

Prepare for the Tsunami of Court Cases—It's Coming

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by **Scott J. Silverman and John W. Thornton Jr.**

It is not uncommon for opportunity to grow out of tragedy. The coronavirus pandemic is no exception. Had Florida's legal profession not been on lockdown or involuntarily socially distanced for extended periods of time by the courts and other governmental entities, we would likely never have migrated to videoconferencing—and discovered its many benefits along the way.

The pandemic has irrevocably changed the manner in which our profession does business. Five months ago, for most people, the word "Zoom" referred to an action hero. Today, it is an online platform that serves as a lifeline for litigators and their clients to the courts, and it is our profession's generally accepted default conduit for conducting hearings, depositions, and mediations. "Zoom"—the verb that was once commonly used to describe a sense of speed—now permeates our profession as a noun or adjective through which business is routinely conducted.

With the exception of experimental proceedings, stipulations and the anomalous case, Zoom will likely never be agreed to or adopted by counsel as an adequate or acceptable substitute for an in-person court trial. Yet, while people of reasonable minds may differ, a Zoom final hearing is more concise and less dramatic than if the same hearing were held in a public courtroom. This opinion comes from two former judges who presided over numerous Zoom arbitration final hearings (and they work) and hundreds of jury trials. Drama, excitement, theatrics and jury trials often go hand in hand. Zoom hearings produce less drama and excitement, and fewer theatrics, and many would consider that a good thing.

However you may feel about drama, there is no question that most full-time mediators have become perfectly adept at conducting Zoom mediations. As we note below, this expertise will be



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a boon to the judicial system going forward.

Courthouse Trials During the Pandemic

With the exception of July's experimental nonbinding jury trial conducted in part via Zoom, there has not been an in-person circuit civil jury trial in the Dade County Courthouse since the rendering of the verdict on March 18, 2020. Given that Florida (and Miami in particular) is currently one of the country's epicenters for COVID-19, we cannot foresee any in-person civil jury trials taking place, in earnest, until mid-2021.

The inability to host a traditional circuit civil jury trial in the

courthouse does not appear to be due to a lack of available judges, clerks or attorneys. The challenge seem to stem from finding jurors who are willing to spend a day in an enclosed public courthouse in the midst of a deadly pandemic, even assuming such an endeavor would be deemed safe. There is discussion regarding the possible recruitment of volunteer jurors, but the court will need to adopt all necessary precautions to protect them. However, the court cannot and will not be able to guarantee that jurors will not be infected while performing their civic duty. Further, there remains the concern that a jury of stalwart volunteers may not reflect a cross section of the community.

Case Filings Are Down (For Now)

It is no secret that circuit civil case filings in the Eleventh Judicial Circuit have been trending downward over the past twelve years—and maybe longer. This is evidenced by the linear trend line in the below graphic.

In 2007, the clerk of the court's records reflected that 47,075 cases were filed in the civil division of the Circuit Court for the Eleventh Judicial Circuit. That number rose dramatically between 2008 and 2010 due to the Great Recession. During that three-year period, case filings increased to 83,638 in 2008 and peaked at 95,057 in 2009. Towards the end of the recession, filings declined to 64,737 in 2010. Predictably, foreclosure suits were the primary culprit. For the nine-year period thereafter (January 2011 through December 2019), circuit civil case filings averaged 38,335 per year.

By the close of the first half of 2020 (January 2020 through June 2020), the Clerk of Court reported the aggregate filing of just 13,804 new cases in the circuit's civil division. When compared to the same six-month period in 2019, the current filings are a 30% reduction. The reduction is unquestionably statistically significant.

In all of 2019, there were 37,785 new circuit civil court cases filed. If the trend continues for the remainder of 2020, we can expect to see only 27,608 filed for the year, which equates to 27% fewer cases filed in 2020 than were filed in 2019.

We are in the midst of a litigation lull, and, of course, the coronavirus crisis is the main reason why. The general public is legitimately uncertain and concerned about the future. Commerce is noticeably reduced. More people remain at home to minimize the chance of contracting the virus.

Less time outdoors lessens the chance of personal injury from third parties. There are fewer people on the street getting into car accidents. How about fewer people in the malls who might have otherwise slipped and fell? Let us not forget about governmental moratoriums on the filing of eviction and foreclosure suits.

With significantly fewer cases at the courthouse, it might be natural for some litigators to question the sources of their next cases. They need not worry, however.

Despite the obstacles presented by the pandemic, there is serious and substantive legal work being conducted during these trying (pardon the pun) times. Regardless of which side a lawyer may

be on in a case, the Great Recession showed us that challenging economic times present opportunities for those in the legal profession. The lull in cases, which the courts and some lawyers are experiencing, is in our opinion transitory. Things are going to change ... and drastically so.

Case Filings Will Surge Going Forward

We are not clairvoyant. But we lived through the Great Recession in Miami-Dade County. We witnessed first hand, at the courthouse, how the economic downturn bludgeoned people and businesses alike. Those were challenging times and lessons were learned.

Foreclosures provide a prime example. Before the start of the Great Recession, it was common to preside over six or seven foreclosure proceedings a week. During that time, banks routinely requested deficiency judgments, costs, and attorneys fees from defaulting borrowers. By the time the recession was in full bloom, the frequency of foreclosure cases ballooned to a point where one lost count.

Foreclosures became the blob that ate the city—and the courthouse. Banks began to take a different tact. Some ceased seeking deficiency judgments. Instead, they began to offer defaulting borrowers money just to get the keys to their foreclosed homes. Banks and homeowners adjusted and adapted to the hardships created by the harsh economic conditions. Judicial burnout was a frequent side effect.

In a similar vein, we expect to see new COVID-19-related litigation that will include foreclosures

and evictions. There will be wrongful death suits. There will be commercial litigation involving business interruption insurance and force majeure clauses. There will be suits by hospitals and doctors for unpaid medical bills. There will be employment cases brought by employees who may have been diagnosed with COVID-19 while at work or who were not rehired. Just use your imagination. Our courts may be inundated with cases that rival and may exceed the numbers we experienced during the Great Recession.

Some claims may be viable, and some may not. Regardless, they will all take time to sort out and resolve. In the meantime, those cases currently filed and pending in the circuit court will remain pending without a realistic trial date in sight. They will risk growing stale unless the courts take a proactive posture to resolve them now. As the facts recede into history, so can the truth.

In a civilized society, the courts and mediation caucus rooms are frequently the places where the rubber meets the road for dispute resolution, which provides a critical safety valve for the administration of justice. If Congress acts and our courts are forward thinking, we may avoid revisiting the darkest days of the Great Recession. If not, those who participate in our justice system, including judges, will surely be in for Mr. Toad's Wild Ride.

How the Judiciary Can Avoid the Coming Tsunami

Under normal circumstances, sans pandemic, judges in Miami-Dade County are extremely busy.

Due to their lack of discretionary time, most tend to be more reactive to problems as they arise, rather than engaging parties proactively.

But today, there is much the Eleventh Judicial Circuit can do while it experiences the current lull in case filings and jury trials. Circuit civil division judges typically preside over three-week jury trial periods. Since jury trials are not being routinely held, that time could be used to set circuit civil non-jury trials, special sets, and other nonjury related matters.

To their credit, some judges have started conducting more Zoom case management conferences to assist in the resolution of disputes and to streamline issues in the cases. Constructive communication between counsel is essential to achieve case resolution, and judges are certainly capable of encouraging those meaningful discussions.

The legal profession, like many others, works from and relies upon deadlines. A set trial is the ultimate deadline for a trial lawyer. With a specific trial date and a pretrial order, lawyers know exactly what they must do and by when they must do it. This sense of urgency can be made applicable as well to mediation.

Most, if not all, pretrial orders require the parties in a case to mediate their dispute before any case can go to trial. Such orders are valuable, because court initiated and ordered mediations can avoid a requesting lawyer's case from appearing "weak" to opposing counsel.

However, pretrial orders do not always give a specific date by

which the mediation should take place. Judges might want to consider ordering their currently pending cases into mediation and giving the parties a deadline by which to mediate their dispute, i.e., 90 or 120 days. If parties simply opt to mediate just ahead of the three-week jury trial period (whenever they eventually are able to take place), judges will find these currently pending cases in the company of the crush of new COVID-19-related cases.

As the judiciary awaits the new COVID-19-related litigation, we see the benefit of taking effective steps today to resolve those cases presently pending before it through the strategic use of case management conferences and court ordered mediation. We also see the opportunities given us by Zoom technology to do so safely and efficiently.

One day, we will gladly bid adieu to the ravages of the coronavirus and all the havoc it has wrought. In the meantime, we recognize the new avenues of dispute resolution that have emerged because of it—avenues that will remain available to us long after it is gone.

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