

## Coronavirus Puts Trial Courts In Uncharted Waters

By Daniel Siegal

*Law360 (March 11, 2020, 8:59 PM EDT)* -- In New York, a state court civil trial was postponed the day it was to begin after counsel in the case revealed that a fellow lawyer in Quinn Emanuel Urquhart & Sullivan LLP's Manhattan office had tested positive for the coronavirus.

In the Western District of Washington, which has courthouses in Seattle and Tacoma, court officials placed a temporary freeze on jury trials and suspended all in-court appearances until the end of the month.

And the Eastern District of Louisiana — along with a growing number of federal courthouses across the country — is barring its doors to anyone who recently traveled to countries hardest hit by the virus or who has come into contact with someone testing positive for it.

The spread of COVID-19, the illness caused by the novel coronavirus that first appeared in Wuhan, China, in late 2019, has placed trial courts in uncharted territory. With no formal guidance on the books for federal courts on how to handle a pandemic, besides obeying public health authorities, and state preparedness varying, judges are increasingly being forced to put trials on hold in the interest of public safety — even at the risk of creating significant backlogs and possible mistrials down the road.

Attorneys said the outbreak is similar in that respect to major disasters from years past that led to delays and interruptions in court proceedings, including the Sept. 11, 2001, terror attacks and Hurricane Harvey in 2017. But in both of those cases, courts were in “recovery mode,” as they knew the disaster had passed, said Allan Kanner of Kanner & Whiteley LLC.

With the coronavirus, “we’re in reactive mode,” Kanner said. “We’re still searching for more information.”

Courts in areas that have had outbreaks of the disease are being asked to balance public health concerns with administering justice — without any systemwide instruction on how to do so.

In the Southern District of New York, a trial over an alleged violation of U.S. sanctions on Iran was paused and moved to a new courtroom after it was revealed that a potential juror had possibly been exposed to someone with the virus.

The New York State court system revealed Wednesday that an attorney had tested positive for the virus after appearing in a Westchester County courthouse last week. One hotly anticipated trial pitting New

York Attorney General Letitia James against opioid drug makers and distributors was delayed at least several weeks from its March 20 start date because of concerns about the coronavirus.

California's Central and Northern districts have issued announcements asking prospective jurors to contact the court before showing up if they are suffering flu-like symptoms, coughing or sneezing.

"If the disease is as serious and as widespread as the medical folks are saying, it's going to create a huge backlog in the civil litigation system," said Wright Close & Barger partner Raffi Melkonian.

He noted that with the flu and other illnesses, alternate jurors can be used with no broader impact on a case. That won't be possible with public health measures being implemented to contain the spread of the coronavirus.

If a juror is diagnosed with COVID-19, the building he or she was in will need to be cleaned and everyone who was in contact with that juror will need to check in with public health authorities and possibly self-quarantine, according to Dr. Amesh Adalja, senior scholar at the Johns Hopkins Center for Health Security.

Some courts are taking further precautions. King County Superior Court in Seattle is preemptively excusing any prospective jurors who are at high risk for serious harm from the virus. This includes people who are 60 or older, pregnant, or have a compromised respiratory or immune system. The court also announced that it is encouraging appearances by telephone for all nontrial proceedings.

Kanner said that attorneys in some cases might argue that a jury pool without people over 60 is prejudicial to their client and seek a delay of trial. But he said attorneys will likely put up with increased use of telephonic appearances, which are common. He noted that depositions are sometimes taken remotely.

Other creative measures could include seeking bench trials instead of waiting for jury trials to resume or pushing for a settlement in a case where a trial date may otherwise get pushed back.

But attorneys won't make such moves without first waiting to see whether the outbreak's impact on the courts is a one-or-two month inconvenience or a more long-term wrench in the gears, according to Kanner.

In courts where jury trials are still proceeding, the revelation that an impaneled juror tested positive for the virus could force a judge to pause a trial for several weeks to see if other jurors, attorneys or court staff were also infected.

Jury consultant Rachel York Colangelo of Magna Legal Services said that if a juror in a trial starts showing symptoms, the parties might want to push to the finish line. But if other jurors tell the judge they don't feel safe, the judge may have no choice but to declare a mistrial.

Adalja proposed an out-of-the-box solution to the problem of what to do if a juror gets the coronavirus once a trial is underway: have the juror videoconference from home.

"This is 2020 ... a juror doesn't have to physically sit in the jury box to hear evidence," the physician said. "Doctors do telemedicine all the time and make life and death decisions via telemedicine. I don't think there's anything majestic about sitting in a jury box getting coughed and sneezed on."

While the new virus has already become more widespread in the U.S. than the 2003 outbreak of SARS and the bird flu, which was highlighted as a high-risk disease in the 2000s, the possibility that a contagious disease could impact the courts wasn't completely unforeseen.

Crowell & Moring LLP partner Gregory Call noted that the Administrative Office of the Superior Court of California released a report in 2006, during a time of global concern about the bird flu. That report assessed how the court system would be impacted by a pandemic or epidemic, and how it should respond.

The report highlighted "mission-critical functions" that courts need to maintain even during an epidemic. These included conducting arraignments, issuing restraining orders, and hearing criminal and civil cases.

Adalja added that once the coronavirus becomes widespread within a community, there actually is less incentive to shut down operations as containment measures are too late. The challenge for courts at that point will shift to being resilient and maintaining operations despite staff and jurors being out sick, he said.

--Additional reporting by Frank G. Runyeon, Jeff Overley and Stewart Bishop. Editing by Jill Coffey and Emily Kokoll.