

Daily Journal

www.dailyjournal.com

MONDAY, OCTOBER 29, 2012

Surviving civil litigation's 'new normal'

By Carl West

California's cash-strapped state courts face severe cuts in the face of a budget crisis that threatens to usher in a "new normal" for civil litigation.

That new normal includes dramatically reduced resources, staff reductions at all levels and courtroom closures. Already, Los Angeles County Superior Court has closed more than 50 courtrooms countywide; this at a time when the number of cases being filed is increasing.

In light of this, there will likely be significant delays in calendaring demurrers and summary judgment motions. Average time to trial for all civil cases is rising, nudging the courts closer to similar conditions present in the early 1980s, when only five-year cases were going to trial. Both defense and plaintiffs' counsel will be affected, and so will their clients. Delays serve neither side. They increase cost pressures and may force clients into making decisions about their cases that have nothing to do with the legal merits, but everything to do with time and money. This is not justice at work.

All of these factors place significant roadblocks in the civil process. They're also forcing attorneys to reevaluate and change how they manage their cases, requiring them to be more efficient and collaborative with opposing counsel and the court. Adopting efficient case management practices has the potential to save time and money and counteract the impacts of the crisis facing our courts. The following are examples of case management techniques adopted by the complex courts throughout the state that may be useful in handling a broad range of civil cases.

Better use of technology.

The use of web-based e-service platforms and message and bulletin boards can help facilitate communication between the parties themselves and also with the court. This technology enables the parties and the judge to effectively address many scheduling and non-substantive issues before they become motions or *ex parte* applications. Such efficiencies will lessen the burden on court staff and judges. Embracing technology allows a judge to be more hands-on with problem cases and intervene in matters before they become time-consuming and expensive. These processes also give counsel unprecedented access to the judges overseeing their cases. While all cases may not be suited to hands-on case management, and all judges may not embrace the concept, the

opportunity to take advantage of available technology should at the least be considered by judges and counsel in appropriate cases.

Reconsider filing, pleading and hearing strategies.

Counsel can also consider avoiding filing pleading challenges, such as demurrers and motions to strike, whenever possible. Such challenges often do little else other than defer for six months the parties' and the court's attention to significant issues in a case. Unnecessary delays can be avoided with meaningful meet-and-confer processes in which defendants identify perceived deficiencies in the pleadings, and plaintiffs are afforded opportunities to amend. As an alternative, the parties may stipulate to obtaining orders that permit defendants to answer and raise as affirmative defenses all matters that could or must otherwise be raised by demurrer or motion to strike, without prejudice to any such defenses. The take-no-prisoners approach to litigation is no longer a practical alternative; litigants and counsel must adopt a more cooperative and collaborative approach to litigation if they are to survive the new normal for the courts.

Delays ... increase cost pressures and may force clients into making decisions about their cases that have nothing to do with the legal merits, but everything to do with time and money.

Developing issue-oriented approaches to pleading challenges that facilitate early appellate review of significant issues will also lead to significant efficiencies and economies because burdensome discovery and law and motion practice may be deferred or rendered unnecessary. Counsel should consider at an early stage of the litigation whether there are significant legal issues in dispute, and if so, seek to engage the court in a collaborative effort to obtain an early determination of the issue. This will generally be done on stipulation and tender of the issue to the court.

There's no reason to wait until the end of the case to place expert opinions on the table. Early designation of experts in appropriate cases, followed by *Cottle-* or *Daubert-*type hearings, will frame issues and often lead to early case resolution or appellate review of potentially case dispositive issues. Expert presentations intended to educate the court and parties may also encourage realis-

tic evaluations of the parties' positions regarding settlement or alternative dispute resolution.

Collaborative approach to discovery.

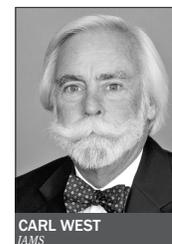
Discovery is another area that can add time and costs to cases if left unchecked, so discussing with the court alternatives to the traditional discovery motion practice is a necessity.

Collaborating with opposing counsel in vetting proposed discovery will often avoid boilerplate objections and needless discovery motions. If counsel engage in a meaningful meet-and-confer process with respect to proposed discovery, as well as discovery responses, often issues can be presented to the court for determination upon the filing of a joint statement as an alternative to traditional motion practice. Developing protocols for e-discovery is also an effective means of streamlining the process and avoiding the expense and burden of failed or deficient productions of electronically stored information.

The role of ADR.

There is a need for the courts and counsel to recognize that the more complex cases require a certain amount of management and structure to place them in a position to take advantage of alternative dispute resolution through mediation or settlement conferences. In the face of fewer judges handling civil cases, and the burdens of ever-increasing caseloads in the civil departments, litigants and counsel should consider stipulating all-purpose references pursuant to Code of Civil Procedure Section 638 or appointment of a temporary judge under Article 6, Section 21 of the state constitution. Such an approach can preserve appellate review and insure timely and hands-on management of a case by a retired judge or lawyer in which all parties and counsel have confidence.

Budget cuts to the courts represent a crisis for judges, court staff and litigants. Most of all, however, this is a dire situation for civil justice. With adaptation and collaboration, attorneys can navigate the "new normal" of California's courts while also becoming more effective and efficient advocates for their clients.

CARL WEST
JAMS

Hon. Carl J. West (Ret.) is a JAMS neutral specializing in complex case management, e-discovery and civil procedure. Previously, he was a judge with the Los Angeles County Superior Court's complex litigation panel. He can be reached at cwest@jamsadr.com.