

LITIGATION POST-PANDEMIC: THE VIEW FROM CORPORATE LEGAL DEPARTMENTS

BY JANA FRIEDMAN & T. RAY GUY

FOR SEVERAL WEEKS AFTER COVID-19 MADE its appearance last spring, changes in the manner in which litigation matters were being prepared and tried were low priorities for most in-house counsel, whose more pressing concerns involved their employers' immediate survival needs: Could the company ameliorate losses by invoking *force majeure* provisions in its contracts? Could counterparties do so to the company's detriment? Would funds be available, under the CARES Act or from other emergency sources, to fill holes in the employer's income stream? Should the company immediately draw down its revolving credit line? Were layoffs in the offing, in the legal department and throughout the organization?

As weeks passed and the business world settled into an uncomfortable interim reality, in-house lawyers and their outside counsel turned their attention to pandemic-related changes in the practice and procedures of dispute resolution. Now, after months of experience using videoconferencing platforms and other tools for tasks formerly accomplished by face-to-face interaction, corporate counsel find themselves evaluating the continued utility of those vehicles as—hopefully in the near future—the restrictions responsive to the Coronavirus are eased or eliminated.

What aspects of discovery, motion practice, trial preparation, and trials will revert to the old normal when the rest of the world does so? On the other hand, which (if any) of those practices have likely been forever altered within company legal departments and in their directives to outside counsel?

In General: Too Early to Tell.

With a few exceptions we don't have definitive answers to those questions. Most law departments haven't yet formally amended outside counsel guidelines to enumerate post-pandemic changes in their expectations for conduct of litiga-

tion. Many in-house trial lawyers and litigation supervisors are still primarily working remotely (literally, in "the house"); for others, the primary current focus is on upcoming settings and activities that will likely be reached or occur while restrictions remain in place.

But we can pass along some expectations and predictions for post-pandemic trial practice, from Jana's experience within the legal department at American Airlines and from consultations with general counsels and litigation supervisors at other Texas-based companies.

Written discovery; document production; case investigation.

Many aspects of written discovery have continued without change under lockdowns and other governmental restrictions. Responses to interrogatories continue to be drafted by lawyers, although conferences with and interviews of company personnel with knowledge have typically been conducted, inconveniently, by remote video. Pre-pandemic much (if not most) document collection was already being accomplished

remotely by extraction of electronically-stored information from servers and hard drives that can be accessed remotely; production similarly is accomplished by posting the collected and reviewed ESI to a secure file transfer site or delivering a hard drive.

But most in-house counsel seem to be looking forward to returning to in-person witness interviews, investigations conducted across a desk or conference table, and person-to-person collection of hard copy documents.

Depositions.

Remote depositions via Zoom or Teams or other video platforms have been an unfortunate and inconvenient necessity during pandemic-imposed lockdowns. Even so,

We sense that both in-house and outside counsel anticipate that most aspects of litigation practice—from case filing through final hearing—will return to something close to pre-pandemic normalcy when the rest of everyday life does so.

in-house counsel generally prefer for a company witness and the attorney defending a videoconference deposition to be in the same room rather than depending on virtual breakout rooms for witness counseling and consultations.

Somewhat to our surprise, most in-house litigation coordinators don't seem to anticipate saving travel and lodging expenses, post-pandemic, by requiring that depositions continue to be conducted by video—at least for important witnesses. There appears to be a general appreciation of the value of the depositing attorney being able to observe the witness's demeanor; to see and react to facial expressions and other non-verbal communications; to know that hesitation in formulating an answer may be caused by witness discomfort rather than a streaming delay.

Our expectation, therefore, is that in-person, on-premises depositions will once again become the rule with video depositions the exception for special circumstances.

Hearing and Motion Practice.

On the other hand, many in-house legal departments have had favorable experiences with videoconference hearings on motions, at least for hearings not requiring live testimony. Even before March of last year, telephone conferences were often offered as an alternative to in-person hearings and status conferences; as this article is being written and some courtrooms have re-opened for motion practice, many courts continue to offer video hearings as an option. To the extent that—as seems likely—the option remains widely available after restrictions are eased, we would expect that non-evidentiary out-of-area hearings will be considered a suitable activity for saving travel costs and billed hours by requiring attendance by videoconference.

Even so, at American Airlines and elsewhere, there is a general preference that counsel attend and argue in person on important motions and other hearings—and of course do so if opposing counsel has elected to appear in person in the courtroom.

Mediation.

Mediations have continued despite Coronavirus lockdowns, with mixed degrees of success and satisfaction. Most mediators seem to have quickly become facile at managing videoconferencing platforms—for example, employing breakout rooms so that even affiliated parties and counsel can confer in private from different locations. But the length of a typical mediation day means more chances for technical problems: a participant's earbuds running out of

power, a screen freezing up, a laptop needing a reboot, or an internet connection becoming unstable. And some aspects of a mediation, such as sharing calculations or executing an agreement, are inherently more difficult during an on-screen mediation.

Further, practitioners seem generally in agreement that proximity—all parties, on both sides, in the same set of conference rooms—significantly enhances the chances of a successful mediated resolution of a dispute. In addition to the inevitable onset of Zoom fatigue as the hours pass, participants are generally more invested in the process when gathered in a single location. For example, most of us have seen a logjam break and meaningful negotiations suddenly ensue near the end of a long day of minimal progress toward an agreed resolution; the propensity for calling a too-early stalemate likely increases when the only obvious consequence is the screen going blank after clicking “end,” instead of departing for home or office or the airport. One in-house lawyer who routinely defends employment litigation noted that a wrongful-discharge plaintiff appearing by video didn't seem to feel that he had had an adequate opportunity to be heard—which can be one of the primary purposes of the mediation process for individual plaintiffs.

In short, videoconference mediations will continue to be an option, but we don't expect them to remain the norm after pandemic-related restrictions have become an unpleasant memory.

Trials and Arbitrations.

Trials on the merits have been rare since March of 2020; jury trials, almost nonexistent. No in-house counsel seems to expect that virtual trials will be a significant factor when courtrooms once again are fully open for business.

We noted earlier the difficulty of evaluating witness credibility in a deposition conducted by videoconferencing platform. The same considerations apply with greater force when witnesses' veracity is also being evaluated by a judge or arbitrator or members of a jury. As one in-house lawyer explained, “It is difficult to read body language when observing only the tiny box of a human on the screen.” Further, when the witness is on screen, “It's hard to know if the awkward pause is because the witness doesn't know the answer, is lying, or just didn't hear the question.”

Otherwise-routine aspects of a trial or arbitration such as objecting to testimony become more cumbersome in a videoconference than in an in-person hearing. Despite

continuing advances in video technology and increases in streaming capacity and speed, transmission delays still exist, meaning that lawyers are more likely to talk over witnesses (or vice versa) or each other during a Zoom trial.

In short, we found little appetite among general counsel or in-house litigators for the continuing use of virtual trials and arbitrations once pandemic restrictions have eased.

Conclusion.

Recent advances in video technology and increases in streaming capacity have somewhat ameliorated the adverse effects of pandemic-related restrictions on litigation practice. Most of us have been at this long enough to remember when a videoconference required expensive computer hardware in a conference room instead of laptop computer or tablet with a tiny camera, and when even “high-speed” internet service rendered dialog awkward because of a several-second transmission delay between locations. Without question, trial lawyers have had far greater ability to practice their craft during the past year than would have been the case a decade earlier. Nevertheless, we sense that both in-house and outside counsel anticipate that most aspects of litigation practice—from case filing through final trial or hearing—will return to something close to pre-pandemic normalcy, enhanced but not drastically altered by the utilization of technology, when the rest of everyday life does so.

Jana Friedman is a Managing Director and Senior Attorney at American Airlines.

T. Ray Guy is a member in the litigation group of the Dallas office of Frost Brown Todd LLC. ★