

Strategies for Reducing Litigation Spend During COVID-19



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Scott Carvo



- Litigation attorney with a focus on eDiscovery
- Specialties include restrictive covenants, employment issues and tax litigation
- Represents clients in state and federal courts, the Michigan Court of Appeals, the Michigan Tax Tribunal and local government entities
- Oversees large-scale eDiscovery review processes for Warner

Madelaine Lane



- Trial attorney with a focus on white collar criminal defense
- Represents both corporate and individual clients facing compliance violations and criminal charges across a wide array of industries
- Represents witnesses and defendants in complex criminal cases and conducts internal investigations for major corporations and within higher education
- Coordinates responses to grand jury subpoenas and counsels witnesses and targeted individuals

Janet Ramsey



- Litigation attorney with a focus on complex (high-stakes) commercial litigation
- Represents corporate clients in mass tort and environmental litigation, and false advertising and unfair competition
- Represents a wide array of industries, from agriculture and automotive to financial institutions and pharmaceuticals
- Manages the entire litigation process from start to finish — and all its parties — to ensure a cost-effective and winning strategy

Agenda

1. Update on court operations
2. Strategies for managing discovery during pandemic
3. Tips for avoiding cost in criminal litigation
4. Tips for avoid cost in civil litigation
5. Questions



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Federal Court Update

Western District of Michigan

“Appointment Only Access”

Audio and Video Conference Hearings

Civil deadlines not moved

Criminal hearings continue

Grand jury sitting this week

Federal Court Update
Eastern District of Michigan

All civil matters postponed
- Deadlines have not been moved

Blanket Ends of Justice Continuance issued staying Speedy Trial Clock

Initial criminal hearings continue

Michigan State Court Update

Limited to Essential Functions

- Initial criminal hearings (in custody) continue
- Video/Audio hearings if not in custody
- PPOs
- Child Abuse/Neglect

Be careful out there

Civil Court Operations

“Make it work” or “Wait and see”

Make it work: Minimal, if any, extensions or other accommodations and an expectation that the parties have enough tools to get done what needs to get done.

Wait and see: Granting extensions without much proof of an actual issue and/or setting time frames (30/60/90 days) for the parties to provide status updates.

“Make it Work”

Chief Judge Jonker,
Western District of Michigan

4/28/20 Order Cancelling Bench Trial: “Convinced a bench trial like this one cannot effectively proceed by video. . . Cannot imagine a trial where all witnesses were examined by remote video, particularly with the mass of exhibits in play here and the technical complexity of some of the issues.”

5/1/20 Order Confirming In-Person Rule 56 Hearing: Order confirms six Rule 56 motions will be heard in-person on May 21st. “Encourages the parties to consider sensible accommodations” such as limiting the number of lawyers, using local counsel more, and, “to the extent travel is necessary, maybe counsel can consider an old-fashioned road trip instead of airline travel. There is plenty of time between now and May 21, gas is cheap, and springtime blossoms make driving more visually rewarding than flying. Plus, this is a case about car mirrors.”

“Wait and See”

On March 27, SDNY suspended all jury trials until June 1 and on March 30 announced the courthouse would be closed except for “urgent criminal matters” and emergency actions seeking a TRO.

On March 24, a California federal court granted a motion to stay all proceedings indefinitely based on the fact that “[c]ounsel are unable to go into the office to work and are attempting to work remotely,” and were having trouble “obtaining documents and information” from the defendant. Court is requiring status reports every 30 days “on their current working conditions and abilities to properly litigate their case.”

Civil Litigation Operation Tips

Check your playing field. Every state, district, court and judge is different. Confirm all standing orders. Local counsel guidance is more vital than ever.

Do not stop. Do not assume extension requests will be granted. Triage and prioritize tasks.

Be proactive and creative. Document basis for any positions, particularly refusals to engage in non-traditional litigation methods.

Do not assume a “return to normal.” Parties should be prepared to proceed in the litigation assuming compliance procedures for existing guidelines and orders.

Karma

"If defense counsel opposed the motion [to reschedule trial and extend deadlines], then he is best advised to provide a comprehensive and rational explanation. . . . Before filing this response, though, defense counsel may want to brush up on the concepts [of] karma, goodwill, grace, compassion, equity, charity, flexibility, respect, spirituality, selflessness, kindness, public spirit, social conscience and empathy."

-U.S. Magistrate Judge Jonathan Goodman (Fla.)

Discovery Strategies

Criminal Litigation

- Have a plan.
- Identify key personnel and location of data/documents.
- Engage prosecutor early.
- Start early.

Discovery Strategies

Civil Litigation

- Service of process and acceptance of service.
- Negotiate discovery limits, particularly ESI agreements, at the onset.
- Assume "new normal" discovery and make accommodations and changes accordingly.
- Consider phased discovery proposals.
- Utilize new Michigan state court rules.

Criminal Litigation Strategies	Internal Investigation -Opportunity to disclose to Government (safe harbor?)
	Explore resolution before indictment -Diversion program or deferred prosecution -Civil fine -Rehabilitation program

Criminal Litigation Strategies	File motion seeking pre-trial release
	Revisit discovery disputes Ends of Justice Continuance Plea negotiations Compassionate Release (Post-conviction)

Civil Litigation Strategies	Big Data
	Project Management Alternate Fees

BIG
DATA



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Old Way

Linear.
Everything is important. Equally.
Everything is the same. Every time.
Unintentionally assumes risk.

Open Book.

Go to first page.

Read Book.

Put Book on bookshelf.

Start Next Book.

New Way

Intelligent.
Targeted.
Creative.
Asks questions.
Consciously assumes risk.

Do I have the right Book?
"[Reads Preface.] I don't even have to read this Book!"
"[Reads Author and edition.] I need the JFK version, not the RFK version!"

Do I need to read the whole Book?
"I really only care about what happened before the election."

Review Table of Contents.
"Wow, I only need to reach Chapters 2 and 10."

Review Index.
"I only need to read the section on fruit pies, not chicken pot pies."

Write notes about what you learn before putting it on the shelf.

New Way In Action
Technology-Assisted Review

100 GB of Data

Old Way
Process and review it all.
Cost: >\$15 million

New Way
Remove certain data before processing
Savings: \$22,500 in processing; \$375k in review
(removes 50% of data to be processed)

Use TAR for first review
Savings: \$475,000
(removes 70% from manual review)

Use first-tier reviewers for first pass
Use substantive team members for key document review and quality control
Total Savings: \$872,500

New Way in Action
Leverage resources like dedicated review teams

WNJ eDiscovery Center


Experienced lawyers making experienced decisions

Extensive experience on high stakes matters

Better equipped to leverage AI/Technology to reduce costs and meet deadlines

Assist with strategic decisions early in discovery

Project. Managed.



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Scoping
Statement of Work.
It's a living document.

Old Way
"Build a house."

New Way
"Build me a four-bedroom Arts and Crafts style house on a two-acre plot for \$525,000."

**A plan.
Make one.**

Old Way
"I need to see the SJ motion before it's filed."


New Way
"I need a plan for the SJ motion when we start written discovery. Provide bi-weekly updates against plan. Affiants identified 3 weeks out. First draft 7 business days before filing."

Control inputs.
Aggressively.

Old Way
How to Get Out of a Mess


New Way


Alternate Fee Arrangements



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Old Way

The Billable Hour.

A billing system developed by lawyers
for lawyers.

Reduced Rates
"I get a 10% discount from all my counsel."

Negotiated Rate by Level
"All partners at \$XXX; all associates at \$XXX."

Fee Caps per Overall Project
*"No more than \$5,000 for this project."
(Often paired with an overall discount)*

Risk collars
"Good faith negotiation if billables are +/- 20% of fee"

These are all still the Old Way.

New Way

Incentivize beneficial behavior.
Kill the billable hour.

Phased fixed fees
-Set fees through written discovery, depositions, SI, etc.

Shared success
-[Reduced rate or phased fixed] - (contingency or success kicker)

Tiered pricing or fixed fee menus
- \$XXX for Tier 1; \$YYY for Tier 2; \$ZZZ for Tier 3

Caps on inputs
*-No more than X billing professionals for 85% of the work.
-No more than 5 depositions.
-Develop a targeted document review plan and negotiate an ESI agreement.*

New Way
Must Haves.


Caps on inputs.
-number of billing attorneys per project
-number of experts/depositions
-how many documents are reviewed

Phased.
-by task (through project): by quarter

Project Management.
-statement of work/scoping conversation
-detailed plan before each major phase (document review, depositions)
-negotiation planners

Lessons Learned
-what can the organization do better/differently?

Questions



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Conclusion



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