



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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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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