5 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.

What can we in the legal community do? Below, I suggest steps attorneys can take to handle the overburdened court system and help ameliorate its unacceptable delays. First, some background:

Presiding Judge Katherine Feinstein of the San Francisco Superior Court has stated that "the civil justice system in San Francisco is collapsing." The cuts to the San Francisco Superior Court will necessitate the closure of 25 of the 63 existing courtrooms and layoffs of 40% of court personnel. Already, eleven hearing officers/commissioners have received notices of separation. Judge Feinstein continued that, "we will prioritize criminal, juvenile and other matters that must, by law, be adjudicated within time limits. Beyond that, justice will neither be swift nor accessible."

As reported in Friday's New York Times, uncontested divorces could take 18 months to complete, and child custody battles could take more than six months. Alameda County Superior Court is also seeing its budget slashed by $6.7 million, and Santa Clara Superior Court by $6.8 million. Leaders of the Judicial Council of California leaders met today to figure out how to cut 10% of the state court system budget, on top of the 20% that has already been cut in the last two years.

Here are five suggestions on ways that attorneys can help deal with the situation:

1. USE 998s AND WORK UP YOUR CASE EARLY FOR RESOLUTION

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. However, this matrix does not work for the carrier if the plaintiff served a timely and reasonable Code Civ. Proc., §998 demand for settlement that exposes the carrier to expert costs and, most importantly, 10% interest per annum from the time of the demand. So, if the case cannot get a trial for three to five years and the verdict is obtained above the §998, the plaintiff obtains 30% to 50% interest added to the judgment. This concern will help influence any carrier to rethink the "hold their money" strategy. Additionally, the 998 is just as important in business litigation where both sides face increased litigation costs and uncertainty with the inability to obtain a courtroom trial.

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."

2. INCLUDE ALL DOCUMENTS AND EXHIBITS TO PROVE YOUR CASE WITH THE 998

Since Najera holds 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.

One effective step is to include in the §998 demand a list of all the documents, exhibits, photographs, medical records or anything else to support the offer of settlement. This helps prevent any later claim that the other side did not have sufficient information to make a decision.

3. CONSIDER THE ONE-DAY TRIAL OPTION

I am a big fan of the expedited one-day trial option now available to attorneys in California. My prior post The Best Way to Present A Case Under the New One Day Trial Law explains the process and provides a downloadable proposed stipulation that can be used to obtain agreement for this process. Clearly, in a reduced courtroom environment, you'll have a better chance of getting on calendar if you'll only tie up one day of courtroom time.

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. For all others, you must obtain a stipulation, and you do waive any right to appeal. However, you gain a much greater likelihood of actually getting out to trial.

As explained in my earlier post, if you choose to do a one-day trial, it behooves you to prepare a 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 the procedure a great deal.

4. CONSIDER STIPULATING TO A SPECIAL MASTER (REFEREE)

Under Code Civ. Proc., § 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." With this broad mandate, parties may stipulate to use anyone of their choosing to decide the issues of a case.

The hearing before 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 in the same manner as if the court had rendered it. (Code Civ. Proc., §§ 644, 645.)

The benefit of stipulating to a referee under §638 is that, unlike the one-day trial, you retain your right to appeal. But, be careful how you write a stipulation to assure its 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 arbitration and lose your right to appeal.

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 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.

5. PREPARE FOR MEDIATION LIKE THE TRIAL IT IS

If 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?

Under the circumstances, it's even more important for attorneys to prepare for mediation like trial, because it really is your trial. Unless you are OK with your case hanging around for five years, put everything you have into mediation and get it settled.

My article in Plaintiff Magazine (available as a PDF here) discusses some of the ways in which visual presentations and other multimedia tools, such as interactive briefs, should be prepared for mediation to help create the foundation for getting cases settled no matter what is going on with the court system.

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.