



Supervising the civil division of the LA County Superior Court during the pandemic

WE WILL BE ABLE TO KEEP THE WHEELS OF JUSTICE MOVING FORWARD
NOTWITHSTANDING CONTINUING OBSTACLES

When I assumed this position in January, my primary goal was to find ways to allow the Civil Division to move forward and provide prompt access to justice, consistent with the Court's mission, notwithstanding the major strictures placed on the Court by the pandemic. Any move forward, however, had to be consistent with ensuring the primary goal that all Court users, as well as judges and staff, be able to come to court safely. Whereas in 2020, the Court was able to successfully allow hearings – and to some limited degree trials – to be conducted remotely, in 2021 I wanted to make sure that the parties were able to reach the finish line and conclude their cases; having had their day in court. It was not enough to just move the deck chairs on the ship – or go from motion hearing to motion hearing – if the ship was stranded at sea. The parties needed to reach port and have finality in their case – whether plaintiff or defendant.

One size does not fit all

How Court leadership has had to balance those at times competing concerns has not been easy. Some in the community argued that courthouses were not safe and that we should halt certain Civil operations altogether. Others argued that courts were not moving quickly enough in allowing critical cases to be tried and injured persons compensated. Our Presiding Judge, Eric C. Taylor, determined that the best course of action under the circumstances was for each judge in his or her discretion, based on the judge's knowledge of the case, to determine how to move forward in that case based on the particular facts involved, taking into consideration safety concerns, the type of case, whether it was entitled to preference, the age of the case

and the readiness of the parties and lawyers to go forward and in what way. Every case is not the same just as no person is the same. Litigants are entitled to decisions that are premised upon their case. One size does not fit all.

Initially this year, most judges determined that the pandemic was such locally that trials could not proceed forward safely. Though likely all judges wanted to provide firm trial dates, and thereby incentivize counsel to be ready to proceed, the pandemic caused most trials to have to be continued. How long they were continued in turn often depended upon a variety of case-specific considerations. As a result, we focused initially on disseminating information about how counsel could conduct bench trials remotely.

Jury trials have gradually resumed

Over the last several months, however, the Civil Division has gradually resumed conducting jury trials with appropriate safety measures: Judge Stephen Moloney led the way by conducting the first of these trials. With meticulous care and preparation, he held a 10-day jury trial concerning injury from talcum powder resulting in a significant verdict (after a second phase related to punitive damages). I understand the jury found the defendant about 25% responsible for those damages. Judge David Cunningham then started a complex asbestos trial that settled after an evidentiary ruling during trial related to the qualifications of an expert. The trial started after Judge Cunningham had made an earlier ruling bifurcating the claims against different defendants, in part based upon the difficulties in holding a trial with multiple defendants based on social-distancing requirements. Judge Mark Mooney conducted an elder

abuse trial. Judge Fred Shaller held a difficult loss of consortium auto case. Judge Gregory Alacorn conducted a wrongful eviction trial. Judge Susan Bryant-Deason just concluded a three-week trial concerning a catastrophic injury from a car collision. Other judges are now proceeding with additional jury trials in several courthouses around the county.

As of writing this article at the end of May 2021, since inception of the plan described below, Dept. 1 has approved thirty-three Civil jury trials to proceed forward with ordering jurors. Seven have reached verdict. Six are now in process. Five were preference cases under CCP section 36. Fourteen were entitled to preference as UD cases. In six, the five-year statute was fast approaching. Ten settled prior to commencement of testimony; several during jury selection. One settled during trial. Others continued for miscellaneous reasons. Therefore, one important message of this article is that jury trials are happening. The Court needs counsel to be prepared and ready to proceed.

The Court is conducting these trials and the gradual ramp up by way of implementation of a careful management plan: Presiding Judge Eric Taylor initiated that process by forming a Special Civil Jury Trial Committee to work with me as Supervising Judge and Chair of the Committee, on how best to do so. The three Assistant Civil Supervising Judges, Ann Jones, Elaine Lu and Michelle Williams Court, as well as Judges Daniel Crowley, Jay Ford, Holly Kendig, Ruth Kwan, Joel Lofton, Margaret Oldendorf, Stephen Moloney, Stuart Rice and Olivia Rosales serve as members.

The Committee already has helped the Civil Division work through the pandemic in numerous ways:

- First, in creating a protocol for the orderly ramp up of jury trials around the County consistent with the demands of public safety, considering the parallel needs of the criminal courts, as well as the demands of the Bar for greater predictability in how the Court would prioritize the resumption of trials. This has been accomplished by way of coordination of the commencement of jury trials county-wide through Dept. 1, where I sit, in consultation where applicable with the District Supervising Judge. The judge indicating a case is ready to go forward submits a standardized form to Dept. 1. The completed form provides the information needed for determining where a jury trial can be held, including whether a different courtroom is needed given the number of expected people to be in the courtroom during trial after finding out if any persons can participate remotely. The form also asks if the parties stipulate to a jury of a lesser number of people. With such stipulation, parties might be able to conduct trial in smaller courtrooms. For example, most of the Mosk Independent Calendar (IC) courtrooms are not large enough to allow for the number of people required for a socially distanced jury trial.

In this way, Dept. 1 (including its terrific staff) can determine which courtrooms are available to safely conduct a jury trial. By keeping track of all Civil cases, as well as by conferring with the judge in charge of the courthouse where a trial is to be held, Dept. 1 endeavors to ensure that by holding this trial, it will not create crowding in the hallways or in too many people entering and leaving the courthouse at the same time – keeping in mind other activity at that courthouse or in a particular hallway. Dept. 1 also attempts to ensure full utilization is made of available courtrooms so that as soon as one trial ends, another one can begin. At least as

of this time, there has been no waiting list for trials. Judges, however, have had to temporarily relocate from their courtrooms to hold trials in bigger courtrooms. For example, several Mosk IC judges have, after finishing their morning calendars at Mosk, then gone over to Spring Street to conduct the jury trial. The Complex judges at Spring Street have kindly agreed to hold their hearings remotely from chambers where possible so that the visiting judge can use their courtroom. One day each week is reserved for that judge to keep his or her courtroom for those proceedings which cannot be held remotely. Communication among all the impacted judges has been crucial.

As part of this protocol, Dept. 1 requires that prior to determining a case is ready to call in jurors, a settlement conference or mediation have been conducted within the last 90 days. In this way, the Court can conserve use of jurors and assure them that all reasonable efforts have been made before calling them in to serve. As a result, Civil trial judges have switched gears and been acting as settlement officers. They are responsible for resolution of a very significant percentage of a vast number of cases – thereby providing litigants an informal opportunity to be heard by a judge, as well as finality to allow them to move on accordingly. Many cases are also settling as parties have been meeting and conferring with the assigned trial judge to prepare for trial and better understanding the difficulties and extra consumption of time in working through the logistics of a jury trial that needs to meet social-distancing requirements, including where people are to sit, handling of exhibits; not to mention all persons having to wear masks. Last-minute settlements are on the rise. In turn, the Court can better accommodate those remaining cases requiring a jury trial.

Using these procedures, Dept. 1 has processed 72 requests to proceed

forward with jury trial since its inception of this procedure on March 29, 2021. As indicated, Dept. 1 has approved thirty-three of those. Most of the requests declined have been because either there had been no MSC or mediation conducted within the last 90 days, information was missing or there were reasons why continuance was required because of witness, counsel or judge availability. Dept. 1 has not rejected any request based on the type of case involved or had to draw relative conclusions about which case was more “important” than another. The Court recognizes that amounts in question do not necessarily mean they are more important to the litigants than a case with a lesser amount involved.

- Second, in reorganizing the Mosk UD Hub so that, effective June 1, 2021, four courtrooms will now be all-purpose courtrooms instead of two calendar courts and two trial courts. Through case management by one judge from start to finish under the new procedure, as in an IC court, the Court hopes to create efficiencies, and in turn, allow the trial judges to have more time to hear the backlog of PI cases where they may have now less need to try UD cases. The fifth UD courtroom will handle overflow trials, handle MSC’s and provide coverage to the other judges.

- Third, in creating a Fast-Track Pilot Program for bench trials in PI Hub cases. Effective May 3, 2021, for six months, parties may elect to waive jury, and in exchange, obtain a bench trial within 60 days – if they are ready to do so. Parties thereby avoid potentially waiting a substantial time for a jury trial. As a result, the Court can obtain a start on addressing the backlog prior to full resumption of jury trials. This also will cause more judges to be available to hear jury trials when they do fully resume. In addition, the program provides another alternative for parties who want swift and easy access to justice – simply by submitting to Dept. 1 a form choosing to be part

of it. This form and instructions are available for review on the Civil page of the Court's website. These trials can also be conducted remotely – further easing logistics for litigants. Hence, which courthouse the judge may be sitting in will no longer be relevant. Finally, parties may elect to use a confidential “high-low” agreement; thereby assuring a minimum recovery and capping liability. The Court is grateful for the input and support of CAALA, ASCDC, LACBA and the LA Chapter of ABOTA in adopting this plan.

- Fourth, in providing judges guidance, education and opportunities for discussion on calling jurors in batches and with other pandemic-related case and trial management issues, including how to maintain firm trial dates given these issues and how to handle the practical concerns in caring for jurors. Judges have been sharing with each other lessons learned from each of these carefully calibrated trials. In addition, the Committee has discussed providing guidance related to competing concerns regarding what questions the Court itself or counsel can permissibly ask as to whether jurors or others have been vaccinated.

Remote civil jury trials

Finally, the Committee is now moving on to discuss difficult issues related to whether the Court should consider remote Civil jury trials.

On the one hand, the public has become accustomed to holding meetings virtually and appreciates the convenience associated with doing so. Digital technology in turn allows for people to participate from significant distances, often saving parties considerable time and expense. People may not want to have to come to a courthouse if they do not have to do so – in the same way lawyers may not want to return to court to make appearances in person. We have seen already how routine virtual depositions have become, notwithstanding concerns about the level of examination that could be possible. Virtual technology in some form is likely the future one way or another.

On the other hand, numerous Constitutional, statutory and policy concerns have been raised:

- Whether remote trials, dependent as they would be on digital technology and bandwidth in jurors' homes, can adequately and fairly provide all members of the community an equal opportunity to perform their statutory right to serve as jurors, and in turn satisfy litigants' rights to a proper venire from which jurors are selected.
- How to make other options available where jurors could convene and privately deliberate together.
- Whether there can be effective jury selection if people are remote.
- Whether jurors will be able to concentrate on the trial if they are at a remote location where it might be difficult to do so if there are potential distractions from other people, for example, in a small apartment. Relatedly, it is not clear a judge would have the same ability to determine if jurors are doing other things at the same time – thereby raising questions about whether jurors have heard critical testimony.
- Whether a remote jury trial can substitute for a trial in a courtroom that allows, for example, cross-examination of witnesses sitting on a witness stand in front of a judge and jury. Nobody should want to lose the special character of a trial in a courtroom and the seriousness associated therewith. Given the critical part a jury trial plays in our civil justice system, and democracy, that has been with us through history, extra caution is required that – in facilitating convenience – we not thereby water down the search for truth that is the essential function of a trial.
- Whether jurors would be able to determine as easily the credibility of witnesses who are not sitting directly in front of them and where jurors cannot see in person how witnesses react to a question and

how they answer. In addition, if jurors are in different locations, there would not be the shared experience of seeing how fellow jurors or others in the courtroom react to testimony.

- Whether such trials would be required or merely voluntary if stipulated upon. Many lawyers argue that there could not be the same level of advocacy if jurors were not sitting directly in front of them.

CourtConnect has not been perfect, but it was a huge start

The Court's investment in technology has also been critical in allowing the Court to continue to function despite the pandemic. While the video (and at times audio) feature of LA CourtConnect (“LACC”) has not been perfect, we should still acknowledge what would have happened had the Court administration not been able to have that software up and running so quickly. We would not have been able to hold the hearings that are necessary to keep cases moving forward, including motions, case management conferences and informal discovery conferences. In this regard, the Court's CEO Sherri Carter, and her staff, as well as the Court's Technology Committee, including Assistant Presiding Judge Samantha Jessner, Committee Chair Judge Court and Judge Amy Yerkey, were all instrumental in making remote appearances possible across our big court.

In addition, while we have been working to improve the video component, the Court has allowed counsel to provide their own virtual platforms to permit judges to conduct virtual bench trials. Since last fall, the Court's judges have conducted countless virtual bench trials in those cases where either there was no right to a jury trial, some part of the case was properly tried by the Court and/or the parties elected to waive their right to a jury trial.

I am also pleased to report that by the time you are reading this article the

Court will have started using a Microsoft Teams software program for LACC that will significantly improve remote appearances, including especially the video feature. Teams, in conjunction with the Court's case management system, will enable parties having a hearing to do so as if they were in front of the Court in a courtroom, where all parties can see one another, as well as further facilitate virtual bench trials as part of what the Court can itself offer.

PI settlement program to go virtual

Lastly, as we go to press, based upon hard work and resources provided by the Beverly Hills Bar Foundation, CAALA, ASCDC and the LA Chapter of ABOTA, I am very much looking forward to those organizations starting shortly a virtual platform that will allow for resumption of the distinctive and successful settlement program operated at the Spring Street courthouse for the Personal Injury Hub Courts – staffed with one attorney from the plaintiff side and another attorney from the defense side. The Court is indebted to these justice partners and

their leadership for implementing this new virtual platform. In addition, I wish to recognize the goodwill of the lawyers who will be volunteering their time and skills to assist litigants reach informal resolution of their disputes. Their efforts in the past in this regard made a huge difference in allowing the Court to be able to meet the need of litigants to proceed forward with trial in those remaining cases that could not be resolved informally.

The challenges continue

The pandemic continues to be challenging. However, the flexibility of the Court's judges in adjusting to current needs, the leadership of the Presiding Judge, the guidance of fellow Committee members, as well as the significant support of Court management and staff, together with the partnership of the Court's justice partners, including CAALA, and its President, Genie Harrison, and input by leaders of the Bar at various Bench Bar working group meetings, have made this crisis one that we are managing. With the patience,

understanding and cooperation of lawyers practicing in our courtrooms, we will be able to keep the wheels of justice moving forward notwithstanding the continuing different obstacles. We are achieving timely access to justice for the members of our community by working together. With time, we hope the impact of the pandemic will subside. We will then be able to handle cases more quickly than we can now.

Judge Cowan is Supervising Judge of the Civil Division of the Los Angeles County Superior Court. Judge Cowan received his BA from Columbia University and JD from Univ. Calif., Hastings College of the Law. Prior to going on the bench, Judge Cowan practiced business litigation for seventeen years; initially, with Rogers & Wells, and later in his own office. In 2005, the judges elected him a Commissioner. In that capacity, he handled primarily family law cases in the Santa Monica Courthouse. In 2014, Gov. Jerry Brown appointed him a Judge. Until his move to Civil, Judge Cowan was assigned to the Probate Dept., where he became the Supervising Judge. ☞