Lauren Wood
LAW OFFICES OF SCHURMER & WOOD

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2020 Issue

Expedited Jury Trials level the playing field for smaller-value cases

CAN YOU PRESENT YOUR CASE IN THREE HOURS AND WIN OVER 6 OF 8 JURORS? THIS LOW-COST TRIAL OPTION MIGHT BE RIGHT FOR YOUR LOW-DOLLAR-VALUE CASE

What do you do when the insurance company isn't playing fair, but going to trial doesn't make sense economically? In smaller-value cases, the dilemma of taking the insurance company's meager offer or trying the case – and ending up with essentially the same recovery after spending inordinate costs and time and taking on the attendant risks associated with jury trials (or worse, ending up with less!) is all too common.

Let's say you've got a good client who made a nice enough appearance at deposition, has very reasonable medical specials, and suffered a legitimate injury. Yet, the insurance company offers only a very small amount of money, citing reasons like "low speed impact" or "soft tissue in nature." Why the paltry offer? Because the insurance company knows they have the upper hand – trying the case will probably cost more in time and money than the case is worth.

Thus, the insurance company (who is probably represented by house counsel) faces little risk in rolling the dice and calling your bluff, expecting you to cave prior to trial. Even if the case goes to trial, there's a good chance that the outcome for your client will end up being about the same, after the costs of trial, as it would have been had you taken the offer. This is a difficult – yet extremely common – predicament when you are dealing with a smaller-value case.

What do you do? Level the playing field by taking advantage of the court's Expedited Jury Trial (EJT) option.

What is an EJT?

An Expedited Jury Trial is a mechanism by which attorneys can quickly try smaller-value cases with very few issues in dispute. Enacted with the passage of AB2284 in 2010 and effective as of January 1, 2011, EJTs were created to address the lack of access to courts and offer a more streamlined approach to the traditional trial. (Code Civ. Proc., §§ 6310.01-630.12.) The goal was to allow the parties to complete a full trial in just one day. The Judicial Council adopted Rules of Court, rules 3.1545-3.1552 and created a new form, the *Expedited Jury Trial Information Sheet* (form EJT-010), explaining the basic rules of how to try an expedited jury trial.

What are the benefits of an EJT?

The primary benefit of an EJT is its significantly reduced cost. Expedited Jury Trials make the most sense in cases with very low damages, such as limited jurisdiction cases where the total value of the case does not exceed $25,000, or those where spending five- to ten thousand dollars (or more) to have your

client's doctors testify on damages would not be wise. EJTs are the perfect way to help clients with smaller-value cases get full value when an insurance company isn't playing fair. The lower cost, coupled with the shorter timeline to try the case, allow the litigant their "day in court" – quite literally.

To illustrate the cost-saving measures of an EJT, let's say your client was involved in a simple rear-end auto accident. He suffered from neck and back pain, went to the emergency room that day, then followed up with a chiropractor and treated for four months. The chiropractor sent him to an ortho, who ordered an MRI, but the MRI findings were largely unremarkable. The client makes an okay witness and testified at deposition that he has some lingering neck and back pain but hasn't sought any additional treatment since concluding care about six months after the accident. His total *Howell* meds are $10,000.

Defense offered $11,000, citing unreasonable treatment, low speed impact and noting the client has minimal residuals, if any. Assume it will cost $5,000 to have the orthopedist testify and another $2,000 to bring the chiropractor to trial. You would need a verdict in excess of $18,000 just to cover the additional costs and get you back to the silly $11,000 offer from the

See Wood, Next Page

defense. It's no wonder clients and attorneys choose not to risk going to trial.

But, what if you can reduce or even eliminate the costs of the experts? That is one of the main benefits of an EJT. The doctors can "testify" by way of a declaration, and you simply read their testimony to the jury to get the evidence in. Sure, you reading the testimony is not as effective, but the benefit to the client outweighs any negative impact on whether the jury would feel better hearing it directly from the doctor's mouth. You are essentially able to get the evidence you need in "for free": you don't have to pay the expert to physically come in to testify and you avoid spending five- to ten thousand dollars on a case that might be worth only $15,000-20,000. Tilting the cost-benefit analysis in your client's favor makes deciding to call the insurance company's bluff and try the case a much closer call.

Second, the EJT was designed so the parties can try the case in a single day. That means – from start to finish, including voir dire – an EJT will generally take only one to two days. A brief time frame is not only enticing for clients who are stressed about taking time off of work or arranging for childcare, but also means the attorney will only be out of the office for about two days.

Third, trying an EJT is not only a shorter process, but it's just plain *easier*. EJTs are perfect for new lawyers with little trial experience because the rules are simpler. Although there are four mandatory elements (each side gets only three hours; there are only eight members of the jury; each side gets fewer peremptory challenges; and the jury decision is final), the judge will generally allow great flexibility on all other aspects. For example, the parties can agree to waive evidentiary issues of authentication or foundation to speed up the process. The parties are even encouraged to use innovative methods to present material to the jury, such as summaries, video testimony of experts, and other creative means.

In essence, the parties can specifically tailor the trial to better suit their needs, as long as they both agree. Since the parties are often encouraged to stipulate to as many issues as possible in advance of the trial, when you add in the ability to change any pretrial deadlines by mutual agreement, to stipulate to authentication or foundation, and the option to simply read from a doctor's declaration instead of calling him or her to testify, the trial is a lot easier and perfect for new lawyers to get their feet wet. With fewer rules and a more relaxed environment, young lawyers can become comfortable with the process before embarking on the longer, more traditional – and more stressful – jury trial.

Another great benefit is greater control over the testimony. Because your doctors can testify through a declaration, you can frame the testimony in a way that best serves the case. Reach out to the doctor to confirm what is listed in the medical records and find out what their testimony *would be* if they were to testify in trial, then prepare the declaration and have the doctor sign it. Since you prepare the actual intended testimony of the doctor, chiropractor, or physical therapist, frame it in a way that best suits your case. This approach can be advantageous in situations where your treating physician has little or no experience with trial testimony and may not know the most artful ways to testify in court.

Perhaps my favorite benefit of an EJT is that most cases are allowed a "date certain," versus answering ready and getting put on 12- or 24-hour trial call. Waiting around on trial call is one of the most disruptive parts of our business. You are essentially in limbo until you are called to trial – not able to commit to much of anything, and often not even getting sent out or having the case kicked out weeks and months at a time. With an EJT, you won't have to worry about answering ready in June and not getting out until November because of courtroom availability (or lack thereof). Most judges will allow you and opposing counsel to compare your respective schedules on the original date your trial was set by the court or when you show up for a final status conference, and then you will pick a date certain to show up for trial. That means no trial call, no waiting in limbo, and no disrupting the rest of your schedule.

Important rules for EJTs

The benefits of EJTs do come with some limitations, though. To keep the process short and simple, the Judicial Council devised several EJT-specific rules the parties must be aware of. Before you agree to an EJT, keep the following in mind:

The trial will be shorter

Each side has only three hours to put on all of their witnesses, present evidence to the jury, and argue the case. The three-hour limitation includes opening, closing, and cross-examination in addition to your case in chief. Though this does not include voir dire, it severely limits your ability to get crucial evidence in if your case is factually or legally complex. Unless your case involves only one to two disputed issues (e.g., injuries and damages when liability is admitted), a three-hour time limit will make presenting all of your necessary evidence very difficult.

Voir dire is limited to one hour: 15 minutes for each side, 15 minutes for the judge, with the remaining 15 minutes left to exercise peremptory challenges. In practice, voir dire generally takes longer than an hour, but not by much since judges will want to do their best to keep it as short as possible.

The jury will be smaller

In Expedited Jury Trials, there are only eight jurors instead of 12. This difference is important because three-quarters of the jury must agree in order to reach a verdict in an EJT, which means that six out of the eight people will be required to agree. So even though the percentage of jurors required to agree is the same as for a jury of 12, you have fewer people to make that decision and some view this as potentially unfavorable. Although the jury is smaller, thankfully there is no time limit for jury deliberations.

However, like many aspects of EJTs, if for some reason you want fewer than eight jurors, as long as both sides agree, you can have a jury of fewer than eight.

Choosing the jury will be faster

Since the jury is smaller, the parties are allowed fewer challenges than in a

See Wood, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2020 Issue

traditional 12-person jury. If you are in a conservative district like mine (Ventura County), you may want to think twice about having only eight jurors and three peremptory challenges. You may be more likely to get stuck with a jury panel you don't like.

Each *side* will be allowed up to three peremptory challenges, which means that if you have more than one attorney on either side, in theory you could actually end up with *fewer than* three peremptory challenges, if there are multiple parties. The court does, however, have discretion to allow one additional peremptory challenge each if there are more than two parties in a case and more than two sides.

Limited post-trial proceedings, including waiving the right to appeal

Once six of eight jurors reach an agreement, the verdict is binding (subject to any written high/low agreement). To keep the costs of litigation down, the Legislature mandated that appeals are not permitted except in very rare circumstances, such as judicial misconduct that materially affected substantial rights of a party, juror misconduct, or something like corruption or fraud that prevented a fair trial.

Post-trial motions are also limited. The parties may only make post-trial motions to correct a judgment for clerical error, to enforce a judgment, or for costs and attorney's fees.

Thus, if your case involves complex legal issues or facts, an EJT is clearly not the right option because in most cases you waive your right to appeal.

The parties are required to exchange exhibits and witness lists several weeks in advance

Though this practice is close to standard in places like Los Angeles County, venues like Ventura County do not require advance exchange of these trial documents unless the judge specifically requires it. In EJTs, you are required to have copies of all documentary evidence you plan to introduce, a complete witness list, a list of all depositions intended to be used at trial, a copy of all audio or video materials, any proposed jury questionnaires, list of proposed jury instructions, special instructions or proposed verdict forms, and all motions in limine *no later than 25 days before the trial.* Failing to serve the exhibits in advance is grounds for preclusion of that evidence. (Cal. Rules of Court, rule 3.1548(e).) You must have all your ducks in a row well in advance of the EJT. However, there are exceptions to this rule (see below).

Both parties must agree to an EJT

Electing to use the EJT process instead of a traditional jury trial requires an agreement set out in a proposed consent order and signed by both parties and counsel. Both you and your client must sign a proposed order specifying that you understand the rules and restrictions posed by an EJT. Section 630.03(e) of the Code of Civil Procedure requires each party – including any insurance carrier responsible for providing coverage or a defense on behalf of that party – to state in the proposed order that they have been informed of the rules and procedures of an EJT, that each side has agreed to take part in the EJT, and that each side has agreed to all the specific provisions set forth in the consent order. The proposed order must also include a statement that both parties are aware of the four mandatory elements (each side gets only three hours, there are only eight members of the jury, each side gets fewer peremptory challenges, and the jury decision is final).

The proposed order will also include any other agreements between the parties, such as a stipulation that liability is not in dispute or a high/low agreement. The parties can even agree to modify the requirements or timelines for pretrial submissions required by Rule 3.1548. So, if you're not keen on the thought of exchanging all of your documentary evidence, witness lists and MILs more than 25 days in advance, you can simply "opt out" of that rule if you and the other side agree to it. This is also where you would agree to evidentiary stipulations as to evidence, scope or relaxation of the rules of evidence.

An important note about the consent agreement is that the court is *not allowed* to unilaterally change provisions in the proposed consent order. Although a judge has the discretion to deny an EJT consent order if he or she finds good cause why the case should not be in the EJT program, the judge cannot amend or strike provisions of the consent order that the parties agreed to.

The decision to have an EJT is final

Once the parties have filed the proposed consent order and the court has signed it, a party cannot unilaterally back out of the EJT. The agreement is binding on both sides unless the other side also agrees to return to a traditional jury trial. After the agreement is entered, it can be changed only if *both sides* want to change it or if the court finds for good reasons that the case would not be good for the EJT process. This is another reason why it's important that both you and your client understand the limitations of an EJT, because you likely won't be able to change your mind later.

EJTs offer plaintiff attorneys a way to level the playing field on smaller-value cases. Using them effectively can help your client obtain full justice and increase future settlement offers.

Lauren Wood is a partner at the Law Offices of Schurmer and Wood. *Ms. Wood's practice focuses on personal injury and wrongful death, primarily in Ventura and Santa Barbara Counties. Ms. Wood graduated from Golden Gate University in San Francisco She currently serves as a board member for the Ventura County Bar Association (VCBA) and as a board of director for the Los Angeles Trial Lawyers' Charities (LATLC). To contact Ms. Wood, you can email her directly at lwood@schurmerwood.com.*