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Practice and professionalism considerations in a post-pandemic court

FROM TESTIMONY THROUGH A MASK TO VIDEO-CONFERENCE TESTIMONY, IT'S A BRAVE NEW WORLD IN THE COURTS

While the world is in chaos, our courts remain partially open. At the time of this writing in late May, 2020, legal proceedings across all disciplines have slowed to a crawl. Statutory deadlines, set in stone just a few short months ago, have crumbled. The definition of a speedy trial has, by the stroke of a pen, been altered. Although civil courts are scheduled to start up on June 22, civil jury trials, other than unlawful detainer matters and a few preference cases, will not begin for a minimum of several months. Jury selection could proceed virtually. Judges, witnesses, lawyers, and jurors will likely be required to wear masks for the foreseeable future. These are scary times. Yet crisis can create opportunity if we keep our minds open.

As our justice system evolves in the coming months and years, we should reflect on practice and professionalism in what will become our new normal. Changes caused by the pandemic will, of necessity, result in changes in attorneys' interactions with judges, court staff, and juries. Trial mechanics and strategy will be altered in a manner to ensure social distancing and promote public safety. What follows are some issues to consider in the post-pandemic era.

Efficiency and court time

As the courts reopen, understand that court time will be difficult to get, and consequently, more valuable, particularly in trial courts. As of May, 2020, there were

approximately 2,000 pending unlawful detainer cases in which a jury trial was requested and nearly 900 criminal cases in which the statutory last day for a speedy trial falls in June. Hundreds of additional criminal cases are set as "0 of 10," which means the state has 10 calendar days from the date set in which to begin jury selection. Also, once the eviction moratorium lifts, we should expect a deluge of additional UD filings, all of which have priority over most other civil cases, and many of which are expected to include requests for jury trials.

Even if 75% of these cases result in last-minute settlements or postponements, we are likely to be left with over

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1,000 criminal cases and unlawful detainee cases set for trial this summer, all of which will be prioritized over nearly every other civil case. Los Angeles judges have been informed that we will be called upon to cross disciplines in order to address these enormous backlogs of priority cases. Civil trial and Independent Calendar judges are likely to be presiding over criminal trials and unlawful detainee trials to address the criminal and UD backlogs.

Being respectful of court time, including ensuring witnesses are present, appearing at the court-ordered appointed hour, and being fully prepared to proceed, will become a critical factor in efficiency and professionalism. Additionally, since many judges will not want to be handling paper that has been touched by others, attorneys will need to *timely* e-file anything requiring judicial review. This e-filing should be done in time to enable your judge to review and consider your moving papers prior to the day of the hearing.

Keep the court apprised of changes in the status of your case. Few things are more frustrating to judges than spending their weekends making tentative rulings on dozens of motions in limine, or preparing to rule on a summary judgment motion, only to find out on Monday morning that the matter is off calendar because it settled days earlier, or that the parties agreed to withdraw a motion, and no one bothered to notify the Court.

The standard 8:30 a.m. court appearance is a likely casualty of the COVID-19 pandemic. Hearings at staggered times, i.e., 8:30, 10:30, 1:30, 3:30, are likely to become our new normal in an effort to decrease the number of individuals entering courthouses and congregating in courtrooms all at once. Video appearances are expected to become as routine as CourtCall.

Jury trials: testimony without facial cues

As previously discussed, the availability of civil jury trial courts is expected to be limited. Prepare for 2021 and beyond. When a case is able to be tried, consider the following:

Plexiglass barriers and masks are going to be part of our new normal. The connections that lawyers strive to create with jurors will be much more difficult when masks are required. Conveying emotion and picking up on non-verbal facial cues will be challenging. Although no one likes masks, if it comes down to a choice between wearing masks to protect public health and not wearing masks to create better observation and interaction, the latter option fails.

Work with opposing counsel to give an *accurate* estimate of the number of trial days needed. Remember to factor in at least a day for jury deliberations. Understand that jury selection is likely to require substantially more time than in the past. Due to social-distancing requirements, we will be unable to bring full panels of 30 to 35 jurors into courtrooms at one time. Be prepared to question people in smaller groups of eight to 10 jurors.

Consider stipulating to a smaller jury panel, perhaps eight jurors, with six being required to agree for a verdict. A smaller panel will speed up the jury selection process and will make social distancing during deliberations easier. Keep in mind that courtrooms have been “red-tagged,” which means that only certain seats will be available for use and that a 12-person jury will not be permitted to sit together in the jury box. A smaller panel will enable attorneys to better connect with selected jurors.

Consider an expedited jury trial

Consider an expedited jury trial format. In today’s climate, jurors will be especially eager to minimize their time in court. Many attorneys disfavor Code of Civil Procedure section 630.04 expedited trials because they are concerned about waiving their appellate rights. However, in cases where an expedited trial is not required, nothing precludes counsel from stipulating to an expedited trial format *without* a waiver of appellate rights. Counsel can and should agree on reasonable time limits for the presentation of evidence. Streamlining the process will endear attorneys to

judges and juries and will allow us to more rapidly process the backlog of cases.

A standardized expansive hardship questionnaire, which might include questions regarding job loss, exposure to COVID-19, caregiving responsibilities, and finances, should be utilized. I would like to see judges pre-screen jurors for hardship prior to those jurors ever being assigned to courtrooms.

According to Governor Newsom on May 15, unemployment in California may reach over 24%. I expect the number of prospective jurors with legitimate financial hardships to skyrocket. Those financial hardships, coupled with increased family care responsibilities and increased fear of being in a public courtroom, could make jury panels look very different than in times past.

Given the social-distancing requirements that will allow very few venire members (8 to 10) into court at a time, it will be overly time consuming to question everyone live without pre-screening. Additionally, individuals who are immunocompromised should not be required to appear in court for the sole purpose of explaining why they should not appear in court.

A better practice would be to conduct an initial judicial screening for hardship. There is precedent for this. In extended criminal cases, it is common to order time-qualified jurors who have been pre-screened by the jury coordinator.

Exhibits

Attorneys should work together to stipulate to admissibility of the majority of exhibits. At a minimum, lawyers should stipulate to the authenticity of exhibits if authenticity is not an issue. Presenting exhibits to a jury could be tricky. Due to social distancing requirements, attorneys will not be permitted to approach witnesses, hand them documents, and question them about those documents in order to lay a foundation prior to the exhibit being shown on a screen.

With the use of paper being minimized, the customary practice of showing a witness a piece of paper while the

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jurors are present and questioning that witness about its foundation prior to the item being actually shown to the jury will have to change. Absent agreements between attorneys, the time-consuming process of laying the foundation will most likely need to be done out of the jurors' presence, again, causing additional delay. If there is not cooperation in this area, imagine the difficulty in laying a foundation for every exhibit outside the presence of the jury.

All of the trial courts contain video screens and document-viewing technology, which will be utilized more now than ever before. Rulings on admissibility of exhibits will need to be addressed prior to those exhibits being shown to the jury. Unless the authenticity of a document is in question, or unless there are clear evidentiary rules that would preclude its admissibility, I encourage counsel to agree, before the witness takes the stand, on what may be shown to the jury.

Chambers conferences and sidebars will require far more time than in the past because of social distancing requirements. Although some court reporters are equipped with microphones, judges and lawyers will no longer huddle together, sotto voce, to quickly resolve issues that arise. Again, working with opposing counsel on the front end and hammering out agreements on admissibility of testimony and exhibits will facilitate a smoother trial.

Technology and LA Court Connect

Videoconferencing is coming to the Los Angeles Superior Court. Court-Call will give way to LA Court Connect, which will enable proceedings to be done remotely with video. Many lawyers want face time in court, but as the new normal evolves, understand that if you appear live, parties, lawyers, jurors, and judges will be wearing masks. Judges are now required to wear masks while on the bench.

In past generations, physical presence has been viewed as an indication of seriousness and industry. Spending face time, often thousands of hours, in an

office, was viewed as a critical element to success. Younger Americans, particularly millennials, view this concept as foolish. In their minds, so long as the work gets done, why does it matter where they do it? Given that we can be in touch with a few clicks of our phone, why spend hours in an office?

I was skeptical of their view pre-pandemic. What about collaboration and teamwork? What about quality control? Over the past couple of months, as we judges have participated in video conferencing, complete with slide shows and interactive private chats, I have come to realize that millennials may have a point. One can be productive and can collaborate virtually.

Be open to video conferencing opportunities. The new system enables lawyers and judges to interact in a video conference format. In addition to the obvious social distancing benefits, LA Court Connect is expected to cost less than Court Call and will enable matters to proceed without the need for masks. Video settlement conferences provide excellent opportunities to resolve cases. Many platforms are equipped with secure breakout rooms.

Video proceedings, particularly bench trials, should be considered. Consider the benefits of video:

- 1) Ability to see the unmasked faces of all participants. Given the new mask requirements, in a live hearing, it may be difficult to fully observe the proceedings if everyone is together live. In a video conference, attorneys will be better able to observe opposing counsel and all witnesses and parties during testimony.
- 2) No added costs for travel time.
- 3) No risk to anyone's health.
- 4) Simpler to secure testimony from out-of-town witnesses and experts. That expensive out-of-state witness may be more accessible if the witness need not spend days traveling to and from court.

Although most lawyers I have spoken with oppose the concept, video jury trials in civil cases could be in our future. Jury panels are going to look very different, and may be far less economically and

socially diverse than in times past. As we increase the use of technology during our usual proceedings, it is not at all far-fetched to start contemplating how virtual jury trials might proceed.

ADR and ODR

Alternative dispute resolution has long been utilized to settle large numbers of cases. In recent weeks, a new term has emerged. ODR, or Online Dispute Resolution, creates exciting opportunities for parties to reach a settlement, either through a formal mandatory settlement conference, or a less formal mediation, without leaving their homes.

If you opt to engage in ODR, keep in mind that Evidence Code sections 1152 and 1119 will apply. Section 1152 provides that offers to compromise, promises to provide compensation, and conduct and statements made in negotiation thereof, are not admissible to prove liability in court. Section 1119 provides that communications, negotiations, and settlement discussions made during mediation remain confidential.

Unlike the attorney-client privilege, mediation confidentiality cannot be unilaterally waived. Mediation confidentiality means that documents prepared for and shared by lawyers during mediation should not be provided to your expert. If an expert's opinion ends up being based on materials obtained as part of mediation, that expert's testimony may be excluded.

Furthermore, California Rule of Court 2.30, which permits sanctions for rules violations in civil cases, could come into play if attorneys improperly attempt to use materials obtained during online mediation, or statements made in settlement discussions, to gain an advantage in a subsequent trial.

Penal Code section 632 prohibits recording of confidential communications without the consent of all parties. Unless everyone agrees, if you do engage in ODR, be it a mediation or a settlement

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conference, you may not record any portion of the proceedings. It would also be improper to have anyone in the room or on the call whose presence is not disclosed to all the people present.

It is understood that cases settle when a trial date looms. In the present pandemic, one hopes that litigants will want to take control of uncertain outcomes and make serious settlement efforts much earlier in the litigation process. This is particularly so due to the expected difficulties in securing trial dates. Both plaintiffs' and defense attorneys should be realistic in assessing the value of their cases. Plaintiffs' attorneys should consider accepting less money in order to timely resolve matters for their clients. Defense attorneys should recognize there is a huge opportunity to minimize litigation costs and should consider offering more money early in the process.

In light of the uncertainty and ambiguity before us, there is value to both sides in resolving matters prior to running up litigation expenses and spending what could be additional years in limbo. Resolution of cases will also enable those cases that should be tried to proceed in a more timely manner.

Know your "local rules"

By local rules, I refer not only to the Los Angeles County Rules of Court, but also to rules put into place and preferences expressed by individual judges. For example, judges have preferences on how witnesses are addressed, whether attorneys may use the well, how technology may be utilized, and how close lawyers may get to witnesses.

In the classic 1967 movie *In the Heat of the Night*, Sidney Poitier played a homicide detective who stated, in response to a condescending police officer who insisted on using his first name, "They call me Mr. Tibbs!" One of my "local rules" is that witnesses must be addressed formally. Lawyers often attempt to address clients and witnesses by first names in an effort to personalize them in front of juries.

However, other than child witnesses, I frown upon this practice. Using a formal form of address reminds us that we are in a serious place, with real consequences. I remind my juries that to the people sitting at counsel table, there is no case more important than the one right here, right now. Let's keep it formal with the witnesses.

Don't assume you know all the rules, even if you have appeared before a particular judge in a prior case. "Local rules" in many courts will change due to the pandemic. For example, I have always required lawyers to provide cell phone numbers and email addresses to my judicial assistant, but going forward, they will also need to provide this information to each other. When court time is scarce and we want to minimize juror time in court, last-minute issues that could cause delay should not wait until attorneys appear in court, but rather should be discussed after hours, out of the Court's presence. Not being able to reach opposing counsel would be an impediment to enforcement of this "local rule."

Rules about use of trial notebooks, sharing of technology, gloves, and masks may well become part of our new local rules.

Civility

Ask any judge about his or her best advice for lawyers and the response will invariably include being civil and respectful. The request for civility and respect extends toward not only the judge, but also toward court staff, opposing counsel, parties, and witnesses.

In over 80% of the civil trials assigned to me, the lawyers state at the outset, "We get along great," or "We've been working well together." That they feel a need to tell me this is troubling. As often as not, the announcement precedes a breakdown in communication and trust as the jury trial gets under way.

I handled criminal cases as a lawyer and judge for nearly 20 years.

In my experience, criminal lawyers are far more civil and respectful of each other than civil litigators. I suspect the reason is because they know they will interact again in future cases. Every one of the thousands of criminal cases is handled by at least one government attorney. Criminal lawyers don't talk about how well they get along because it is expected that they do so. Bad behavior in one case becomes public quickly and may affect how the lawyer and his or her future clients are treated in subsequent cases. Be the lawyer whose reputation ensures you get the benefit of the doubt.

Jurors neither admire nor respect rudeness. Even when attorneys' positions are legally or morally correct, unpleasant attorneys and parties are likely to obtain a less favorable jury result than they expect. Bad behavior in the long run will not reap rewards.

Kindness and civility matter more now than ever because people are stressed and hurting. Recognize that everyone has been impacted by COVID-19. Time away from court has given us an opportunity for reflection and perspective. Perhaps an understanding that we are all weathering the same storm will create connection and will enable attorneys to disagree without being disagreeable. It is my hope that when civil attorneys return to court, be it live or by video, they will recognize that civility and courtesy toward each other will help us meet the challenges we all face in the coming months and years.

Valerie Salkin has been a Los Angeles County Superior Court judge since 2010. In an effort to address the case backlog created by COVID-19, she will be handling video settlement conferences in Van Nuys for the next several months. Judge Salkin received her law degree from USC Law School and her undergraduate degree from the University of Michigan.

