holmer, counsel at Crowell & Moring. "Individual federal and state courts, and even county courts in many states, were in charge of determining how they reopen. So there was a lot of variation in how they approached the pandemic and the restart of operations." Some courts quickly reopened; others took tentative and incremental steps forward.

The evolving nature of the pandemic further complicated the reopening (and reclosing) process. As COVID rates spiked in the summer, courts that had reopened a month or two earlier closed again for a few months. And by late fall, the resurgence of the pandemic prompted another round of changes, with many federal courts stepping back from holding in-person jury trials. At times, it could all be hard to follow. At one point, courts in Georgia closed down just a week and a half after the governor had reopened businesses in the state. "It really came down to understanding what each specific court was doing," says Holmer.

That still holds true when considering how courts will continue to reopen through 2021. Just how that will unfold depends on the ever-evolving state of the pandemic in each location, which is difficult to predict. Courts continue to have individual control over how they reopen, and if the last year was any indication, the path ahead is likely to be uneven as courts feel their way forward.

But even if courts resume some "normal" operations relatively soon, it will be some time before they return to business as usual. With courts closing or operating in a limited fashion through much of 2020, there was naturally a significant drop in the number of jury trials. At the same time, however, litigation went on. After declining in April, filings in many courts increased in the following months, returning to near pre-pandemic levels in some jurisdictions. And looking ahead, many observers expect to see more COVID-related lawsuits.

Not surprisingly, courts have already been reporting significant jury trial backlogs. Florida's Trial Court Budget Commission recently underscored the problem when it asked the state legislature for $16 million—much of it intended specifically to help deal with a projected mid-2021 backlog of more than 990,000 cases.

In short, trial backlogs are likely to be the norm for 2021, and courts will often struggle to work through them. As long as COVID continues to be a public concern, courts may also find it difficult to find enough jurors willing to serve. That will contribute further to the backlog—as will any additional shutdowns or limits on court operations. Moreover, says Rochelle-Leigh Rosenberg, counsel at Crowell & Moring, "courts will have to prioritize criminal jury trials, with their constitutional and statutory deadlines, over their civil jury trials." Many courts have tried to keep criminal trials going during the pandemic, but that has proven difficult. From March through December, state and federal courts in New York City reportedly completed just nine criminal

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> *Andrew Holmer*

jury trials, compared to the 800 or so criminal trials they handle in a normal year. "Even after courts are fully reopened, civil trials in general are going to be lagging quite a bit," Rosenberg says.

Shaping strategies for reopened courts

Organizations should consider how these issues can affect their approach to litigation. For example, the uneven nature of reopenings might present a challenge for companies that have similar cases in different jurisdictions. "Normally, you might want one of the cases with smaller exposure to go first," says Rosenberg. "But with courts' differing reopening plans and backlogs, you might not have that control over the schedule anymore."

Meanwhile, courts faced with the need to work through their backlogs may be more open to summary judgments and motions to dismiss. "I expect that we will see a lot of motion practice in the coming year," says Holmer. And while defendants often like to delay trials to help spread costs out over time, they may now want to leverage the courts' interest in keeping things moving by aggressively pursuing litigation. "That might be the right approach if your company has a greater ability to litigate and more resources relative to the other side," he says. "It may be an opportunity to put pressure on them." The increased use of remote document review and remote depositions may make it feasible and cost-effective to pursue the discovery aspects of litigation and prepare cases for motion practice.

At times, companies may find it more effective to push for an early resolution to litigation. "The pandemic has been impacting all businesses at all levels, and many companies across the country are currently or may soon be experiencing cash flow issues," says Rosenberg. "These companies may now be more willing to settle at a discount, giving you a window to resolve matters on favorable terms." Plaintiffs may also see the backlog-driven delay of trials as a motivation to settle, rather than possibly wait years for a trial.

Settlements can also help companies manage the uncertainties that COVID brings to the legal arena. "By settling sooner, you avoid some future litigation risk and lighten your docket for whatever comes along next," says Rosenberg. "There's no way to accurately predict how the contours of litigation and liability are going to continue to change as a result of COVID." But one factor is fairly easy to predict, she adds: "We will continue to see plaintiffs' advocates thinking up new and unique ways to sue."

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