

THURSDAY, MAY 21, 2020

## New normal for civil cases

By Wynne S. Carvill

Let's face it: We are a very long way off from a return to civil trials, especially civil jury trials. Until there is a vaccine for the coronavirus and it has been widely administered, citizens will be reluctant to respond to jury summons; and even if they do, most courthouses will not be able to assemble juries while observing social distancing. It is also difficult to see how jurors can share a traditional jury box or retire during recess to a traditional jury room. And when all these issues are finally addressed, the backlog in criminal trials is going to force courts to continue to push back all civil jury trial dates. Indeed, many of these same issues will hamper the ability of courts to conduct a bench trial if the parties were to waive their right to a jury trial.

For a few parties, this is good news because it will delay the day of reckoning that so often comes with a firm trial date. The vast majority of civil cases settle, many within three months of trial or even on the eve of trial. When I served as presiding judge for the Alameda County Superior Court, our civil settlement departments resisted scheduling settlement conferences more than six weeks before trial, as setting them further in advance was rarely productive.

The difficulty in resuming civil jury trials any time soon, coupled with the reluctance of many civil parties to consider settlement seriously without a looming trial date, is a problem that should

concern both courts and civil litigators. The new normal during this pandemic poses a long-term threat to the health of our civil justice system, and we must find ways to keep cases moving despite the growing backlog of civil cases. That backlog will only become more severe as the pandemic continues.

There is no easy solution, but here are a few options. First and most obvious is the need to get more cases to mediation. It's never too early to mediate, and putting it off increases the sunk costs of litigation reflected in procedural motions and discovery battles. Those sunk costs should not be a barrier to settlement, but they often do make it more difficult for one party or another to accept a settlement offer late in the game that would have been better had it been presented earlier. It is the duty of attorneys to counsel their clients on the financial and psychological costs involved in long-term litigation. Significantly, with so much of traditional litigation currently shut down, virtual mediation on platforms such as Zoom and BlueJeans may be the only way counsel can advance their clients' interests in the immediate future. Indeed, these platforms are being utilized by some courts for oral argument on law and motion or appeal. Attorneys must become familiar with these technologies.

Mediation does not need to be expensive. Local bar associations, either directly or through the courts, may offer low-cost options, and JAMS has an alter-

native fee program for personal injury mediations in which the amount in controversy does not exceed \$100,000. Even in traditional mediations, it is not uncommon for the mediator to follow up after an unsuccessful day to see if a settlement may be possible at a later point. Getting a mediator involved early typically gets the mediator "invested" in the ultimate success of the negotiations and is a good way to increase the likelihood of settlement even if the first endeavor is unsuccessful.

Litigators know that arbitration is always an alternative. What they sometimes overlook is that the nature and scope of arbitration are negotiable. The parties can craft a detailed custom agreement or choose from some standard alternatives. JAMS, for example, has a set of comprehensive rules as well as a set of streamlined rules. Parties can either chose between them or chose one and then add specific rights or limitations suited to the dispute. One option worth considering during the pandemic is whether an arbitration agreement should expressly include or exclude holding sessions on videoconferencing platforms. While many attorneys are instinctively resistant to virtual arbitration, they are sometimes pleasantly surprised by the experience. If the alternatives are delays or in-person sessions with everyone wearing a mask, arbitration on a virtual platform may be the best option.

While many parties are wary of arbitration because of the

limited appellate remedies, they can always have the benefits of arbitration with the full panoply of appellate rights by stipulating to a temporary judge (California Constitution, Article 6, Section 21; California Rules of Court, Rule 2.830). The parties could also specify certain rights or limits on discovery in order to control costs or provide certain protections. Although it may be cost-prohibitive in the vast majority of cases, it is possible to construct a way to hold jury trials with a temporary judge.

All of the above options should be explored during the new normal that has been foisted upon us by the pandemic. The alternatives are mushrooming civil dockets, additional years before trial and an unprecedented civil trial backlog. We need to do better. ■

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