



2021 Vision: Southwestern’s Top Trial Pros Pick the Trends for the Coming Year

The legal profession may never be the same after this momentous year. With civil trials stalled, what comes next? We asked one judge and four top trial lawyers to share their insights on all the ways the COVID-19 pandemic is affecting the civil court, and what else to expect in the year to come. Below are their answers in their own words.

Hon. Linda Marks '84 is a Superior Court judge in Orange County. She recently served as President of the Orange County chapter of the prestigious American Board of Trial Advocates (ABOTA).

Civil cases will bear the brunt during this pandemic with criminal cases taking precedent over civil jury trials. To move cases forward, lawyers need to practice civility. Everyone is anxious, concerned and stressed right now, and I encourage counsel not to make unreasonable demands, not to draw lines in the sand, to be patient, and to work together in order to get through what is a very difficult and unprecedented time.

Do not rely on emails and written correspondence. Pick up the phone and introduce yourself. Establish trust. Understand if you do plaintiff’s work that, on the defense side, businesses may be closed, employees may be furloughed, and it may be difficult to secure witnesses. If you do defense work,



Hon. Linda Marks '84, photo provided by Judge Marks

understand that plaintiffs may not want to appear for an in-person deposition and/or appear for an IME and risk exposure to COVID-19. Both sides need to be up front about the issues they face, and while COVID-19 should not be the reason for all delays, counsel need to accept the challenges, and maintain flexibility when working with each other.

Counsel need to think “out of the box.” On many cases, remote depositions for third parties should be considered if not for party depositions. Also, in my court, I am inviting the lawyers on all my cases to set up an Informal Discovery Conference (IDC) to assist in moving their cases forward during this time. The conference setup is free, and Orange County Superior Court uses the TEAM application. C.C.P. §2016.080(a) states that a Court “may conduct an informal discovery conference upon request by a party or on the Court’s own motion.” I am not limiting the conferences to discovery issues, and would encourage all counsel to contact their individual courts to inquire whether the judge might be willing to set an IDC on their case.

Orange County Superior Court has geared up and is hearing remote court trials using a WebX platform, and conducting limited in-person jury trials based on numerous factors which may include a reduction in panel size from 12 to 8 jurors, and trial estimates of 4 to 5 days in duration. Counsel are encouraged to meet and confer, and discuss an upcoming trial in advance of the trial date with their trial judge. While the backlog is immense, Courts across the country are struggling with many issues associated with conducting civil jury trials during the pandemic. However, the civil jury trial has been at risk for some time, and is now at even greater risk as we struggle through this pandemic. Now might be the time to consider changing how we proceed with civil jury trials in California after this pandemic passes. To save the civil jury trial, a revamping of the trial itself might be considered. A reduction in trial time estimates, perhaps a reduction from twelve jurors to eight jurors, along with a reduction of preemptory challenges might be given some thought to avoid the civil jury trial going the way of the dodo bird, and insuring the right of the 7th amendment.

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It is going to take an effective vaccine sufficiently distributed



Peter Dubrawski '75, photo provided by Mr. Dubrawski

to determine if we are ever going to be able to get back to anything close to a traditional jury trial process. It is probably a safe assumption that nothing will be precisely as it was. Even when we get a civil case to trial, what will it look like with physical distancing or other rules? Where do you put your jury panel in the courtroom? Who wears masks? How can a jury evaluate a witness or a lawyer if you can't see the expressions on their faces?

The idea of a remote jury creates a risk of losing the focus of the jury since they are not physically present. I have already experienced that in remote mock jury exercises. If they are not there, how do you present the evidence? Is it all going to be via video? When a juror is sitting behind a computer screen, it is a lot easier for them to be distracted. How are they going to deliberate? There is loss of the benefit of collaborating or exchanging ideas with other jurors during deliberations.

Another major question is, after heightened stress of the pandemic, what will a jurors' attitudes be towards people with claims for injury? Will that affect the size of the verdicts? Los Angeles County is already nationally recognized as a location where significant plaintiffs' verdicts occur.

The reputation for significant verdicts has another effect on litigation. Major injury lawsuits are often vehicles for investors. People who have financial stakes and expect a certain return on a case often make it difficult to get that case resolved. Medical expenses and liens become more difficult to compromise in order to get a case settled.

The practice of law has always been the vehicle by which society resolves disputes. The process and procedure has



Delmas Woods '99, photo provided by Mr. Woods

changed over time, and adapts to circumstances. While things will not be the same, it continues to be very interesting to see how the practice of law adapts. A significant factor in the success of any practitioner is civility. It continues to be remarkable how, in spite of serious differences of opinion, civil lawyers, who are cooperative with each other, accomplish so much for their clients.

Delmas Woods '99 is a partner at Resnick & Louis, and represents high-profile national brands in insurance defense. Prior to Southwestern Law School, he was a computer programmer for Litton Industries.

We are about to see a large shift in the way we practice law. My firm happened to have gone remote before COVID hit. Across the board in the legal profession, we will see a push to go remote. What the pandemic has shown everyone is that we don't need monolithic buildings with glass walls overlooking downtown. A lot of the firms are going to reassess where their money is being spent.

If you think of all the parts it takes to put a trial together, the big firms won't have an issue with their attorneys working primarily remotely. Some paralegal or clerical employees will need smaller spaces to handle physical documents. A law office could become something like a document center.

At the moment, the civil trials are stalled, as everyone knows. Criminal trials will always have priority, and civil trials will be the first to get pushed back. The courts are going to have to figure out how to incorporate more technology into the practice. For example, I'm not sure how we're going to handle things like jury selection under pandemic lockdown, or even afterwards. It

will be tough for a long time to get people feeling comfortable sitting together for the day. Maybe we'll need outdoor waiting areas, or a system that texts people to notify them when it's time to come in.

Parties on both sides seem to be questioning the effect COVID-19 will have on settlement and negotiations. I've been able to settle cases during this time.

There are other things going on not directly related to COVID matters that could make for an interesting year. For example, we have rules in federal law about electronic discovery (related to getting the actual computer the discovery was created on) so you can collect all metadata. Right now the tendency is to give away the result, not the physical device. I've seen in certain areas of federal law, people are now demanding the original computer. I don't know how big of a trend, but it's an emerging trend for discovery.

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I don't know that we can begin to list all the ways in which this pandemic will have lasting effects on everyone involved in civil litigation.

For starters, the use of technology, especially video depositions, in trial is going to increase exponentially. As a result, unless there is a significant change in the situation—like a truly effective vaccine—cooperation among lawyers will



Maria Cousineau '84, photo provided by Ms. Cousineau

be essential to get anything done. For people coming out of law school now, who are accustomed to being 100% digital and not reliant on paper, the change to digital may be a non-issue. For those who have been around a few years, and were perhaps reluctant to make the shift before now, the change to digital-only may be a bit more challenging.

More importantly, courts will have to adapt to certain changes. For example, the concept of an “original” document or the “original” exhibit will shift as the “wet” signature is slowly replaced by the digital one. And while certain items may still require independent authentication, there may be more than one person who can authenticate a digital signature, and the steps for doing so will be different. This is one place where cooperation among counsel will go a long way.

And of course, time to accomplish anything, especially the time from filing to trial, is going to increase. As a result, I anticipate a shift toward alternatives to a jury trial—even more than we have seen in the recent past. We will have to advise our clients that their case may not get to trial for several years. Lawyers and litigants alike may be more interested in court trials, private trials, and/or binding arbitration rather than wait to present their case to a jury. And I am certain there are additional “out of the box” alternatives that no one has thought of yet. This means people may have to pay for justice, which will result in further disparity of the justice delivered to those without means.

And what if the parties want to proceed with a civil jury trial? How will the lawyers conduct voir dire? Will judges do all the inquiry in the future? How do you put 12 or 14 people in a jury box and meet the social distancing requirements? What about stipulating to a smaller number of jurors? Do you agree to six jurors? Eight? Nine? And once the parties agree to a number, they will have to agree on what constitutes a verdict. Will it have to be unanimous? Six of Eight? Seven of eight? Seven of nine? The possibilities seem endless. And the answers will be harder to obtain if the parties do not get along.

Those attorneys who are civil, cooperative, think outside the box, and have immense patience will surely be the ones to weather this storm most successfully.

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Robert Morgenstern '80, photo provided by Mr. Morgenstern

We are in a new era. Jury trials simply aren't going to be as they used to be with 12 jurors in the box and live testimony in the courtroom. We're going to have to adapt to remote trials, minimal live participation, potentially video-taped witness testimony, and potentially fewer jurors per case. It is hard to anticipate what the trial dynamic would be.

Until this pandemic has a cure or viable treatment, it is going to be difficult to get our citizens in one room for purposes of voir dire and civil trials. You're going to have to look at different ways of selecting juries. Given the dimensions of most civil courtrooms, at least in the California system, it will be very difficult to have packed courtrooms with social distancing.

The fear for some trial lawyers is that the necessary changes will take the human emotion out of jury trials. A lawyer might not get to be in the courtroom with witnesses for direct or cross examination. They won't get to look the jurors in the eye. But those are the dynamics you have to face until the end of this pandemic arrives, or a viable treatment becomes available.

In light of the new protocols, the notion of civility between lawyers becomes even more important. In order for us to get cases resolved by way of jury trial, we're going to have to work together, and have good communication and cooperation. Honesty and trust will be needed to serve the interests of both sides so that a case can be presented to a jury ultimately for resolution. We need to respect each other's positions when we disagree, and do that in a manner that is constructive.

With the backlog developing in the civil courts, it will be harder to get a hearing. The only way our system will get back on track is if opposing lawyers work together.