

Virtual Representation: One Attorney's Anecdotal Ramblings on the Odyssey of Practicing Law in a Pandemic

March 2021

There are very few people who have not been substantially affected by COVID-19. As March marked one year of life in the pandemic, many of us long for the "Before Times" and the freewheeling way that we were able to deal with claims and litigation. Alas, the nature of our work, yours and mine, has been altered – likely forever. I am writing this anecdotal/opinion piece to provide a perspective on the civil justice system and the manner in which one lawyer has done her best to persevere. I am that lawyer, this is my story.

My 74 year old parents, retired and living in a small town in central Florida, have weathered the pandemic better than anyone else that I know. They have been married to each other for fifty-five years and still seem to like one another. They are practical people, raised by depression era folks savvy in the prudence of having an extra 48 pack of toilet paper in the hall closet. For this I am grateful; however, they had little guidance for me as I entered an unfamiliar world of isolation and virtual reality.

For those of you who know me, you know that I am a social creature. In the Before Times, I thrived in large gatherings and looked forward to events like the SCAHRM Annual Conference with the anticipation of a child counting down the days before his or her birthday. I served on Boards and volunteered at the LA Food Bank and the Downtown Women's Center. I attended black tie functions and fundraising events. I ate out no fewer than ten times per week, often more. I mourn for the loss of these personal interactions and have struggled with each postponement and/or cancellation of cherished yearly gatherings.

When the Governor's initial Order came down, my firm determined that lawyers were "essential" and therefore, we have remained almost fully operational in our offices during this entire period. I have missed very few days in my office and those are usually when I have full day virtual depositions that can be as easily handled at home. This gave me the luxury of at least interacting with my law firm colleagues throughout the work week. I know of many, many firms, large and small alike, that have been shuttered and all remaining personnel are working from home. Some report this as a wonderful opportunity to spend more time with their family and others report periodic homicidal ideation.

Somewhat surprisingly, I have personally seen an uptick in case filings and assignments. Some of this seems to be due to people being bombarded by television and radio advertisements for lawyers offering to take the smallest of complaints and turn it into a million dollar claim. These same people were turning up each night at 8:00 p.m. to clap and whistle and celebrate the "Healthcare Heroes," a trend that was shorter lived than it should have been. Attorneys with absolutely no experience in medical malpractice have been authoring the complaints crossing my desk, making my job a bit trickier. These complaints are also riddled with inappropriate claims and the punitive damages box has been checked on a lot of them. I have filed more law and motion in the past year than several years prior – combined.

In the beginning, after the Courts closed, I, like many others, assumed that it would be a couple of weeks to a month and most things were simply postponed. Then they were postponed again and again and again. I started an e-mail folder for the various news releases, emergency orders and Court notices regarding policy and action. The file currently contains 186 e-mails.

On March 17, 2020, then Presiding Judge Kevin Brazile issued an Order for the Los Angeles Superior Courts to suspend all jury trials through April 16, 2020. On March 23, 2020, Hon. Tani Cantil-Sakauye, Chief Justice of the CA Supreme Court, issued an Order suspending jury trials statewide for 60 days. Various Courts issued orders, FAQs and advisements. Virtual appearance modalities that were not set for introduction to the public were rushed forward and were glitchy at best. Law and motion hearings were initially suspended and then were touch and go as to whether the judge would hear the issues or postpone it last minute. It seemed as if someone pressed the pause button on the civil justice system.

In April, Emergency Rules were enacted and four in particular, Emergency Rules 9, 10, 11 & 12, applied to civil litigation. Rule 9 tolled the statute of limitations and was subsequently revised to its present form which eliminated the period of April 6, 2020 – October 2, 2020 in the calculation of any statute of limitations defense. Rule 10 tacked on an extra six months for any case filed before April 6, 2020 to go to trial. Rule 11 was codified on September 18, 2020 as *Code of Civil Procedure* Section 2025.310 and allowed for remote video depositions. Rule 12 was also codified as *Code of Civil Procedure* Section 1010.6 allowing electronic service of almost everything. In addition, Senate Bill 1146, which codified Rules 11 and 12, also added Code Section 599 which states that when a trial is continued and the associated deadlines had not passed by March 19, 2020, they were by default extended to the new trial date. This assisted in creating uniformity amongst the individual judges as they were handling the massive number of trial continuances.

Accordingly, we plodded along and eventually we were able to appear at law and motion hearings via Court Call or various video platforms. In May 2020, a couple of Courts started boasting that they were equipped for virtual trials and there was murmuring about whether the courts could mandate the use of a remote video platform to handle trials. A few jury trials slipped through when COVID numbers were looking to be on the decline in Orange County. My firm even managed to plow through a personal injury trial in Contra Costa County. Our Appellate Law Specialist was present the entire trial anticipating an appeal on one or more of the myriad of issues of concern. However, rumors of very low juror turnout and technical difficulties made the prospect of trying a case during this time very unappealing – there seemed to be a consensus that any substantial case tried during this time would likely be appealed.

Today, concerns still abound regarding the ability to effectively advocate when wearing a mask and standing far away from the jury, or worse, having them remote with no governance. E-mails have swirled with defense counsel trading ideas on how to combat an order to use a virtual trial platform and motions to preserve appellate rights.

With every statistical surge reported, and with COVID positive results, the judicial system responded with efforts to protect the Court staff and jurists as well as the general public. Courts have been randomly closed without warning. Ventura Superior Court has been closed for full weeks at a time. I handle a multi-party matter that was set for a CMC in mid-January. There was no notice sent to the attorneys and nothing on the website public docket. However, our office received a general advisement that the Court was closed so we notified all counsel by e-mail. Skeleton staffing and overload of telephonic inquiry combined makes for a bad situation for the court, the attorneys and the litigants.

Uncertainty is on the horizon for jury trials. The local Courts are one upping each other playing an expensive game of "I Can Try That Case" wherein lawyers are forced to prepare a case for trial only to show up at the Final Status Conference and get booted well into 2022. Those are the lucky ones as opposed to the matters that are indefinitely trailed as if we were back in the 1990s and needed to put new batteries in our beepers. There are no winners and the losers are the clients and carriers that pay for the pointless effort.

The Los Angeles Superior Court claims to have started jury trials in January; however, it is up to the individual judges as to whether they go forward and only about 1/3 of the jurors called are showing up for jury duty. Furthermore, the largest Court in the country has identified only ten out of its 600 courtrooms throughout the county to be capable of conducting socially distanced jury trials.

In early February the Presiding Judge advised that trials will now start in March. On March 24th, the Assistant Presiding Judge stated that only two asbestos preference cases had been slated for trial (1 settled and 1 is in jury selection). She also confirmed that there is no standardized procedures in LA, let alone throughout the state. I personally do not know of anyone moving forward in trial in the LASC, and I have received several annoyed reports of showing up, answering ready and being pushed into 2022. This makes sense as the first cases to be tried should be those with preference and those that are past or up against the five year statute.

Orange County only has six courtrooms capable of handling a socially distanced trial. Kern County only has three. Ventura County has reported conducting a single jury trial in 2020 and remains suspended along with Santa Barbara where zero trials have been conducted in the last year. San Diego has started to send out jury summons and plans to start trying cases again soon.

San Bernardino issued word through the Presiding Judge on March 12, 2021 that civil trials will not begin before May and then there are only 4 courtrooms capable of handling them and they are shared with criminal cases as well.

Riverside has made consistent pushes to proceed with virtual civil trials. They have begun conducting in person criminal trials with social distancing and masks. However, civil trials are underway in virtual format only. One of my partners just finished a case in Riverside via the WebEx video system and obtained a defense judgement. It was a relatively run of the mill personal injury (slip and fall) case where the plaintiff's pre-trial demand was \$300,000. These seem like the kind of cases that will be best suited for virtual trials. In his matter, the assigned judge was young and on the forefront of technology which made the process smoother. I do not have the same high hopes for complex medical malpractice cases driven by expert testimony or judges/lawyers who have not embraced technology or do not have the means/support to participate virtually.

It has been a year with no certainty and the mystery remains. I personally do not believe that the average medical negligence case will be tried until next year. There is such a tremendous backlog of priority and older cases that must be tried in advance of any routine matters.

What I have seen is a shocking increase in the price of Court Reporting services and I think that the video deposition is here to stay. Personally, I do not feel that the cost savings is sufficient enough to forgo the in person observations of a deposition held with all participants together in one room. In a video deposition I cannot watch the deponent walk without issue from his/her car from the parking lot and then develop a pronounced limp once they hit the door of the deposition room. I can't watch the deponent and the attorney's body language and I cannot determine if the attorney is texting the deponent answers during the deposition. I cannot give my client a detailed physical description of the deponent as I can only see them from the neck up (shoulders

if they agree to adjust their screens). I have also discovered that I am not nearly as intimidating on a screen as I am in person. I think that there is an inordinate amount of value lost and I highly recommend that, when it is permitted, you authorize your attorneys to go back to in person depositions.

I remain cautiously optimistic that things will progress positively throughout this coming year and that the wheels of justice will once again start to turn. However, I do not believe that anything will ever go back to "normal" as we have all been forever changed. The collateral damage to the legal system is being kept quiet but I assure you that it is there. Dan Packel has written a series of articles titled, "Law Firm Disrupted" for Law.com and it has addressed many of the issues affecting the modern law firm. Young Associates are on the move for better compensation packages and many want to continue to work from home regardless of the status of the pandemic recovery. Solo and small firm practitioners have had to invest large amounts of money to handle the need to electronically file and serve everything and appear and argue/depose/mediate on a large number of virtual formats. On March 22, 2021, California even made it official by adopting a new Rule of Professional Conduct requiring attorneys to keep abreast of the benefits and risks associated with technology.

The stories that have been shared with me reflect lawyers who have fought hard to navigate these unexpected changes in their practice. Some skilled litigators that relied on being in trial more than out lost a large portion of their expected income last year and anticipate that this year will not be much better as many areas of the law simply are not viable under these conditions. One senior level Associate frets daily over the fact that her child is not being socialized and that while she wanted to be a mother, she did not want to be a stay at home mother, full-time teacher and still be expected to bill 50 hours a week. She also wonders how this will affect the partnership track that she has ambitiously pursued. Still another goes to the office ten hours a day and writes motion after motion after motion as she has been instructed by her client to "paper" the

plaintiffs into submission. She used to be in trial no fewer than four months out of the year.

Speaking only for myself, it has been a bewildering experience but I have no valid complaints. I have always enjoyed my representation of healthcare providers. My clients are intelligent and dedicated and the risk management and insurance representatives that I work with have continued to be incredibly supportive during these unprecedented times. Every minute over the past 25+ years that I dedicated to building personal relationships has paid off tenfold in the last 12 months. For that I am grateful beyond words.

Thank you for reading this wandering missive. I sign off by encouraging you to take an extra minute or two the next time your attorney calls to chat about something other than the pressing case. It is time well spent and will reinforce the fact that we will all get through this together and – hopefully very soon – will be raising a glass in the desert and congratulating one another for a job continuously well done.

We make a living by what we get, but we make a life by what we give. ~ Winston Churchill

About the author:



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