FUNDING CRISIS

Five Ideas on What Attorneys Can Do about the California Courts in Crisis

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The news out of the California justice system is somewhere between dire and disastrous. All signs indicate it's only going to get worse in California, and attorneys are scrambling for ways to deal with this crisis.

Presiding Judge Katherine Feinstein of the San Francisco Superior Court stated that "the civil justice system in San Francisco is collapsing. . . . We will prioritize criminal, juvenile, and other matters that must, by law, be adjudicated within time limits. Beyond that, justice will be neither swift nor accessible."

What can we in the legal community do? The following are five actions that attorneys can consider to handle the overburdened court system and help ameliorate its unacceptable delays.

1. Use § 998 and work up your case early for resolution.

The use of a strategic Code of Civil Procedure § 998 early in litigation forces attorneys from both sides to think reasonably about their case at an early stage. For defendants, a § 998 offer that is more than the jury award prevents the plaintiff from recovering his or her costs after the time the offer was made, and also allows the discretionary award of expert fees. This certainly helps keep down the additional litigation costs that can occur with a case that lasts longer than a year.

From the plaintiff's perspective, the § 998 procedure is particularly useful in personal injury actions since 10 percent interest is awarded if the result at trial exceeds the § 998 offer to settle. (See Code Civ. Proc. § 3291.) Plaintiff attorneys are concerned that insurance carriers will use the inability to obtain a courtroom to "hold on to their money" and not settle a case no matter what the liability is against them. But this matrix does not work for the carrier if the plaintiff served a timely and reasonable § 998 demand for settlement that exposes the carrier to expert costs and, most importantly, *10 percent interest per annum from the time of the demand*. (See Code Civ. Proc. § 3291.) So, if the case cannot get a trial for three to five years and the verdict obtained is above the § 998, the plaintiff obtains 30 percent to 50 percent interest added to the judgment. This possible outcome will influence any carrier to rethink the "hold their money" strategy.

So, when should a party serve this demand? The answer is as soon as reasonably possible, but you have to give the other side enough time and information for them to make a considered decision. The case of *Najera v. Huerta*, 191 Cal.App.4th 872, that holds "[a]n important factor in deciding whether a § 998 offer is unreasonable or in bad faith is whether the offeree was given a fair opportunity to intelligently evaluate the offer." The court held that a § 998 served with the complaint in the case prevented the defense counsel from having "access to information or a reasonable opportunity to evaluate plaintiff's offer within the 30-day period." (See also *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699.)

Since *Najera* holds that the issue of a § 998 being reasonable is tied to whether the other side has sufficient information to consider the claim, then what any attorney should do to assure a valid § 998 is clear: work up the case early and powerfully, and serve the § 998 with anything necessary to prove your case.

2. Include all documents and exhibits to prove your case *with* the § 998.

If obtaining a trial court is unlikely, it becomes much more important to put all your cards on the table early and provide claim and defense evaluation information to opposing counsel. For plaintiff attorneys, one effective step to increase the likelihood of a valid § 998 is to include in an offer to settle all the documents, exhibits, photographs, medical records, or anything else to support the offer of settlement with the documents specifically listed in the offer to settle itself. In essence, you are using the § 998 itself to prove the other side had sufficient information to make a decision.

There is, however, no reason this method should be limited to the plaintiff. If a defendant has information that goes to show plaintiffs why their case is not what they think, this should be included and mentioned in the defendant's § 998 as well.

Providing documentation for either side to assure a valid § 998 in the face of a potentially long wait to obtain a trial is a key way to assure the good representation of your client.

3. Prepare for mediation like the trial it is.

Under the circumstances, it's even more important for attorneys to prepare for mediation like trial, because it really is your trial. If your well-timed § 998 does not result in the settlement of the case, and you cannot be assured you will ever get a courtroom, your handling of mediation becomes that much more important. Will any case get settled if the other side sees a lackluster settlement brief that fails to detail the case? Unless you are OK with your case hanging around for five years, put everything you have into mediation and get it settled.

While the key of any mediation is to get all the information to the other side necessary for a decision, you also want to accomplish two other things: (1) let the other side know you *are* completely ready for trial; and (2) make them worried about going to trial.

Some steps to consider to reach both goals are to create an "interactive brief" for mediation, which allows a viewer to use interactive features similar to website navigation. You can place all the relevant documents such as depositions, photographs, contracts, or whatever with navigational features to access the documents. You then can digitally deliver the PDF files to opposing counsel. This shows opposing counsel that you have completely organized your case, you know it inside and out, and you have proof for every claim. This format is much easier to copy for distribution to many decision makers than a five hundred to thousand page document with all these exhibits.

Also consider creating interactive timelines, which can be created as PDF files and visually allow readers to see how the chronology of events unfolds with the inclusion of all relevant documents (such as medical records, police reports, or any other document). Allowing readers to go back and forth in the chronology of events can visually bring the case to life.

Anything that you would do in trial to prove your case should be considered in mediation to get the maximum result for your client in this atmosphere of not knowing when you will get a courtroom due to budgetary constraints.

4. Consider the one-day trial option.

If you cannot settle your case by way of a well-presented § 998 or mediation, then consider the new procedure of the expedited trial to get to trial, when a courtroom for a traditional trial is unavailable.

The Expedited Jury Trial Act (Code of Civil Procedure §§ 630.01–630.10, AB 2284), which went into effect in California on January 1, 2011, allows cases to be tried *in a single day*. It's really the first major overhaul of how a trial may be conducted in the State of California, and it offers tremendous opportunity for attorneys and their clients.

While designed for smaller cases, there is no actual limit on the amount that can be in controversy, and the main point is to allow the case to be tried in a single day. How do you get this done? The parties must agree and stipulate[1] as follows:

- The jury is limited to eight or fewer, with only three peremptory challenges per side, and no alternates, which shortens jury selection.
- A waiver of right to appeal and posttrial jury motions (Code Civ. Proc. § 630.08; Rule 3.1547(a)(1)).
- High/low agreements on damages are allowed but not required (Code Civ. Proc. § 630.01(b); Rule 3.1547(a)(2)).
- Each side has three hours for its case, including opening statement, cross-examination, and closing argument (Rule of Court 3.1550). The use of stipulations and evidentiary summaries is encouraged (Rules 3.1551(a), (c); 3.1552(a)).
- Traditional rules of evidence apply unless the parties stipulate otherwise (Code Civ. Proc. § 630.06(a)).

The one-day trial allows a matter to be decided extremely quickly in front of a jury rather than taking up to a week or more, and you gain a much greater likelihood of actually getting out to trial.

However, if you choose to do a one-day trial, it behooves you to prepare a high-quality presentation that uses graphics and other visual tools to make your case in the most efficient, compelling, and convincing way. A case presented at a one-day trial is really mostly about opening statement and closing argument with very little actual testimony thrown in. Using effective graphics to narrow and highlight the issues will help your client a great deal.

5. Consider stipulating to a "judicial reference."

If all of the above do not resolve the case, you may consider the hiring of a private judge to act as your judicial

reference trial judge. The benefit of this procedure under Code Civ. Proc. § 638 is that you retain your right to appeal an adverse judgment against you, unlike with an arbitration award that is reviewable only on very narrow circumstances[2] or an expedited trial that is not reviewable at all.

Under § 638 "[a] referee may be appointed upon the agreement of the parties filed with the clerk . . . (a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision."

The hearing pursuant to a judicial reference (who is often called a "referee") is conducted in the same manner as it would be before a court under the rules of evidence applicable to judicial proceedings. (Evid.Code, § 300.) The referee must prepare a statement of decision, which stands as the decision of the court and is reviewable on appeal in the same manner as if the court had rendered it. (Code Civ. Proc. §§ 644, 645; *Jovine v. FHP, Inc., supra*, 64 Cal. App.4th at 1522, 76 Cal.Rptr.2d 322; *In re Marriage of Demblewski* (1994) 26 Cal.App.4th 232, 236; 31 Cal. Rptr.2d 533 6 Witkin, Cal. Procedure, *supra*, §§ 68, 69, 466–468.)

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Presiding Judge Katherine Feinstein, San Francisco Superior Court

However, be careful how you write a stipulation to assure that it's proper under § 638. If you use loose language such as stipulating to have a "private judge resolve your dispute" without referencing § 638, you may unintentionally wind up in binding arbitration and lose your right to appeal (see *Sy First Family Ltd. Partnership v. Cheung*, 83 Cal.Rptr.2d 340, 344).

There is no question that many attorneys will be looking more closely at using private judges to try their cases under this procedure, since they cannot assume any larger cases will ever get out to trial in the Superior Court. The downside of this procedure is that it costs a lot of money to pay a judge for a full trial, which many litigants cannot afford. This in turn may lead to a two-tier system of those who can afford justice and those who cannot.

No matter how bad things get, we should keep in mind that cases can move forward and settle even without the help of a hamstrung judicial system, especially if attorneys do what they should and really prepare cases to help them settle.

Notes

1. If you are representing a minor or incompetent who has a conservator appointed, you have a right to a one-day trial, even without stipulation of the other side.

2. Code of Civil Procedure §§ 1280–1294.2. Section 1286.2 sets forth the grounds for vacation of an arbitrator's award and limits such grounds to fraud, corruption, or misconduct of the arbitrations, or where the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

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