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TOP VERDICTS

Litigating in a pandemic

Managing the impact of a virtual justice system

By Jack S. Yeh

A year ago, litigants in California's congested court system were facing significant challenges seeking justice. Whether you were a party to civil litigation, a participant in the criminal court system, or working your case through the family law courts, pursuing your "day in court" was already a difficult objective to achieve.

That's no surprise considering California's court system is one of the world's largest, serving a population of nearly 40 million people — over a tenth of the total U.S. population. Approximately 6 million cases are filed each year in California's state court system, requiring the attention of over 2,000 judicial officers and nearly 17,000 judicial branch employees. Technological advancements (e.g., Courtcall, e-filing, etc.) have created efficiencies that help stabilize court systems' ability to manage the swelling queue, while alternative dispute resolution (private arbitration and mediation) offers relief from the backlog so long as both sides agree. It is a delicate balance that parties, attorneys, judges and administrators all understand requires patience

and diligence to make it all work — so long as matters proceed through the pipeline. As a benchmark, the Judicial Council of California's 2019 Court Statistics Report indicates that just over 75% of

long this unfathomable scenario would last.

As the reality set in that this state of emergency would be more than just a brief temporary pause, ramping back up proved to be no small feat.

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all civil cases are disposed of within 18 months — as they have been in previous years.

In March 2020, that trend came to a halt — every citizen's day in court would have to wait a little longer. Stay-at-home orders issued because of the novel coronavirus triggered closure orders in each of the 58 superior courts across the state, bringing the system to a grinding stop. Litigants and their lawyers were left in limbo as access to judicial officers were restricted, but for the most urgent of matters. Jury trials were canceled. Court deadlines and hearings were suspended. Depositions and even meet and confer efforts were taken off-calendar as everyone waited to see how

The courts were faced with limited physical capacity restrictions making jury trials all but impossible, particularly as surging COVID case counts in impacted counties dashed optimistic re-opening hopes for most of the State. The Los Angeles County Superior Court, for example, did not see its first criminal jury trial until early September 2020, with over 7,000 additional criminal cases trailing to satisfy the defendants' right to a speedy trial. All civil jury trials would be rescheduled for 2021. The impact to civil litigants expecting to get to trial in 2020 would be at least a full year delay. And for those newly filed cases in 2020, trial is unlikely until at least 24-

28 months out as the State's judicial officers will have the unenviable task of working through the ever-increasing backlog once civil jury trials are able to practically resume.

Given these circumstances, there is very little chance for parties to affect this timeline (absent waiving or otherwise compromising jury trial rights — i.e., smaller jury or bench trial, etc.). Time horizons for cases will become longer, as well as costs. To balance those concerns, litigants and their attorneys can voluntarily pursue disposition of their disputes via private alternative dispute resolution (which has its own cost burden). If ADR is not an option, counsel should evaluate whether their matter might have trial preference priority under Code of Civil Procedure Sections 36 (party with a substantial interest in the action is over 70 and health of the party would result in prejudice absent trial preference), 37 (damages caused by the defendant during the commission of a felony offense for which the defendant has been criminally convicted), 527(e) (preliminary injunctions), and 1062.3 (declaratory relief). Otherwise, you are out of luck if you want to speed up the process.

In the meantime, adapting to this new normal means things will be different — for a long while. With caseloads backing up, trial courts are dealing with larger law and motion dockets as existing cases compete for attention with the addition of newly-filed cases — compounding the demand for more judicial resources to process matters. Hearings dates are being scheduled farther out and ex parte applications to advance dates are becoming almost routine. That reality places greater cost and strategic burdens on parties as a result.

The good news is that access is available, as courts have resumed full-time operations. Telephonic and video appearances are now commonplace and, in many instances, the only way to have a matter heard. While virtual appearances for hearings and mediations lack the in-person hu-

man element of oral advocacy that most lawyers prefer, it is nevertheless manageable with today's technology to at least keep matters moving forward.

Cautionary note: Technology platforms and standards are different in each court. Practitioners should make themselves familiar with the applicable systems and programs and also be prepared with back-up solutions should their primary method of connecting experiences any problems. For those working from home (which is just about everyone), having a mobile hot-spot available via your cellphone is a life-saver if your Wi-Fi unexpectedly crashes. If you are unfamiliar with how that technology works — learn it, test it and practice it. You will thank me later.

The same IT self-education advice applies for depositions. Court reporting firms have adapted the best to this pandemic — adopting and em-

bracing videoconferencing and web-based technologies that impressively replicate many of the real-life functions and environments of in-person depositions. However, platforms differ by provider. Practitioners should familiarize themselves with the provider's system and test out the functionalities in advance so that your time on the record can be efficiently utilized. The judge, jury and court reporter will be happy you did.

While the pandemic has curtailed the personal interactions of litigation, we have nevertheless adjusted and managed to keep the wheels of justice turning. I, for one, would just rather do it in person. Never has the phrase "see you in court" taken on such an optimistic meaning.

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