



# THE EFFECT OF COVID-19 ON EXISTING LITIGATION

May 20, 2020

**Litigators and litigants across the country will need to be prepared for a changing litigation landscape in light of the novel coronavirus (COVID-19). Most courts have delayed their current trial settings. Courts across the country are also exercising their discretion to modify existing scheduling orders, hearing settings, and other deadlines to reduce the risk of COVID-19 transmission. This client e-alert provides resources on: (1) the various court orders that impact scheduling, hearings, and trials for existing litigation; (2) guidelines on filing a motion for continuance in light of COVID-19; and (3) a step-by-step guide to effectively conduct a videoconference deposition and hearing.**

## Updated Landscape for Existing Litigation In Light of COVID-19

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On April 28, 2020, Texas Governor Greg Abbott issued an executive order<sup>[1]</sup> relating to the expanded reopening of services. This was a significant move following Texas's First Emergency Order Regarding the COVID-19 State of Disaster issued on March 13, 2020.<sup>[2]</sup> The most recent executive order ushers a cautious, yet hopeful period for Texans.

While Texas may be re-opening in some parts, appellate courts, district courts, criminal courts, civil courts, justice of the peace courts, and other courts have chosen to apply the above order in a variety of degrees, and adopted different standing orders or notices as a result.

- **Northern District of Texas** – Other than one specific case listed in the most recent order, civil and criminal jury trials scheduled to begin through May 31, 2020 will be continued and reset to another date by the presiding judge. Upon motion of defendant in a criminal case, that particular case may be tried at an earlier date. The shift in trial dates does not impact other deadlines, although attorneys are encouraged to contact the presiding judge should they seek to modify any other deadlines. While judges may continue to hold in-person hearings, proceedings, and conferences, counsel has the opportunity to seek relief from those matters by appropriate motions. Grand jury proceedings may resume under conditions directed by the court.[3]
- **Eastern District of Texas** – All civil and criminal jury trials through May 31, 2020 will be continued and reset to another date by the presiding judge. This continuance does not affect other deadlines. Courts have the discretion to hold bench trials, in person hearings, and scheduling conferences. Telephonic and video conferences are welcome, as deemed appropriate by the individual court. Additionally, the grand jury will meet only once during the month of May.[4]
- **Western District of Texas** – On May 8, 2020, the court issued a supplemental order stating that civil and criminal bench and jury trials and all grand jury proceedings scheduled to begin on or before June 30, 2020 are continued to a date to be reset by each presiding judge. This does not affect other deadlines. Judges may continue to hold in-person hearings, but counsel may seek relief from those matters by appropriate motions.[5]
- **Southern District of Texas** – Jury trials and scheduled sessions of the Grand jury through May 31, 2020 are continued, to be reset by the judge.[6]
- **U.S. Bankruptcy Court for the Northern District of Texas** – Court hearings will go forward for the month of May 2020 (except for motions to extend or impose the stay, trials in adversary proceedings, and contested matters requiring lengthy hearings). With limited exceptions, the hearings will be by video and telephone. On rare occasions and after motion for a live hearing, the court may grant an in-person live hearing with face masks required. Parties will be permitted to participate by video or telephonically. If party is a witness, must appear on video. For trials in adversary proceedings and contested matters requiring lengthy hearings, parties should contact appropriate courtroom deputy and each judge will handle those on a case-by-case basis.[7]
- **Dallas County District Courts, County Courts, and Justice of the Peace Courts** – All jury trials are cancelled through at least June 1, 2020.[8]
- **Tarrant County** – All jury trials are cancelled through at least June 1, 2020.[9]
- **Collin County Courts** – All jury trials are cancelled through at least June 1, 2020.[10]
- **Ellis County District Courts and County Courts at Law** – All civil, criminal, and family jury trials set to begin before May 31, 2020 are postponed.[11] All jury trials are cancelled through at least June 1, 2020.[12]
- **Dallas District Court of Appeals** – Oral arguments through May 8, 2020 are suspended.[13]



- **Fort Worth District Court of Appeals** – According to its website, the court continues to operate and remains open during regular business hours (8:00–5:00 p.m., Monday-Friday). All parties are expected to continue to comply with applicable laws, rules and deadlines.”[14]
- **U.S. Court of Appeals for the Fifth Circuit** – Cancelled in-person oral arguments scheduled for April 30, 2020. The Court may consider telephonic argument for cases, which the Court will promptly post as audio files on its website. Requirement to submit paper copies of filings is suspended until further notice.[15] Oral arguments resumed on May 4, 2020.
- **American Arbitration Association** – No hearings will take place in AAA or ICDR (the International Centre for Dispute Resolution) hearing facilities until at least June 1, 2020. Hearings can proceed in other locations if the involved parties comply with state/federal/city regulations and minimize the risk of transmitting COVID-19. Alternately, the AAA encourages video and teleconferencing if desired.[16]
- **FINRA Arbitrations** – FINRA administratively postponed all in-person arbitration and mediation proceedings scheduled through July 3, 2020. All case deadlines will continue to apply unless the parties jointly agree otherwise. FINRA will waive postponement fees for certain dates. FINRA Dispute Resolution offers virtual hearing services to parties in all cases by joint agreement or by panel order.[17]

A comprehensive list of closures for Texas courts can be found on the Office of Court Administration's website for information on closures or delays reported to the OCA. <https://www.txcourts.gov/programs-services/court-security/emergency-court-preparedness/closures/>. This site is changing daily and prudent practice calls for checking the website of the individual judge, reviewing any applicable standing orders, and calling the court staff to confirm availability.

## Motions for Continuance and Conferencing Procedure

Various special court orders, including the Special Order by the Northern District of Texas, have requested that litigants work together to resolve scheduling disputes, conflicts over deadlines, and to promote the health and safety of the general public. A litigant who is seeking a motion for continuance should consider citing the specific special order or notice that is in effect for a certain court. The litigant should also consider providing specific factual reasons why a motion for continuance is warranted. Getting a continuance may not be a straightforward matter, however. For example, on March 12<sup>th</sup>, Chief Judge Rodney Gilstrap of the Eastern District of Texas denied a joint emergency motion for continuance due to COVID-19 for the case styled *Saint Lawrence Communications, LLC v. Amazon.com, Inc. and Amazon.com, LLC*, Case No. 2:19-cv-00027. The Court was confident the parties would be able to use “technological innovations” to move the case forward. The Court further cited that it needed “specific concerns backed by firm restrictions from a governmental/public health level or actual exposure” before granting a continuance for witness depositions. Thus, be wary of using COVID-19 as a blanket excuse. Attorneys are expected to find a way to keep the world turning.

## Guidelines for Video Depositions and Videoconference Hearings

Discovery is one of the most essential phases of litigation and arbitration, where the parties learn each others' strengths and weaknesses and pin down key witnesses on their allegations. While attorneys, parties to lawsuits, and witnesses may need to avoid being in one room with other people, that does not mean depositions are not possible. As referenced in the Supreme Court of Texas and the Court of Criminal Appeals Emergency Order, all courts must "[a]llow or require anyone involved in any hearing, deposition, or other proceeding of any kind — including but not limited to a party, attorney, witness, or court reporter . . . to participate remotely, such as by teleconferencing, videoconferencing, or other means."

Not surprisingly, videoconference depositions require more planning than a traditional in-person deposition. The first step in the process is choosing a court reporting service with experience in video teleconferences. Attorneys should pay close attention to the technological aspects of the services provided, so they will not be surprised during the deposition. For example, some of these systems include real-time transcriptions, some videos may lag, and other systems may allow for only a limited number of participants who are able to see the video and hear the audio. After confirming the court reporting service, the attorney will need to be sure that he or she can properly log in to the applicable system. This will also give the attorney the opportunity to ensure the camera on his or her laptop, computer, or tablet is capable of being used in this process. Ideally, this is all done at least one day beforehand so that there are no disruptions on the morning of the deposition.

The attorney will also want to have a reliable speakerphone at his or her desk. There are two reasons for this. First, some of these video conference services suggest you use the speakerphone for audio so it frees up processing resources on your computer, potentially allowing for better video quality. Second, the speakerphone also serves as a back-up in case anyone has technical difficulties or needs to leave the room during the session.

There are additional practical considerations when taking or defending a deposition that is being recorded by video. Most importantly, the attorney should always remember that his or her conduct and tone of voice will be recorded for all, including the judge and jury, to hear at a later time. Additionally, if the deposing attorney wants to use a specific document during deposition, the attorney should upload the proposed exhibit to the website ideally a day in advance to ensure the documents are uploaded. Some court reporting video programs allow a deposing party to upload documents such that they will not be visible to the opposing party until the deposing party chooses to present the exhibit to the witness. Exhibits can be uploaded during the deposition, but doing so may take additional time. In any event, an attorney would want to coordinate ahead of time with the court reporter to ensure the attorney understands how to use the program and download the documents. The deposing attorney may also consider sending a binder of exhibits in advance of the deposition as a fail-safe measure.

Likewise, the Texas Supreme Court is permitting telephonic hearings and hearings by video for cases pending in state courts. Specifically, the order mandates that Texas courts must "[c]onsider as evidence sworn statements made out of court or sworn testimony given remotely, out of court, such as by teleconferencing, videoconferencing, or other means."

Regarding federal cases, the Administrative Office of the U.S. Courts sent guidance to federal courts across the nation, urging them to remain flexible and encourage methods to reduce travel by out-of-town lawyers and witnesses. Chief District Judge Lee Rosenthal of the U.S. District Court for the Southern District of Texas has supported this effort, by noting that we all should take advantage of video conference technology or different kinds of ways to present arguments and information, without physical presence, if and when possible.

Certain software conferencing programs, such as joinme.com or zoom.us, allow participants to engage in videoconferencing, produce exhibits, and also make revisions on documents, such as proposed orders. As with all technology use, it is the litigant's responsibility to be well-versed with the program before the hearing to make sure there are no technical difficulties during the allotted hearing time. Additionally, litigators should coordinate with court staff regarding all use of technology so the presentation is aligned with the Court's preferences. A litigant should also decide if a record is needed for the hearing, and notify the court clerk regarding the need for the record so the court staff can prepare accordingly.

Participating in video hearings presents both new challenges and opportunities. Preparation will be increasingly important for attorneys who are not accustomed to participating in hearings remotely. First, the attorney should reach out to court personnel in advance of the hearing to learn about the particular court's technological capabilities and weaknesses to know what is possible. For example, if the attorney is not able to display documents on the screen, it would be prudent to send a notebook to the Court in advance of the hearing. Planning for logistics such as this can only benefit an attorney's presentation, helping the attorney to more effectively represent his or her client.

Please note that some courts are more advanced in technological capabilities than others. Some smaller or rural jurisdictions may not be able to upgrade their technology to make videoconferencing possible. An attorney should check with each individual court coordinator as far beforehand as possible to assess the court's capabilities.

The next few weeks — and months — will force many firms and courthouses to accelerate their adoption of technology. We anticipate that litigators and courthouse staff will go through a learning curve in the near future, and courthouse preferences will likely evolve over time. For better or worse, litigators will need to be nimble and prepared to persuasively represent their clients, whether in person or through a computer screen.

If you have questions or would like to discuss further, please contact [Heath Cheek](#), [Saba Syed](#) and [Brent Turman](#).

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[1] <https://gov.texas.gov/news/post/governor-abbott-issues-executive-order-relating-to-the-expanded-reopening-of-services>

[2] <https://www.txcourts.gov/media/1446056/209042.pdf>



- [3] <http://www.txnd.uscourts.gov/special-order-13-court-orders-and-updates-during-covid-19-pandemic>
- [4] <http://www.txed.uscourts.gov/>
- [5] <https://www.txwd.uscourts.gov/coronavirus-covid-19-guidance/>
- [6] <https://www.txs.uscourts.gov/sites/txs/files/Special%20Order%20H-2020-09%20Court%20Operations%20in%20Houston%20and%20Galveston%20During%20COVID-19.pdf>
- [7] <https://www.txnb.uscourts.gov/sites/txnb/files/news/General%20Order%202020-08.signed.pdf>
- [8] <https://www.txcourts.gov/media/coronavirus-covid-19-court-operation-guidance/>
- [9] <https://www.txcourts.gov/media/coronavirus-covid-19-court-operation-guidance/>
- [10] <https://www.txcourts.gov/media/coronavirus-covid-19-court-operation-guidance/>
- [11] <https://co.ellis.tx.us/DocumentCenter/View/10951/Joint-COVID19-MitigationDocket-Control-Plan>
- [12] <https://www.txcourts.gov/media/coronavirus-covid-19-court-operation-guidance/>
- [13] <https://www.txcourts.gov/5thcoa/alerts-announcements/5th-court-emergency-order-05-20-0002/>
- [14] <https://www.txcourts.gov/2ndcoa.aspx>
- [15] <http://www.ca5.uscourts.gov/>
- [16] [https://go.adr.org/covid19.html?\\_ga=2.98939674.547421059.1584475079-714665380.1584475079](https://go.adr.org/covid19.html?_ga=2.98939674.547421059.1584475079-714665380.1584475079)
- [17] <https://www.finra.org/rules-guidance/key-topics/covid-19#hearings>

## Related Practices

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Litigation

## Practice Area Contact

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