

Litigation Boutiques Hope Trials Come Roaring Back In 2021

By **Emma Cueto**

Law360 (April 14, 2021, 4:45 PM EDT) -- During a year of court closures and indefinitely postponed trials, litigation boutiques have been uniquely affected by the upheaval. Firms are telling Law360 Pulse that much of the uncertainty remains, but that they expect to see a major increase in trial work in the second half of the year.

No law firm was unaffected by the COVID-19 pandemic, but for litigation boutiques the almost total suspension of jury trials prevented many matters from concluding, either through settlement or trial. And though there is no clear sign of when trial work might resume, firms are largely optimistic that the second half of 2021 will see a major increase.

Firm leaders said that although their firms and litigators have navigated the pandemic well overall, the uncertainty has created particular challenges.

"It's frustrating when 95 to 98% of your business is litigation and trial work and the courts are shut down," said Ronald Schutz, chair of the executive board at Robins Kaplan LLP. "And it causes problems for our clients, who would like their disputes to be resolved."

After the pandemic hit the United States, courts across the country closed their doors, and many have yet to reopen fully. Although judges and attorneys were able to proceed with most pretrial matters remotely, holding remote hearings and taking Zoom depositions to mostly great success, very few have attempted Zoom trials.

Civil cases have therefore seen trial dates repeatedly pushed out or suspended entirely.

"In most parts of the country, [trials] were being delayed on a month-to-month basis," said Steven K. Taylor, managing partner at Kecker Van Nest & Peters LLP. "It was like being in an airport and they keep delaying your flight by an hour at a time, and you don't know if it's ever going to get off the ground."

Overall, litigation boutique leaders said firms have adjusted to the new normal and have been managing well. After an initial drop-off in spring 2020, work picked back up again quickly; by the end of the year, firm leaders said, litigators found themselves busier than the year before, mirroring the same trend seen in the legal industry as a whole.

"I've been surprised how the system has continued to operate," said Neal Manne, managing partner at Susman Godfrey LLP. "A year ago, I wondered how it could ... But the intake side of our business has not changed at all. We continue to get calls."

Some things, however, have been particularly worrisome to litigation boutiques. While waiting without a clear idea of when trials might resume, firms have had to continue with the usual management concerns such as determining staffing levels and setting budgets.

"It makes what is always a challenging process even more challenging," Schutz said. "Budgeting is always a challenge and now you add all this uncertainty."

Some firms are leaning into the increase in work they have seen during the pandemic. Robert Tyson of Tyson & Mendes LLP, for instance, said the firm has increased its head count by about 20% since the start of 2020 and is looking to keep growing.

But perhaps an even bigger logistical challenge — and a greater source of uncertainty — is the backlog of cases that have accumulated. Although most cases do settle before trial, without the pressure of a trial date, the number of settlements has dropped off.

Initially, the pandemic caused a number of parties and cases "to re-evaluate their litigation position given the uncertainty of the pandemic at that point," Taylor said. "But as people got more comfortable with what the pandemic meant ... I think there was less pressure on settlement at that point. There was an understanding that [civil cases] might take a little longer."

Others echoed this idea. "A lot of disputes don't get resolved until people are on the courthouse steps," Schutz said. "And it's been basically impossible to get to the courthouse steps."

And no one is entirely sure when trial dates — or trial dates that both sides believe will stick — might start being set again.

"Judges are giving us trial dates right now that they know are not going to happen," said Tyson. It's a good effort to clear cases off the docket, he said, but until cases are likely to actually be tried, it's not likely to push clients toward settlement.

There's also the fact that reopening dates vary by jurisdiction, as different parts of the country experience different case rates and take different approaches to COVID precautions.

"On a jurisdiction-by-jurisdiction basis, there are real differences in attitudes about holding proceedings by Zoom in order to move cases along and about holding trials," Manne said.

Melody Eagan, managing partner at Lightfoot Franklin & White LLC, based in Birmingham, Alabama, said that in her state trials are already resuming. Courts are being cautious and taking safety precautions, she said, but jurors have been showing up, allowing some civil trials to go forward.

Similarly, Manne said federal courts in the western and eastern districts of Texas have been active and have been pushing cases toward trial.

"I think that judges are just as eager as trial lawyers are to reopen for in-person proceedings and hold trials," he said. "There are a lot of judges [in Texas] I've spoken to that are very eager to start holding trials again."

Most of the firm heads who spoke to Law360 Pulse said they expect that trials will resume in earnest in most of the country in the second half of the year.

"I am optimistic that we are going to, in the next six months, get back to a normal level of activity in the courthouses," Eagan said. "But the reality is that there are still some unknowns."

Taylor echoed this idea. "We're preparing for a big 2021 in terms of the number of trials," he said.

How courts might handle the backlog, however, remains unclear.

Schutz said he hopes that courts will consider implementing timed trials, giving both sides a set amount of time to make their case rather than leaving things open-ended. This strategy, which some courts use often, would make it easier to set more trial dates and keep dockets moving, he said.

Judges might also consider giving multiple cases on their dockets the same or overlapping trial dates, knowing that most of those cases will settle before trial, he added.

Attorneys are also unsure how courts will decide which cases get to go first. It's possible that some judges will put trials on the calendar in chronological order, with the cases that have been waiting longest going first, but it's also possible that things won't work out so neatly in practice at all.

"Once trials start, every single file on our desk could be the next trial," Tyson said. "There's no rhyme or reason ... Why does any case have preference over another right now?" By the time trials resume in meaningful numbers, he pointed out, almost all cases will have been waiting for a significant amount of time.

That adds a level of uncertainty for litigators, as do the safety precautions that courts are taking in the courtroom, with attorneys now preparing for trials where they won't be able to read jurors' facial expressions behind mandatory masks.

Overall, however, firm leaders said they believe that their firms are navigating the uncertainty well. Trial attorneys, they said, are used to managing the unexpected — especially now.

"One thing 2020 taught us is that there's no guarantees on anything," Eagan pointed out.

--Editing by Karin Roberts.