



Selective service

The pandemic and the jury trial: Are they contradictions in terms?



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By MILES B. COOPER

The lawyer, on Zoom, listened to the judge at a status conference in an ongoing complex fire case. “Listen, I’m going to be direct. The criminal case backlog – and I’m talking no time waiver and murder cases – is overwhelming. When it comes to picking a jury, well, we’re in the biggest courtroom in the system and even that won’t give us a fraction of the space to social distance the necessary potential jurors. We’re considering convention space, airplane hangars – we’ll get creative and we’ll get through this. But it will be a challenge.” A challenge indeed, the lawyer thought.

Need-to-know basis

The judge’s statement above was one of the most transparent statements made regarding jury trials during the pandemic. While not actually a word-for-word quote, it sets a very stark tone. Courts have dealt with messaging county by county. Different counties face different obstacles. Most people recognize that nothing drives settlement like a trial date. Many counties are telling folks that their upcoming trial dates can be relied on. And one should always be prepared. But part of our preparation is knowing the odds, including the odds of getting a courtroom and the odds of getting an impartial jury.

Know the process

If one has an approaching trial date, now more than ever is the time to make sure one knows that courthouse’s intricacies. Historically, most counties have specific criminal or civil assignments, with some exceptions like San Mateo, where trial judges can be assigned either. But things are wonky these days, with the criminal case backlog that built up during the shutdown. Don’t be surprised if the reliable process has different, and perhaps unwritten, procedural changes. The best way to find out? Ask. If one has the luxury (or requirement) of going to the courthouse, talk to the clerks, research attorneys, judges, bailiffs – anyone with insight.

If it is the first courthouse visit since this joyous adventure began, leave plenty of extra time to navigate new rules. “Go to the jury assembly room and check in – the court will then call down when they are ready for your case to come up,” was a new procedure explained by the deputy sheriff in a far north county. This was news to the jury assembly clerk, however, who wondered why all the attorneys were being sent in. Expect confusion and contradictions – one will need to be prepared to apologize and push a little to get to the right place.

I have served, I will be of service

“A pandemic rages, the economy has cratered, and the country is getting torn apart. Your job was eliminated, and

the only reason you haven’t been evicted is because of eviction protection. Do you think you’ll be able to focus on our client’s personal injury case?”

While potentially absurdist *voir dire*, it is true that folks believe they’ll have difficulty focusing on a court case these days. NJP Litigation West’s Carol Bauss commissioned a recent survey of Los Angeles and Bay Area potential jurors confirming this, as well as researching other pandemic-related concerns. Her report, which she is willing to share with plaintiffs’ attorneys, deserves its own article (a not-so-subtle nudge...). The 30,000-ft. view: job loss is crippling, even more so for people of color, and the pandemic will impact potential jurors’ abilities to focus and compensate.

Which leads to another question. Who will show up? Jury commissioners track the ratio of jury summonses issued compared to those who actually show up. Pre-COVID-19, 25% was a common ratio. Now, with people legitimately fearing their civic duty, the ratio is expected to drop. Who will show up? Society seems to have divided into those with the ability to retreat and those whose situations mean they must go out. These different situations will indubitably result in different attitudes toward plaintiffs.

Creative selection

Low juror turnout, combined with social distancing and courthouse limitations, will impact jury selection. Some courts are using the jury assembly room for selection. Some are pressing lawyers to stipulate to eight jurors. With these limitations, expect difficulty on cause challenges from judges trying to protect their citizens. Expecting difficulty however does not mean accepting biased jurors. Now is the time to push for detailed questionnaires that can disclose biases for cause in writing. Questionnaires can be filled out while people are distanced and then reviewed with counsel and the court.

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Back to our lawyer and the status conference. Despite the complications, and in the midst of the direct communication, the judge made one thing clear: there was a trial date, the trial date was a date certain, and the judge, one way or another, would make sure it went forward. The trial date’s certainty was buoyed by the judge’s frankness about the state of the system. An important reminder for everyone – that speaking truth, even when difficult – conveys power.

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