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California Civil Trial Juries Need to Be Smaller to Get Our Courts Back on Track

"We need to get over the idea that there must be 12 jurors in the box to conduct a state court civil trial," says Orrick, Herrington & Sutcliffe's Rob Shwarts.

By Rob Shwarts

Much like the limited access to so many rooms outside of their own homes, attorneys' access to California state courtrooms for civil jury trials has likewise been temporarily suspended because of the social distancing necessary to stop the spread of COVID-19. As we shelter-in-place, our civil trial courtrooms sit like time capsules of everything that happened before March 15: proceedings stayed, juries on hold or dismissed, and trials either adjourned via mistrial or in suspended animation as litigants still wait to have their day in court.

The growing backlog of civil cases puts much of the California business community in a similar stasis while active and prospective trials languish in a stalled court system. The respective presiding judges and county court administrators will rightly be taking the lead to prescribe the physical requirements to reopen courthouses and courtrooms for civil jury trials. But our civil trial practitioners also have a clear role to play in getting the dockets moving and getting us back to trying civil cases in state court again.

Along with our diverse landscape of rural, urban, small, medium, large and massive communities, each California county has a court administrator making decisions regarding its courthouses with an eye to local conditions. Even in one of our largest courthouses, on Hill Street in Downtown Los Angeles, the courtrooms cannot seat 12 jurors safely distanced six feet apart, let alone assign a jury room for a group of that size to take breaks and deliberate safely.

Within the court administrator's purview is the courthouse's physical plan and its unique conditions, including courtroom configuration, as well as the power to determine how many persons may be allowed inside. These numbers necessarily include a judge, court reporter, attorneys, litigants, witnesses and, of course, a jury. Likewise, each county has a presiding judge with whom lies the power to decide when the county is ready to resume post-pandemic civil trials. Since the beginning of our statewide shelter-in-place orders in mid-March, we have no consensus for how to manage either suspended or scheduled trials in our state.

Some of our largest counties have already established the contours of their thinking on the subject of reopening its courtrooms: Los Angeles County is not considering civil trials until at least January 2021;

(courtesy photo)

Rob Shwarts, Orrick, Herrington & Sutcliffe.

Orange County vacated all civil trial dates for six months, through November 2020 at the earliest. Add this delay to the 18 months cases normally spend in the judicial pipeline, and we understand why we must consider alternative scenarios for civil jury trials. For obvious reasons, when our courts reopen they will prioritize criminal trials, pushing the civil case timeline back even further.

Meanwhile, California, like the rest of the country, is trying to keep commerce flowing, intellectual property protected, and businesses functioning, which leads us to these questions: How do we get back to

civil trials and, as civil litigators, how can we be a part of the solution?

We need to get over the idea that there must be 12 jurors in the box to conduct a state court civil trial. This number is not legally required, and while COVID-19 persists, it is simply not a practical or feasible count for the jury.

Our state constitution guarantees jury trials in Article I, Sec. 16: "Trial by jury is an inviolate right and shall be secured to all." But it also states "In civil cases, the jury shall consist of 12 persons or a lesser number agreed upon by the parties in open court." California Code of Civil Procedure Section 220 codifies this: "A trial jury shall consist of 12 persons, except that in civil actions and cases of misdemeanor, it may consist of 12 or any number less than 12, upon which the parties may agree." It is here we may begin to pry some courtroom doors ajar.

Why Stipulate to the Lower Number?

First, though California's constitution sets the number of jurors at 12, Federal Rule of Civil Procedure 48 permits federal courts trying commensurate civil trials to sit only six jurors (although their verdicts must be unanimous). There is certainly no magic to the number 12, and any smaller number of jurors has long been effective in the federal system. Assuming the three-fourths rule applies, stipulating to a jury of eight (requiring six for verdict) would (a) depending on the number of alternates, reduce by at least four the number of people in the courtroom; (b) require less people to be called in for jury service; and (c) speed up the jury selection process.

Second, if we were hoping for a legislative intervention, none is likely or even possible in the near future. The constitutional requirement of 12 jurors would require an amendment—an onerous process that demands approval by a ballot vote of our citizenry following either a two-thirds vote of both houses of the legislature, or collecting signatures equal to 8% of the votes cast in the last gubernatorial election. Even assuming legislative buy-in, it could not happen before the end of 2021, at the earliest.

Third, the other non-jury trial options for civil litigants may not be palatable to all parties. While bench trials and arbitrations are obvious alternatives, there is a reason why many litigants might want a jury, especially in tort cases. Even then, bench trials will still be subject to court backlogs and any post-trial delays in obtaining a verdict.

Fourth, as we are learning day to day, while many in the legal community are considering how we might utilize Zoom or other technology to impanel a jury, this writer thinks it is impractical. For example, Duval County, Florida Judge Bruce Anderson, after recently presiding over the nation's first Zoom trial, suggested that the newness of the technology and other wildcard issues made this solution somewhat impractical for complex, multiday cases. More locally, Zoom trials in Alameda County have bared the obvious issues of not being able to supervise jurors in the courtroom: Litigants were complaining that jurors were engaging in other activities during testimony, including reading from other mobile devices, exercising and clearly looking at other screens, rather than at the trial proceedings.

Indeed, there is no way to know what screen a juror is looking at so long as the video function of his or her computer is on, raising the specter of juror doing research in real time. In another twist, Alameda County Judge Brad Seligman had to address a motion for mistrial, because, while the attorneys were in a private Zoom room with the court, the plaintiff started a conversation with several jurors about the seemingly harmless topic of Zoom backgrounds. We all surely agree that litigants are not only entitled to an impartial jury, but to a jury paying attention to their case's evidence and to the court's admonitions.

Of course, for those attorneys who have tried to take a Zoom deposition during these past months, there is a qualitative difference between that experience and an in-person examination, both with respect to engagement with the witness and the use of exhibits. That is equally true with respect to the juror experience, where they are making credibility determinations via video. Even with the best of intentions, Zoom jury trials are not a viable substitute for the real thing.

Reducing the number of people that need to be in the courthouse and courtroom is the best practical solution to getting our civil trial system back to some normalcy. The chief justice, the Judicial Council, and all trial judges should be encouraging parties to stipulate to impanel a jury of less than 12 people (indeed, some judges are already starting to do so). Assuming that all parties want to get to trial expeditiously, attorneys should be doing the same.

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