

Referees Under CCP Sections 638 and 639: A Procedural Vaccine to the Coronavirus' Impact on the Public Court System

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The first case of the coronavirus in California was reported on January 26 of this year, while Placer County reported the first fatality in the state on March 4. That same day, a state of emergency was declared. This was followed by a statewide shelter-in-place order issued by Governor Gavin Newsom on March 19 (Executive Order N-33-20), subject to certain exemptions, including operations of the public court system.

Four days later, the chief justice of the Supreme Court of California and chair of the Judicial Council, Tani Cantil-Sakauye, issued a statewide order suspending all jury trials, criminal and civil, for 60 days. However, her order permitted courts to conduct trials earlier upon a showing of good cause or through the use of remote technology. On March 30, she issued another order that, in part, expressed support for courts to make use of technology to conduct judicial proceedings and court operations remotely, while suspending any rule in the California Rules of Court that would prevent a court from using technology to conduct judicial proceedings and court operations remotely.

Since that time, courts, attorneys and alternative dispute resolution (ADR) providers have used their collective resourcefulness to find ways to reduce the devastating effects the coronavirus and resulting court closures have had on the legal system. Articles, blogs and LinkedIn posts are laying out what technological platforms are available and explaining the pros and cons of using remote technologies to mitigate those effects on both the court system and ADR.

This article will broaden the time horizon for the consequences this epidemic will have on the civil justice system and will offer yet another option to help the courts, legal counsel and litigants dig out from the backlog of cases we all inevitably will face when the crisis ends.

That backlog will indeed be formidable, despite the increased use of technology and the help of ADR during the court closure crisis. A review of statistics compiled by the Judicial Council in its 2019 Court Statistics Report informs that conclusion.

Unlimited civil case filings have been increasing, rising from 192,324 filings in Fiscal Year (FY) 2015 to 221,090 cases in FY2018. In the last reporting year, FY2018, there were



193,615 unlimited civil case dispositions, yielding a caseload clearance rate of 88% (p. 94). Along with the increase in filings, the length of time to dispose of general unlimited civil cases has expanded. In FY2009, 92% of unlimited civil cases were resolved in less than 24 months, while by FY2018, the 24-month disposition rate had slipped to 85% (p. 95). Of the 193,615 dispositions in FY2018, 41,009 did not occur until after trial (p. 96).

Accepting the premise that this year's unlimited civil cases are fairly comparable in volume to FY2018, and assuming the statewide court shutdown does not last more than three months, the number of trials not held during the coronavirus pandemic could be as high as 10,000 in

those three months, while total dispositions this calendar year could fall by one-quarter, or nearly 50,000 cases. These shortfalls can be lessened if the courts are successful in conducting remote trials, as well as through increased mediation assistance of private ADR. Nevertheless, the resulting backlog will burden the public court system tremendously during the second half of this calendar year and beyond.

Another factor almost certain to make it even more difficult for courts to deal with this backlog is the financial impact the pandemic has had, and will have, on state revenues and expenses. California's Senate budget committee is preparing for a projected deficit of \$30 billion to 35 billion in the near future. This deficit is the result of funds being diverted to programs supporting medical care to combat the virus, as well as being earmarked for fiscal support for individuals and small businesses that have lost income or revenue while the state's shelter-in-place order has been in place. Complicating the state's finances is the Franchise Tax Board's 90-day extension of the deadline for filing 2019 tax returns and paying delinquent taxes and estimated taxes for the first quarter of this tax year ("Coronavirus crisis could trigger huge California deficits, lawmakers are told," *Los Angeles Times*, April 16, 2020; "California Faces Budget Shortfall That Could Top \$35 Billion," *Bloomberg.com*, April 16, 2020).

This anticipated deficit will result in a substantial revision to, and reallocation of, the FY2020-2021 budget, which takes effect on July 1. These changes will be introduced next

month when the legislature completes what is known as the annual "May Revision," which will almost certainly include significant funding cuts for the courts.

One additional way parties and courts might mitigate these negative impacts from the coronavirus pandemic on civil litigation, in particular, is by turning to private ADR providers for referee assistance under California Code of Civil Procedure (CCP) Sections 638 and 639.

CCP Section 638 allows the court to appoint a referee upon an agreement of the parties filed with the court or upon a motion by a party showing that there is a preexisting written agreement to refer any controversy between them to a referee. The referee may be authorized to decide designated issues raised by the parties. Alternatively, the referee may make factual determinations necessary for the court to adjudicate the case fully. While the services of a referee normally take place outside of courts and without the assistance of court personnel, the presiding judge can order court facilities and personnel to be made available to the referee upon a finding that their use would further the interests of justice.

Thus, civil parties facing delays in resolving disputes do not have to abandon the public court system; they can agree instead, either by preexisting written agreement or by subsequent stipulation, to have critical issues resolved with the help of a private referee who will expedite resolution of their dispute.

Alternatively, CCP Section 639 empowers the trial court, upon either a written motion of a party or the

court's own motion without the parties' consent, to appoint a referee. The appointment can be made when (1) an accounting is necessary; (2) a question of fact determination is needed to adjudicate the case; or (3) the court needs assistance in resolving discovery disputes. In ordering a sua sponte appointment, the trial court also is required to set forth in its order findings that no party with an "economic inability to pay" its share of the stated referee's cost, will be prejudiced.

The 58 county trial courts in California range in size from fewer than 10 to more than 400 judges, and it is likely that each court will have to fashion its own remedies that fit its specific circumstances regarding the backlog resulting from the coronavirus pandemic. The parties' voluntary use of Section 638 and the courts' exercise of their authority under Section 639 are two approaches that will allow the courts to continue to meet the needs of those litigants who avail themselves of public judicial services.

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