

## Outside Counsel

## Expert Analysis

# Complex Litigation Just Got More Complex: Adapting to a Virtual Reality

The coronavirus pandemic has, like an earthquake, shaken up the world as we know it. Jolted by the crisis in the spring, the entire legal system is continuing to adjust to the new reality that is likely to last for many more months or even years. After a nearly complete shutdown of many court systems, the courts' accelerated adoption of technology, once practically unthinkable, has been remarkable. Some see the crisis as fundamentally remaking aspects of the legal industry, believing that many changes will never fully revert to pre-pandemic patterns.

For counsel who manage complex litigation, the pandemic has rapidly expanded the complexities. Technologies that may have been viewed with trepidation are taking center stage as interactions with colleagues, clients, other law firms, service providers and even the courts have become virtual. Nimble counsel must provide solutions to novel challenges as timelines falter



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and they must respond virtually to discovery, court hearings, and trials.

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These challenges create opportunities to rethink workflows and the adoption of advances in legal technology. But counsel must still manage and mitigate the human impact of the disruption.

### Effects of COVID-19 On Complex Litigation

Virtually no aspect of managing complex litigation has been untouched by the pandemic, with nearly every part of the legal system

impacted simultaneously. Each participant—law firms, clients, vendors, witnesses, experts, jurors, and the court system itself—is striving to accommodate both the known and as yet unforeseen impact on its own employees, workflows, timelines, and communication methods. The intricacies of each require an assessment of what processes to keep and what to alter or revamp, perhaps even jettisoning case themes, or purchasing and deploying new technologies.

### In-person vs. Virtual Communications

Good communication is the essence of managing complex litigation. For a profession that has long valued in-person interactions, the near total switch to virtual communication raises a number of considerations related to both case workflow and communication strategies. This is equally important for internal communication with colleagues and external communication with clients, opposing counsel, witnesses, and the courts.

### Impact on Internal Communications

Complex litigation relies upon teams, which in the past may have

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operated and communicated informally while working in close proximity. With informal, in-person get-togethers no longer possible, counsel should ask: What was the function of face time and informal communication? How can the benefits be replicated? What types of meetings are necessary or valuable?

The sudden, widespread acceptance of videoconference technologies like Microsoft Teams and Zoom has greatly facilitated the management of large teams. But moving exclusively to remote work requires proactive collaboration and coordination to maintain effective communication.

**Workflow changes.** For teams that are now remotely dispersed, clear articulation of case themes breeds cohesion. Frequent updates and defined deliverables can help keep team members focused and feeling part of a team. In addition, all team members need to understand how the workflow has been impacted so that everyone can stay informed about any modified procedures. Virtual meetings need to be consciously scheduled and focused, with a clear purpose in mind; ideally, duration would be defined and limited to accommodate attention spans and physical comfort.

**Attention to Productivity.** Close monitoring of efficiency and productivity may be required, both to ensure that resources and timelines are realistic and to adjust billing where needed. Case management software used to manage complex litigation often includes analytics to track performance metrics, which can be helpful in driving workflow decisions from afar, but attention should

be paid to intangibles—making sure the team feels engaged, connected, and appreciated. The longer the pandemic continues, the more important addressing the human impact of isolation and disconnectedness will be in the “new normal.”

**Communication Technologies and Policy.** On the practical side, technology features, security, data retention, privacy implications of the tool’s storage locations, and administrators’ access (will data remain privileged?), and rules of acceptable use are worth considering. More formal telecommuting policies may need to be adopted or updated. Non-standard or non-enterprise-approved communication methods should be discouraged. Safe and secure access to case information is essential. It may be useful to convene as a team to discuss workflows—what is work-

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ing and what could be improved—to identify potential enhancements. For example, team members may need access to additional technology to perform formerly routine activities, such as executing signatures digitally, notarizing documents or preparing witnesses remotely by video.

**Training.** Expectations for remote communications should be made clear. Consideration should be given to training not only on features of video tools, but also on compliance with ethical rules concerning con-

fidentiality and attorney-client and work product privilege when working from home, when family may be present. Etiquette, including appropriate backgrounds, cameo appearances, and attire while on camera from home may warrant attention.

While videoconference technologies offer benefits like increased flexibility and efficiency (e.g., no travel, and video meetings that tend to start and end on time), counsel responsible for managing a complex matter should nevertheless recognize the disruption it (and COVID-19) brings to individual lives.

Consider addressing hours of availability and whether certain forms of communication, such as text messages, are acceptable or intrusive. While increased flexibility may make issues like childcare and eldercare less daunting, as remote school schedules continue to fluctuate, even greater flexibility may be required. Frequent communication, with empathy for individual circumstances, is essential to the success of the overall effort.

### Impact on External Communications

Nowhere have counsel relied, historically, more heavily on in-person communication than for depositions and court appearances. Lawyers have spent years developing and mastering professional skills tuned to in-person communication to prepare or examine witnesses, and honed to perceive and (perhaps hopefully) affect the reactions of a judge.

**Remote proceedings.** Shifting to remote proceedings has required major adjustments. Platforms like Skype or Zoom may not transmit

the more subtle interactions that can occur between people. Sound or visual cues may be distorted and the platforms can obfuscate details that would otherwise be evident in person, so preparation, interrogation and presentation strategies may need to be reconsidered. The care counsel exercise over the camera angle for videotaped depositions may now need to be directed not only to the witness, but also to themselves.

Logistics require re-assessment. Will counsel exchange exhibits in advance? How will they be presented? How will witnesses be sworn? How will side communications be handled? How will you know if the witness is using notes?

**Courtroom etiquette.** While jury trials and grand jury proceedings are slowly restarting, daunting challenges remain. Meanwhile, courts at all levels have successfully moved to remote communications for conferences and hearings. Some courts have indicated they are likely to continue in that mode; the Commercial Division of the New York County state courts recently implemented a rule allowing counsel to request appearance by videoconference going forward.

With remote appearances, skills likely need to expand and etiquette be revisited. Ease of access has made remote hearings readily available to the public and the media, with over 800,000 people reportedly listening

to a recent Supreme Court argument. Conduct that might not have occurred in-person may raise issues: delays caused by technology have resulted in attorneys being chastised for interrupting the judge. In one well-documented plea for decency, a Florida judge urged attorneys to “put on a shirt” before logging into court hearings.

### Management of Documents

Complex litigation is a document heavy exercise. Document preservation, collection, review and analysis must now be effected at a “social distance,” calling for potential reassessment of priorities and procedures.

**Preservation and Collection.** Preservation and collections historically done in person by in-house or third-party resources may now rely more heavily on individual custodians, who may not be adept at the challenges. Consider BYOD devices, paper notes at home, electronic and paper information located in closed offices, user-selected storage locations. Data transfers that would normally have occurred by physical media handled by on-site personnel may be disrupted, especially if the recipient is experiencing disruption as well. Hosting vendors may also be experiencing delays and unable to accommodate data transfers in the expected timeframes.

**Document Review.** For those who relied on managed review teams sharing a physical space, the process

has changed completely. Reviewers may now be working remotely (or subject to disruption from illness). If the review method has changed, new workflows need to be established. In either case, security and confidentiality should be high on the list of considerations and contracts may require re-review.

Firms that use technology-assisted review may be at a distinct advantage in terms of access, speed, and predictability, but may need to re-evaluate existing workflows and skill sets. Skillfully deployed, technologies can help counsel identify key documents in support of case analysis and theme definition (or re-definition), which need to align with experiences and attitudes in the locale of the upcoming trial.

### Conclusion

The pandemic has been deeply disruptive, initiating the need to rethink and re-imagine the management of complex litigation. The crisis has forced a dramatic acceleration in the adoption of technological innovations by law firms and the courts, and increased demand may spur further innovation. Forward-thinking counsel, working to mitigate the disruption at multiple levels, will do well to address and enhance workflows, technology skill, and human impacts of the pandemic in adapting to this new reality while recognizing the opportunities it presents.

