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Litigators Brace for Challenges, Opportunities as Texas Courts Reopen for Jury Trials

Litigators say COVID-19 might have permanently changed some aspects of a trial lawyer's job—for the better. But worries remain about court backlogs and the composition of juries.

BY ANGELA MORRIS

Trial lawyers across Texas are breathing a sigh of relief as courtrooms open back up for in-person jury trials.

The perk is the opportunity to push forward on stalled-out cases and dig out from a backlog that's piled up for more than a year during the pandemic.

But attorneys also know there are challenges ahead, and they acknowledge that COVID-19 may have permanently changed the practice of law—in good ways.

Texas Lawyer talked to attorneys and judges who have already returned to courtrooms across the Lone Star State to ask them what has changed, and what opportunities and challenges they think may lie in the months ahead.

Judge Vince Santini of Montgomery County's 457th District Court in Conroe, who has presided over 13 jury trials that used COVID-19 precautions since last November, said he is expecting more cases to settle because jury trials are back.

"Having jury trials means justice can resume as the trial date in a docket control order actually means trial," he explained in an

email. "This helps the attorneys resolve their cases as they are able to tell their clients pros and cons of going to trial. When the litigants know their case is up, this helps reduce the case load as more cases are willing to settle."

Santini presided over an April 20 trial that ended in a \$32 million verdict for the client of Corey Wehmeyer, partner in Santoyo Wehmeyer in San Antonio.

"It was so wonderful to finally be back into a courtroom," he said.

The hardest part was picking the jury, because social distancing and masks made a physical barrier to a lawyer forming a connection with potential jurors and making them comfortable enough to open up a dialog, Wehmeyer said.

"Every thing else was incredibly smooth and actually I think the post-COVID world brought a lot of efficiencies," he added.

Wehmeyer said he liked providing the jury with exhibits on a thumb drive instead of paper copies. He was able to call some witnesses, who were outside of subpoena range and wouldn't come in-person, but who could testify over Zoom.



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Venue decisions

In addition to efficiencies, practicing law in the aftermath of the pandemic will bring challenges.

The case backlog in Texas courts has caused litigators' caseloads to backlog, too, explained Wehmeyer.

It could change how attorneys practice law.

Plaintiffs attorneys may change where they choose to file lawsuits, he said.

In some civil cases there may be multiple plaintiffs who live in different cities, giving the plaintiffs' attorney a choice about where to file the lawsuit, he said.

“Typically you make venue decisions based on the type of jury you expect for your case. Now there will be decisions made based on what courts are opened up. Courts that opened up and are moving their dockets, or have segregated criminal and civil dockets,” said Wehmeyer.

In larger Texas counties, there are some district courts that only handle criminal cases and others that take family and civil cases. Smaller county district courts are general jurisdiction, meaning the judges hear all case types. In those general district courts, judges will have to prioritize criminal cases for constitutional reasons.

“Harris County has been one of the courts that opened earlier and has been moving civil cases along. I think Harris will be a more attractive venue than, for example, Karnes County,” Wehmeyer said. “If you go down to Karnes County, for example, we do a lot of Eagle Ford oil and gas litigation—those court share the same judge who presides over a criminal docket and civil docket. Those are going to be incredibly backlogged.”

Criminal bar

The backlog of criminal cases awaiting jury trials will involve the most serious crimes. District attorney offices have still been able to dispose of lesser offenses in the pandemic.

Nueces County District Attorney Mark Gonzalez, who represented the state in his county’s first in-person jury trial in early May, said his office became more efficient when lawyers were working from home. Before the pandemic, the office had a backlog of less-serious crimes that rarely went to trial, Gonzalez explained. His prosecutors have

cleared that backlog—sometimes dismissing charges where warranted, sending defendants to treatment, or negotiating pleas for jail time with defense counsel.

“We have a lot of backlog regarding serious crimes that need to have a jury trial,” he added. “Unfortunately, their day in court hasn’t come as swiftly as without the pandemic, but they are starting to come.”

One of the challenges as courts open up is that not as many people are responding to jury summons. Gonzalez said the government must communicate the safety precautions to make people comfortable.

“We sent out over 300 summons and I think 80 did. People are not wanting to come. Without people coming, we can’t conduct and do the job we need to do,” said Gonzalez.

Another issue: Some defense lawyers worry about the composition of juries at this stage in the pandemic.

Eric Perkins, who was opposing counsel to Gonzalez in Nueces County’s first trial since the pandemic shutdown, explained that the criminal bar has a fear that people who would respond to a jury summons at this point might be political conservatives who are not as concerned about pandemic safety or may even think COVID-19 is a “hoax.” That type of person may tend to be more pro-law enforcement, and more likely to rule against criminal-defendants, said Perkins, partner in Perkins & Perkins in Corpus Christi.

But that didn’t play out in Perkins’ case, where he secured an acquittal for the client, charged with felon in possession of a firearm.

“The inclination seems to be that some of our fears about the attitudes

of jurors were a little misplaced,” Perkins said.

But he added that jurors seemed different. Before the pandemic, when Perkins got a chance to talk to jurors after trials, they were enthusiastic and excited about discussing their experience, he explained. This group was oddly quiet—only one juror spoke up, he said.

“I think something everyone has overlooked about the isolation that COVID created is carrying over into our trials. I noticed for the first time our jurors didn’t seem to be interacting with each other,” said Perkins. “Time will tell if people are comfortable breaking out of that isolation and interacting with what are strangers from the beginning to end in a jury trial.”

Gonzalez, the district attorney, said he was amazed that people watched a live stream of the trial on YouTube, even for a low-level criminal offense. It shows that the public wants involvement in the court process, as long as accessing proceedings is easy.

“At one point in time, we had over 200 people watching our jury trial, which is definitely not the standard,” Gonzalez said. “One good thing that came out of this is accessibility.”

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