

How COVID-19 Could Permanently Alter Litigation For GCs

By Michele Gorman

Law360 (January 14, 2021, 2:08 PM EST) -- Some court depositions and hearings might remain virtual once the coronavirus pandemic subsides, and general counsel will need to adjust their expectations and invest in technology to land among the winners, according to a report released Wednesday by Crowell & Moring LLP.

The international law firm's ninth annual report, "Litigation Forecast 2021: What Corporate Counsel Need to Know for the Coming Year," looks at the ways the pandemic has changed litigation and the courts, from virtual juries to evolving types of cases, and aims to help general counsel and heads of litigation prepare for the effect of those changes on their litigation strategies.

Most hearings, depositions and trials went remote across the country when the pandemic hit the U.S. in March. Challenges arose, but there have been some positive outcomes, too, according to the report.

"We proved in the last nine months that we can do litigation — or at least large parts of litigation — remotely, and there are significant efficiencies to doing so for clients," Mark Klapow, co-chair of Crowell & Moring's litigation group and editor of the report, told Law360. "I think clients are going to change their expectations about how many of these functions are performed and the efficiency they expect with it."

In the report, Crowell & Moring partner Amanda Shafer Berman said she expects virtual hearings to be the norm for at least the first half of the year — and that they could become permanent, particularly in district courts.

But the possibility of permanent virtual hearings also signals the need for businesses and their in-house teams to prepare, and Berman suggests they go through at least one "video moot" before a remote hearing.

"That gives arguing counsel a chance to interact with a virtual judge, even if it's a fake one, and have other attorneys provide feedback about what works and what doesn't in the virtual format," she said.

Among the other significant trends discussed in the report is the use of fully remote video depositions. While there are cons to this approach, such as some deponents having better video quality than others, the pros include in-house counsel being part of certain portions of the deposition while simultaneously saving money by avoiding travel.

"If outside counsel is doing a direct of a key witness, they can have their client appear for that portion just by clicking a link," Nathaniel Bualat, a partner at Crowell & Moring, said in the report.

Klapow cautioned lawyers about the need to adjust their presentation in court and their approach to depositions.

"But it can be done and can be done well by practitioners who are armed with the right tools," he said.

The report suggests businesses hoping to take advantage of remote depositions ensure their videos are high quality to come across clearly in court.

It also recommends companies involved in regular litigation consider preparing so-called deposition packs to ship to witnesses that include cameras, microphones, tripods and lighting equipment.

The report discusses remote trials in various courts and the significant challenges that accompany jury trials in particular.

"I think it can be done, but we certainly believe it's suboptimal and that by and large, courts are going to return to in-person trials at the earliest possible time," Klapow said.

He underscored the backlog that courts are seeing after suspending operations for months, and how clearing that will be the biggest challenge for judges and staff in court operations over the next year.

"One thing to think about from the position of a general counsel or a head of litigation is, as things get moving again, on the one hand, 'My matter has been delayed and I really want it to move forward.' On the other hand, if we're going to conduct a remote trial, I'd say, 'Be careful what you ask for,'" Klapow said. "There are just so many challenges with the cadence of a trial and picking up on nonverbal cues that are really challenging in a remote environment."

Crowell & Moring attorneys underscore the importance of best practices moving forward.

"When COVID came on the scene, everyone understood that there would be challenges with remote depositions, because they were new," Bualat said in the report. "But over time, as more people get better at it, there will be less tolerance in courts for poor quality."

Klapow acknowledged there will be winners and losers in the new reality.

"There will be lawyers and there will be firms that are better equipped and prepared to go into this new reality, and there will be those that are clinging to the old ways of doing things," he said. "As with everything else, the early adopters and the ones who dive in enthusiastically headfirst will be better prepared to represent their clients."

--Editing by Brian Baresch.