



Trying cases in trying times

A LOOK AT HOW WE PULLED OFF ONE OF THE FIRST JURY TRIALS SINCE THE PANDEMIC BEGAN

On March 16, 2020 the courtrooms of the Los Angeles Superior Court were closed to all litigants seeking a jury trial. It started as a 30-day moratorium on the summoning of jurors. When the closure order was first issued, trial judges (naïvely) started continuing cases for a period of roughly two to three months. Boy, were we wrong. It was not until April 2021 that Los Angeles County was finally able to have civil jury trials again. I had the opportunity to preside over one of the first jury trials in Los Angeles County since the pandemic. Having never conducted a trial during a worldwide pandemic, it was a bit of a learning experience for everyone.

Although the Los Angeles Superior Court was once again open for business,

our resources are somewhat limited. Regular trial courts are simply not large enough to accommodate 12 socially distanced jurors, attorneys, witnesses and court staff. If you then include interpreters, tech personnel and party representatives, you have only a handful of courts large enough to accommodate a jury trial. It became necessary for the Court administration to prioritize what cases would be the first to be tried.

I had a case pending in my court for which I had already granted a preferential setting pursuant to Code of Civil Procedure section 36. The case had to be set for trial no later than April 20, 2021. We therefore began jury selection on *Ruvalcaba v. Rechmitz* 20STCV27182 on April 19.

Department 89

One of the largest courtrooms in the Stanley Mosk Courthouse is Department 89. The *Ruvalcaba* case was transferred to that department for trial. Arrangements were made for the attorneys and their technical support personnel to visit the courtroom before the start of trial so that they could better assess their needs and requirements.

Probably the biggest challenge in doing a jury trial in this pandemic era is just picking the jury. Because of the social distancing, the potential jurors had to be spread throughout the courtroom. Fortunately, Department 89 is large enough that we could accommodate 28 socially distanced potential jurors. In pre-pandemic days, my regular

courtroom could at best accommodate 35 potential jurors, so 28 potential jurors was not a bad number with which to commence voir dire.

The *Ruvalcaba* case involved a claim of elder abuse directed against a skilled nursing facility. Plaintiff was a patient of defendant's facility. She sustained injuries as a result of falling out of her wheelchair. Plaintiff claimed that defendant's lack of supervision was the cause of her injuries. This factual scenario was beneficial in selecting the jury. Because no one actually saw plaintiff fall out of her wheelchair, and plaintiff had no recollection of the event, there would be relatively few witnesses needed to testify at trial. A short trial equals fewer requests by jurors to be excused for hardship which equals a faster jury selection. Also, there being only two sides, the parties were limited to six peremptory challenges per side.

Since we were using the entire courtroom, I had to modify my standard practice for jury selection. When I first started practicing law in the early 1980s, the accepted method of jury selection was to place 12 potential jurors in the jury box. The attorneys would then voir dire only those 12 jurors and new jurors would be questioned one at a time as challenged jurors were excused. Sometime in the mid-1980s it seemed as though every judge had gone to the same conference because every judge started using the "six-pack" method. Most litigators are familiar with it. The attorneys will voir dire 18 potential jurors. They will question the 12 jurors in the jury box, as well as the six potential jurors in a row in front of the jury box (hence the name "six-pack"). As jurors in the jury box are challenged and excused, they are replaced by one of the six jurors seated in the row in front of the jury box. Some judges have even expanded upon this concept and gone to a 12 pack, or even an 18 pack.

With our socially distanced jury panel, we could only fit five jurors in the jury box and there was no front row. For this trial, I decided to jettison the six-

pack method and go back to the old style of doing voir dire one juror at a time. I just did not think that I could keep track of 18 jurors spread around the courtroom.

Creating a system for voir dire

To assist in identifying the jurors, we had large numbers taped to the seats in the courtroom. The juror would then sit next to the numbered seat to which he or she had been assigned. In that way the number would not be covered up when the juror sat down in the assigned seat.

Most jurors are not terribly experienced in speaking before a large group of people. In the typical jury selection process, it is not unusual for the court to ask jurors to speak up or talk louder when answering questions. With all jurors wearing masks and sitting further away, it was even more difficult to hear some of their responses. We had a microphone in which the jurors could speak, but it still presented quite a challenge to fully hear some of the answers. Attorneys really don't want to put a juror on the spot by having them repeat their answer three or four times.

We commenced the jury selection process at 10:00 a.m. I anticipated that we would lose a few jurors for one reason or another and ordered a second "batch" of 10 potential jurors to report to department 89 at 2 o'clock in the afternoon. By 2 o'clock that afternoon we had indeed excused seven jurors, but since only seven of the requested ten new jurors responded to the order, we were able to have all of them come into the courtroom and listen to the proceedings. Ultimately, we were able to get our jury selected on the first day.

The challenges of doing a jury trial during a pandemic do not end with the impaneling of the jury. The conduct of the trial and presentation of evidence has its own set of challenges.

Sidebar conferences were discouraged even more than usual. Sometimes they cannot be avoided. The attorneys, the court reporter and I all had headsets. We thought we could just remain in our seats and deal with the

sidebar issue by speaking quietly into the headset. Unfortunately, the microphones were not turned off at counsel's table or on the bench. Therefore, as soon as anyone started talking for the "sidebar" the jurors could hear what was being said. We thereafter conducted our sidebars by putting our headsets on and with me getting off the bench. The attorneys and I then stood in a triangle (six-foot sides), as far from the jurors as we could be. At least the court reporter was able to remain seated.

Getting closer to the jurors

During opening statements and closing arguments attorneys are accustomed to pulling the podium up to the jury box and addressing the 12 jurors seated directly in front of them. Attorneys like to be able to look at the jurors, interpret their body language and facial expressions and try to assess whether or not they are connecting with the panel. When all you can see is the eyes of the masked juror, a whole new emphasis is placed on the importance of eye contact. Moreover, because of the way in which the jurors are spread throughout the courtroom, the attorney needs to be constantly moving his or her head back and forth so that they do not ignore those jurors seated in the gallery. Since the attorney is also wearing a mask, the attorney is not going to win any jurors over with a dazzling smile. You will need to work on that sparkle in your eye to gain favor with those jurors.

The difficulty in assessing the jurors continues throughout the trial. Eyes and body language can only tell you so much about how a juror may be reacting to a particular witness. The grimace, the smile, the frown, go unseen. Assessing how the evidence is being received by a jury is always a bit of guesswork. A masked jury gives you even less to work with.

Dealing with remote testimony

Although we had a few live witnesses, most of the witnesses testified remotely. Unfortunately, the sound quality for those

remote witnesses was less than optimum. Even with the speaker settings at 11, it was difficult to hear some of the witnesses. If the printer in the courtroom started running during testimony, we generally had to have the witness repeat the answer. I pity the poor court reporter trying her best to keep an accurate record while straining to hear the remote witnesses over the speaker system.

One unintended benefit was that because the remote witnesses were difficult to hear, I believe the jurors were actually more attentive. I could see them leaning forward in their chairs and concentrating as they tried to listen to the testimony. Fortunately, this was a relatively short trial and we did have some live testimony interspersed among the remote witnesses. A steady diet of remote testimony over a longer period of time would doubtless prove frustrating to jurors.

Anyone who has dealt with appearances through Courtnet, or conferences by way of Zoom is no doubt familiar with the various technical difficulties inherent with remote testimony. As annoying as technical glitches may be, they are even more annoying when they occur in the middle of a trial. During one particular witness's testimony I remember thinking that the witness was taking an extraordinary amount of time to answer a relatively simple question. What could he be thinking so hard about? Of course, the witness wasn't thinking about his answer at all. The computer was just frozen on his face looking pensive. Ultimately, the connection problems were so bad we had to give up on remote testimony with that particular witness. He came in to testify live two days later.

We had a treating physician who testified remotely. He had his original medical records in front of him to refer to while testifying. Unfortunately, he had his records to the side and behind him. Every time he needed to refer to the records to

answer a question, he would turn away from the microphone and answer the question while looking at the records. We could not hear a thing. The doctor would then face the microphone again and say something like "so that is all I have to say about that."

"If I can show up, so can they"

One of my takeaways from this experience, is to highlight the importance of live testimony. The Los Angeles Superior Court is trying to minimize the number of people in the Courthouse. Certainly, this is a laudable goal during these times. But if you are litigating a case, you really don't need the added pressure of technical difficulties that can occur with remote testimony. Moreover, the jurors are all required to be in the courtroom. They may have a slight sense of annoyance, that they are required to be present while the witness is not. This argument was in fact alluded to by plaintiff's counsel in his closing remarks to the jury. If it is an important witness, I would recommend that you have that person in the courtroom to testify live before the jury.

When it came time for the jury to deliberate, we had to find a room large enough where 12 people could do so and still maintain appropriate social distancing. The standard jury deliberation room can accommodate three or at the most four socially distanced people. Clearly, that would not work. I decided to let the jurors use the courtroom as their jury deliberation room. When closing arguments were completed, instead of instructing the jurors to go into the juror deliberation room, the court staff and the attorneys all got up and left so that the jurors could deliberate in the courtroom. My courtroom attendant then waited in the jury deliberation room. The jurors would either text him or knock on the door of the jury deliberation room if they had an issue. When the jurors sent out a question,

I met with the attorneys in the hallway to discuss the issue. We then went back into the courtroom where the jurors were waiting for us to hear the response. It was an unusual juxtaposition.

Stuff happens

No trial ever goes exactly as planned. Stuff happens. Expect the unexpected. Even with the greatest amount of trial preparation, things occur that could not have been anticipated. Sometimes your opponent may even have laid a trap for you to step into. The good attorneys roll with the unexpected and adapt. In this age of trying cases in the time of COVID, we are all adapting and learning as we go. We all hope this will be a short-term problem. But, as I often tell attorneys when asked how long the Covid restrictions will remain in place at the courthouse: "Your crystal ball is as good as mine on this one."

It had been more than a year since I last presided over a jury trial. It was not quite as simple as riding a bicycle again, but I think I remembered fairly well what I was supposed to do. While there were a few minor hiccups in the presentation of the case to a jury, I am just glad to say that we got it done. The Los Angeles Superior Court is back open for business.

Hon. Mark Mooney received his undergraduate degree from the University of Southern California in 1978. He attended law school at Southern Methodist University and received his Juris Doctor in 1981. Before being appointed to the bench, he was an associate with firms of Hillsinger & Costanzo and Lafollette, Johnson, De Haas & Fesler. He also served as an Assistant United States Attorney for the Central District of California from 1991 to 1995. Judge Mooney was appointed to the Los Angeles Municipal Court by Governor Pete Wilson in 1995. In 1998, he was elevated to the Superior Court for the County of Los Angeles. He currently has an unlimited general civil assignment in the Mosk Courthouse.