Judge Michelle Williams Court
LOS ANGELES SUPERIOR COURT

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Civil litigation in a post-pandemic world

THE "NEW NORMAL" WILL BE NOTHING LIKE WHAT WE KNEW BEFORE 2020

There is no "new normal" in the post-pandemic world of civil litigation. When I began thinking about this article, civil courts in Los Angeles had recently closed and non-essential workers were getting used to the idea of temporarily sheltering in place at home. No one wore masks. We waited patiently with the expectation that life would eventually return to "normal." Then the gravity of the pandemic got worse. The time horizon for returning to "normal" extended. Wearing masks in public became common and was later mandated. We all made plans for resuming daily activities while practicing social distancing and good infection control practices. Retailers embraced this new reality by manufacturing and selling fashionable, eco-friendly face masks. We thought we had the landscape figured out. We knew the rules of interaction – most of us followed them, some of us did not. We began the process as a society of navigating the new social and cultural norms developing around the intersection of health and safety, civil rights, and common courtesy.

Court leadership worked tirelessly through the Spring of 2020 to maintain emergency operations in the civil division while developing and implementing a plan to re-open. As the heavy lifting on the part of individual judges and attorneys was about to begin, we found ourselves amid a national crisis resulting in multiple days of civil unrest in different parts of the county. Our untested reopening plan was about to launch at a time when the resources of the court would be stretched farther than anyone could have anticipated.

We, as a legal community persevered and got through it.

The new year brought new opportunities. Vaccines rescued us from a collective catastrophe. The severity of the impact of COVID-19 on our society began to wane. Again, we started to think about what our "new normal" would be. I certainly do not know the answer to that question. But I do know it will be nothing like what we knew before 2020.

I have read several articles and opinion pieces expressing frustration that most civil litigation in Los Angeles County has been on hold for as long as it has. The frustration is understandable – like attorneys and litigants, judges in civil assignments are concerned about the

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effect the delay will have on the cases on their docket. It is important, however, to understand the larger picture. While the Los Angeles Superior Court is one of, if not the, largest court system in the world, its resources are limited. Court leadership has been faced with the difficult task of triaging operations in each of its divisions, including disciplines in which criminal constitutional rights and health and safety are at issue. And because of its size and geographical scope, it takes time to implement change.

Here For You | Safe For You

The open and public nature of our courts is a hallmark of the American justice system. The Los Angeles Superior Court has developed a "Here For You | Safe For You" reopening model. Then Presiding Judge Kevin Brazile developed the model to restore access to justice while following public health protocols and guidelines. (See May 13, 2020 LASC press release at http://www.lacourt.org/newsmedia/uploads/1420205141254820NR Order5-13-2020.pdf.) The "Here For You | Safe For You" model creates a safe environment to conduct court business by controlling the flow of people through courthouses and courtrooms and protecting people while they are participating in court proceedings or conducting media- related business.

Fast forward to the present. At the time of this writing, Los Angeles County reports a total of 1,244,054 reported COVID-19 cases. 24,343 Angelenos have died. The good news is the County's testing positivity rate is now 0.40% and we have moved from the Widespread Tier (the most severe) to the Yellow Tier (the least severe). (http://publichealth.lacounty.gov/media/Coronavirus/data/index.htm)

Mitigation measures from vaccines to mask mandates to social distancing and personal hygiene are working. They have worked so well in fact that Governor Newsom lifted the statewide emergency order and fully reopened the state on June 15. But COVID-19 is a fact of life and will be for the foreseeable future. We, as a legal community, must prepare to transition into a new way of practicing law that recognizes the reality of a new paradigm while holding true to the principals of equal justice under the law.

It is time for a culture shift

Gone are the days when it was advisable to travel to court for a 30-second appearance at a status conference. For that matter, there is no reason to personally appear on a fully briefed motion when everything that needs to be said has been articulated in the papers.

Remote appearances are essential to the ability of the court to provide timely access to justice in the post-pandemic world. Telephonic appearances have been available for a long time. The more attorneys and litigants avail themselves of the ability to appear remotely, the greater the court's capacity to adjudicate matters. In-person appearances present social distancing challenges that require the court to limit the number of matters each courtroom can hear on a given day. Some attorneys have noted they prefer personal appearances because they can observe the body language of the judge. But remember, judges must wear masks while in the courtroom. Their facial expressions will be obscured and there is very little an appearing attorney will be able to discern from the body language of the judge.

Attorney civility is key to the court's organizational agility

Governmental entities are not known for their organizational agility. But through partnerships with the bar and justice partners, we can all work together to provide access to justice to litigants throughout the county.

The more business that can be conducted without a personal court appearance, the more resources can be dedicated to moving forward. At every Case Management Conference, I remind counsel to review and comply with the court's Guidelines for Civility in Civil Litigation (found in an appendix to the LASC Local Rules). Civility has never been more important. I find that most ex parte applications and a substantial number of discovery motions would not be necessary if the attorneys involved extended ordinary professional courtesy to each other. Fight the temptation to draw a line in the sand and take your chances with your judge rather than negotiating a mutually agreeable stipulation to a scheduling issue, procedural motion, or discovery dispute. With respect to discovery, make a concerted effort to meet and confer, taking advantage of the ability to speak with opposing counsel by video meeting or telephone. If your judge conducts Informal Discovery Conferences, by all means, schedule one!

COVID-19 News and Resource Center

The court's response to the pandemic is nuanced and evolving. To best serve the public, the court has established a COVID-19 News and Resource Center on its website at http://www.lacourt.orginewsmedia/ui/covid19NewsCenteraspx. As the need arises, Presiding Judge Eric Taylor issues orders addressing court operations. These orders are posted in the News and Resource Center as they are issued. To subscribe to the court's news releases, email publicinfo@lacourt.org. In addition to LASC orders and news releases, the COVID-19 News and Resource Center provides links to Judicial Council Temporary Emergency California Rules of Court, FAQs, and other COVID-19-related resources. Check the Resource Center often for the latest updates on court operations.

Civil jury trials in a post-pandemic world

As a large urban court, it is not uncommon for Los Angeles judges to see lawyers from out of county or out of state and witnesses from all over the world. Our plans to resume civil jury trials must account for this very diverse group of litigants and other court participants.

Judges must balance multiple concerns related to resuming jury trials (aside from calendar management and technology). The more difficult issues

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concern how to keep everyone safe, how to protect juror privacy, and how to ensure due process for all parties.

The right to a civil jury trial is guaranteed by the California Constitution and by statute. (See Code Civ. Proc., § 631, subd. (a); *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1, 9; *Shanks v. Department of Transportation* (2017) 9 Cal.App.5th 543, 550.)

Parties demanding a jury trial are entitled to a panel drawn from a representative cross section of the population of the area the court serves. (*People v. Burgener* (2003) 29 Cal.4th 833, 835. See *Holley v. J & S Sweeping Co*. (1983) 143 Cal.App.3d 588, 592-593.) Pools from which juries are drawn must not systematically exclude distinctive groups in the community.) *Burgener, supra*, 29 Cal.4th at p. 856.)

Even in pre-pandemic times, meeting this constitutional requirement in a county as diverse as Los Angeles was not simple. Juror summonses must be purposely and strategically issued to ensure a true cross section of the relevant population.

Before the court and counsel meet prospective jurors, the jury commissioner has created a master list of prospective jurors that includes a representative cross section of the population of the area that the court serves. (See Code Civ. Proc., §§ 194, subds. (g), (i), 197, subd. (a), 198.) The court and counsel must take special care to respect and maintain the integrity of the jury pool as prospective jurors are summoned from the pool and placed in a jury venire and later in jury panels to be assigned to a courtroom.

An elephant in the room – health inequities in communities of color

Most commentary about the resumption of civil jury trials revolves around the logistics for the parties. And while logistics as they affect the parties, attorneys and witnesses is certainly important, the court must also balance the interests of members of the jury pool who answer the call to serve.

As stated by the Centers for Disease Control, "the COVID-19 pandemic has brought social and racial injustice and inequity to the forefront of public health. It has highlighted that health equity is still not a reality as COVID-19 has unequally affected many racial and ethnic minority groups, putting them more at risk of getting sick and dying from COVID-19." (https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html#fn2; See Stokes EK, Zambrano LD, Anderson KN, et al. Coronavirus Disease 2019 Case Surveillance – United States, January 22-May 30, 2020. MMWR Morb Mortal Wkly Rep 2020;69:759-765. DOI: http://dx.doi.org/10.15585/mmwr.mm6924e2 external iconexternal icon.; Killerby ME, Link-Gelles R, Haight SC, et al. Characteristics Associated with Hospitalization Among Patients with COVID-19 – Metropolitan Atlanta, Georgia, March-April 2020. MMWR Morb Mortal Wkly Rep. ePub: 17 June 2020. DOI: http://dx.doi.org/ 10.15585/mmwr.mm6925e1external iconexternal icon.)

"Racial and ethnic minority populations are disproportionately represented among essential workers and industries, which might be contributing to COVID-19 racial and ethnic health disparities. 'Essential workers' are those who conduct a range of operations and services in industries that are essential to ensure the continuity of critical functions in the United States, from keeping us safe, to ensuring food is available at markets, to taking care of the sick. A majority of these workers belong to and live within communities disproportionately affected by COVID-19. Essential workers are inherently at higher risk of being exposed to COVID-19 due to the nature of their work, and they are disproportionately representative of racial and ethnic minority groups." (https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html.)

To safeguard the rights of the parties to have people living and working in these communities included in the jury pool, the court must ensure they will be able to serve in a safe environment.

Courts and counsel must also be mindful of unintended consequences that result in prospective jurors being treated differently because of race or socioeconomic status. Questions commonly asked in jury selection such as, "Where do you work," can now easily lead to a line of inquiry leading to the improper exclusion of a prospective juror based, at least in part, on her residence or employment in a community of color. While the import of this issue may not be immediately apparent, it is extremely important in any case in which race, ethnicity, or socio-economic status is a factor in the case in controversy.

Another elephant in the room – Anti-Asian Pacific Islander bias

Anti-Asian Pacific Islander bias is not new.

"Despite comprising a tapestry of diverse ethnicities, Asian Americans have been historically viewed as a monolith, othered by the myth of the model minority in times of peace and economic security, while othered as a scapegoat in times of economic adversity, wars, or pandemics." (Gover, A.R., Harper, S.B. & Langton, L. Anti-Asian Hate Crime During the COVID-19 Pandemic: Exploring the Reproduction of Inequality. Am J Crim Just 45, 647-667 (2020). https://doi.org/10.1007/s12103-020-09545-1.)

To be "othered" is to be identified as someone who is different or outside of the mainstream in a negative and/or threatening way. It engenders marginality and manifests in both explicit and implicit bias.

As officers of the court, lawyers have a duty to prevent the weaponization of the power of the legal system to perpetuate anti-API bias. Questions commonly asked in jury selection such as, "Where do you live," are at the top of a slippery slope of questions delving into national origin and cultural identity. Improper because they could lead to the exclusion of a potential juror based on

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race, but also insidious and dangerous in light of the expression of explicit bias experienced by our API neighbors historically and as a result of our collective experience navigating the pandemic. We must all support each other in creating a safe space in our courts. The rules of Professional Responsibility, Guidelines for Civility in Litigation, and the Canons of Judicial Ethics demand nothing less.

Hardship excuses

Judges exercise broad discretion when conducting voir dire. (*People v. Whalen* (2013) 56 Cal.4th 1, 29.) As we all know, prospective jurors may be excused from jury service only for undue hardship on themselves or on the public, as defined by the Judicial Council. (Code Civ. Proc., § 204, subd. (b).) The judge must decide whether an individual juror's circumstances make it "unreasonably difficult" for the juror to serve, or that hardship to the public will occur if the juror must serve in the case. (*People v. Tate* (2010) 49 Cal.4th 635, 663.)

Conducting voir dire in the age of COVID-19 is new to everyone. Does reluctance to wear a mask make it "unreasonably difficult" for the juror to serve? Does being unvaccinated pose a hardship to the public if the juror must serve in the case? Should a judge permit questioning into vaccination status and/or COVID-19 diagnosis history? How will parties assess the cohesiveness of the jury as a group when society has not reached the point of congregating together in multi-household groups?

If a lawyer or party has COVID-related concerns about a juror and the court does not excuse the juror for hardship, can a cause or peremptory challenge be lawfully exercised? Remember, a challenge for cause will only be granted when the juror's views would prevent or substantially impair the performance of his or her duties in accordance with the judge's instructions and the juror's oath. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1006.) And a peremptory challenge may be used to excuse jurors "for any reason, or no reason at all" as long as not used to remove prospective jurors solely on the ground of a presumed bias based on the jurors' membership in a cognizable group. (*People v. Armstrong* (2019) 6 Cal.5th 735, 765; Code Civ. Proc., § 231.5; Gov. Code, § 11135, subd. (a); *Armstrong*, *supra*, 6 Cal.5th at p. 765; *People v. Scott* (2015) 61 Cal.4th 363, 383; *Unzueta v. Akopyan* (2019) 42 Cal.App.5th 199, 202; *Di Donato v. Santini* (1991) 232 Cal.App.3d 721, 737-738.) Now more than ever, it is important for civil trial lawyers to hone their voir dire skills to be prepared for a new level of complexity in jury selection.

One way to control the variables which make full-scale jury trials challenging is to simplify the proceedings. Consider stipulating to a jury of fewer than twelve jurors or trying the case as an expedited jury trial (eight jurors, no alternates, each side is allotted five hours in which to complete voir dire and to present its case, including opening statements and closing arguments). (Code Civ. Proc., §§ 630.01,-630.11; Cal. State Civil Rules Rule 3.1545, 3.1547-3.1553).

Litigators are inquisitive by nature. The temptation to explore and dive deep is strong, especially in areas with many unanswered questions. The reality of conducting trials in the COVID-19 era means adjusting expectations and becoming comfortable with some level of uncertainty in deference to the privacy rights of the jurors, the safety precautions taken by the court, and the protections of the constitution.

Our new normal

Our "new normal" is that there is no "normal." We remain in a state of recovery. Recovering from isolation, recovering from anxiety, recovering from loss. As members of the Los Angeles legal community, I am proud of what we have done together. And I am looking forward to continuing our work as we build a new structure to support access to justice in one of the largest courts in the world.

Hon. Michelle Williams Court is an Assistant Supervising Judge of the Civil Division of the Los Angeles Superior Court and a Chair of the Court's Technology Committee.