

Not Until When?! Managing Expectations In Uncertain Times

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By Norman H. Pentelovitch

Among the many effects of the ongoing COVID-19 crisis is the seemingly constant revision of civil litigation calendars. In Minnesota, the federal district court has issued no fewer than seventeen General Orders regarding scheduling, court procedures, and the sequence in which an already overwhelming backlog of cases will be addressed.

Similarly, the Minnesota Supreme Court has now issued a variety of orders governing the suspension of deadlines, as well as the phased resumption of regular court proceedings.

The fluid state of the courts has presented many challenges for litigators, not the least of which is unpredictability in how a case will proceed. One of the most common questions clients ask litigators is, “how long will this take?” That was a difficult question to answer even before a global pandemic, particularly given the frequency of protracted discovery disputes and unpredictable timetables for judges to issue decisions. Under normal circumstances one or more of those elements can combine to create chaos with a carefully considered scheduling order. But at least before COVID-19 the experience of attorneys with the past practices of opposing counsel and judges could be a guide for how a case would progress.

All of that experience and insight is out the window today. If asked by a client tomorrow when a motion will be heard or a trial scheduled, it would be equally valid to suggest a standard timetable as it would be to throw your hands in the air and say “I don’t know.” Because clients often make key decisions, in particular whether to initiate a lawsuit, based on predictions around how long it may take to resolve a matter, today



it is critical, and prudent, to take several steps in advising clients and colleagues as the world continues to deal with the COVID-19 pandemic.

First, in each jurisdiction where a case is pending, it is helpful to set up alerts for any new administrative or general orders issued by the court administrator or chief judge. Doing so will help avoid learning that a deadline believed to be far down the road is suddenly just around the corner. While many courts around the country initially suspended all existing litigation deadlines, some of those restrictions have begun to be lifted, and courts are doing their best to get cases moving again. These changes have the potential to create “fire-drill” situations where an attorney that assumed deadlines were suspended suddenly finds one looming.

Second, while difficult to give clients precise information about how long matters will take, there are places to look for guidance. Most courts nationwide are not yet holding in-person jury trials. However a number of states, including for example Connecticut and Michigan, have been moving ahead with bench trials by video. In Minnesota, courts have been authorized to reopen for “limited categories of hearings in criminal [and] civil” cases and some courts have held criminal jury trials with a number of restrictions, in-

cluding the required use of face coverings. Moreover, a large number of courts have been prioritizing criminal matters over civil ones, so for civil litigators in most states it is fair to inform clients that even if local courts immediately resume all normal functions (which they won’t be anytime soon), any newly filed civil case likely will not be getting the attention the litigants believe it deserves for some time.

Third, at many firms, the constant “stop-start” of case calendar changes is wreaking havoc with attorneys’ ability to plan their time. Depositions that had been delayed while the parties waited to see if in-person testimony could be obtained are now moving ahead virtually as parties accept a new normal of “video-lawyering.” When those few depositions start piling up against a never-moved dispositive motion deadline, attorneys and staff can get crunched. One way to manage that issue is the judicious use of stipulations to modify (or request to modify) scheduling orders. Most judges and counsel are facing the same timing challenges, and there will often be a sympathetic (or grateful) response to a request for a reasonable extension of deadlines.

As is often the case for lawyers, communication is key. Being direct with clients about the knowns and unknowns of case calendars is a critical expectation management strategy, now more than ever when the day-to-day functioning of courts is constantly changing. By understanding the types of cases that a given court is prioritizing, and by focusing on completing litigation activities that don’t involve the court, lawyers can wrest some control over their cases back from the chaos.

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