The Courts
Judge David J. Cowan
LOS ANGELES SUPERIOR COURT

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The gatekeeping function of LA Superior Court Department 1

ASSIGNMENT OF YOUR CASE FOR TRIAL IN THE SIX PI HUB COURTROOMS AT SPRING STREET

"Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. "It is possible," says the gatekeeper, "but not now." – Franz Kafka

Litigants' needs to reach trial are a paramount consideration for Department 1. We recognize that the appearance in Dept. 1 is yet another step in an already long process. However, to help litigants accomplish their goal of reaching trial, Dept. 1 must still serve as a gatekeeper to ensure the trial will be conducted efficiently and that the Court's limited resources are maximized in face of the multiplicity of litigants demanding to go to trial. This article is intended to provide guidance as to the relevant considerations so that your clients can improve their prospects for starting trial at the earliest opportunity.

By way of background, Dept. 1 serves as a master calendar for cases ready to go to trial from the six Personal Injury (PI) Hub courtrooms at the Spring Street courthouse, as well as assignment of long-cause trials from all courtrooms county-wide. (Trial assignments for cases filed in the Southeast District and North District (Antelope Valley) are handled in those Districts, not Dept. 1.) In addition, as the home of the Supervising Judge for Civil, Dept. 1 serves as a "kitchen sink" for other miscellaneous trial assignment requests not otherwise handled by an assigned judge.

There are currently 26 judges around the county on the Court's roster to be assigned civil trials through Dept. 1, as well as three long-cause judges. This list can be viewed on the Court's website and is modified periodically to reflect changes in judicial assignments. While Dept. 1 will attempt to assign the trial to a courthouse near the location of the incident and likely witnesses in the case, this is not always possible, and in practice, the assignment more often turns on judicial availability.

The judge assigned to a case is responsible for determining when the case is ready for trial. The most recent Seventh Amended PI Hub Standing Order sets forth the requirements for a case to be deemed ready for trial. But if a case is claimed to be long cause, requiring more than 20 days of testimony (not including re-direct and re-cross-examination), additional rules apply that are set forth on the Court's website. Dept. 1 makes the final determination of whether a case is eligible for long-cause assignment. (Local Rule 2.8(d).) In doing so, Dept. 1 conducts its own limited review in all cases to ensure that time estimates are accurate and that materials comply with the Long Cause Trial Package Guidelines.

Trial documents must be filed electronically for review by Dept. 1. While trial judges may want physical binders for use at trial, Dept. 1 no longer requires physical binders to review. Documents should be filed jointly to demonstrate parties have met and conferred as to trial logistics. The parties should ensure all columns on the witness and exhibit lists have been filled out completely, particularly the columns indicating which witnesses are expected to testify and which exhibits are stipulated authentic or admissible.

The parties should also provide a running or cumulative total of hours for the witness list, but it is not necessary under the Guidelines to include time for re-direct and re-cross-examination of witnesses (where those are typically shorter if used at all). In turn, naming a witness multiple times when called by more than one party creates a longer time estimate than is justified, frustrating Dept. 1's review of the accuracy of the time estimates. Time is precious.

Caught as it is in the middle between a sending and receiving judge, Dept. 1 does not want to be in a position where a receiving judge advises that the case was not ready for trial after all and must send the case back. Common examples of situations where a case is not ready for trial include non-trial-related motions pending in the originating court; failure to indicate which witnesses are expected to testify at trial; and unavailability of counsel, parties, or expected witnesses for the estimated length of the trial and other scheduling issues.

Therefore, parties should determine their expected witnesses and raise scheduling issues with the originating court at the FSC (or on the trial date if not known earlier) to avoid a needless trip to Dept. 1, which would then not be able to send out the case at that time. Due to the constant flow of cases and need to keep courtrooms in use, Dept. 1 cannot set a trial to begin on reserved future dates in a particular courtroom. The parties must ensure that they are fully prepared for trial before seeking a trial assignment from Dept. 1.

A case may not be ready for trial for less serious (but nonetheless common) reasons, including issues with the parties' joint submissions. For example, parties will often erratically reserve or omit exhibits (not just using reservations to separate plaintiff and defense exhibits), leading to confusing exhibit numbering. Parties at times offer identical descriptions of exhibits or witness testimony, raising questions of cumulative or duplicative evidence. Dept. 1 also sees many instances where signatures are missing on joint documents or where a party has not yet filed a trial brief.

In addition, Dept. 1 also conducts further review of cases in which litigants estimate their trial will be "long cause." A

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trial will be long cause when both parties or the Court estimates the trial will require over 100 hours or 20 days of witness testimony upon an assumption of five hours of trial time per day. (Local Rule 2.8(e) (long cause case involves "20 or more days of testimony").) This estimate excludes time for jury selection and ruling on motions in limine, which do not involve testimony.

If a case is determined to be long cause, it is placed on the long-cause inventory. Cases are assigned to one of the long-cause judges when a judge can take on another long-cause trial – with priority typically given to those in which there is any risk that the five-year statute (and additional six months under Emergency Rule 10) (or the three-year deadline if after remand) may not be met if trial is not commenced. (Code Civ. Proc., § 583.310 et seq.)

Again, the length of the proposed trial can reduce the number of judges available. Even if a case remains a long-cause case, reducing the number of days needed is nonetheless critical. Given the growing number of long-cause cases, and that not all cases can go out to long-cause trial as quickly as the Court would like, Dept. 1 is now also sending long-cause trials to other trial courts to ensure cases are heard as expeditiously as possible.

The Court's continuing ability to do so, however, can only last so long as the Court is able to keep up with the demand of litigants seeking shorter trials. Hearing one long-cause trial likely prevents several shorter cases coming to trial or to be in a better position to settle. In scheduling trials recently, the Court has been fortunate in having fewer unlawful-detainer trials to conduct due to the various pandemic-related moratoria – providing greater ability to try other civil cases.

In the last several years, both before and during the pandemic, Dept. 1 has, for the most part, been able to send out on the trial date all cases that are ready for trial to a trial court. In determining when trial will in fact begin, it is important to keep in mind several points:

The trial judge will still likely need a day or more in advance to hear motions in limine. The more motions in limine filed, the longer it will likely take for trial to start. Litigants are required to discuss evidentiary issues prior to filing motions in limine – as those raise another level of uncertainty as to a start date – consistent with Local Rule 3.57. The Court expects such "meet and confer" to be substantive; not perfunctory. The mandatory declaration will be reviewed for the statement of reasons why parties took their respective positions. Note that motions in limine may not be disguised motions for summary adjudication (Local Rule 3.57(b)) nor to bifurcate (Local Rule 3.57(c)). (See also *Amtower v. Photon Dynamics, Inc*. (2008) 158 Cal.App.4th 1582.) Consideration of these points may eliminate many motions in limine that are perceived to be potential "game changers."

It is the policy of Dept. 1 to make the greatest possible use of the judges on the trial roster. If Dept. 1 loses a judge to motions in limine for a day or more, that reduces the days a judge will be available to conduct trials, and in turn, reduces the Court's overall capacity. The less the Court's capacity, the harder it is for the Court to find a courtroom available for trial and the greater prospect for delay in going to trial. It is in each of our respective interests to conserve the use of our trial judges' time to speed up your ability to go to trial.

Relatedly, the shorter a trial can be, the greater the Court's ability to serve more litigants. To this end, counsel can assist the Court in a few ways:

- Find a way to agree upon either the admissibility of all or at least some exhibits or alternatively, to their foundation. This can save a huge amount of time. A statement that the parties could not agree to the admissibility of any exhibit, without some credible explanation, may engender a further hearing in Dept. 1 before the case is assigned for trial. Lack of agreement on even one exhibit is a tell-tale sign that there is not the level of cooperation the Court expects for a case to go to trial and to bring in jurors.

No judge wants to unnecessarily inconvenience jurors. Likewise, an indication in the witness list that multiple persons will be testifying on the same subject, without some accompanying explanation, will likely prompt a question of why such testimony would not be cumulative and again result in an OSC hearing. Such hearings can be avoided by bearing in mind these time-saving points and the many common trial readiness issues noted earlier.

- In the same way an adept litigator may make a conscious decision not to allege every potential cause of action, even if technically applicable, so an astute trial lawyer knows that a client's case will likely not go over as well with a jury that is overburdened with testimony that could have been streamlined, and which better respected their time and attention span.
- If there is an opportunity to bifurcate issues at trial, shortening the length of trial may increase the ability of the Court to hear the case. Moreover, determination of one issue will likely facilitate resolution of other issues, saving parties significant time and expense. Note, however, any motion to bifurcate originating with the parties must be made in compliance with Code of Civil Procedure section 598; i.e., by noticed motion to be ruled upon "no later than the close of pretrial conference." (See also Local Rule 3.25(f)(2) (motions to bifurcate must be filed "with timely statutory notice so as to be heard" at the FSC).)
- Consideration of a bench trial, where applicable, with the built-in flexibility of bench trials not needing to be held on consecutive days.

Counsel are encouraged to think through and discuss these issues in advance of trial as part of determining readiness for trial in the originating court.

The trial judge decides when the trial will begin. Build into your scheduling some level of flexibility, if possible. A doctor's schedule will not dictate a judge's management of a trial. It bears repeating

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that counsel also cannot agree, themselves, on when a trial will start.

Dept. 1 may not send the case for trial the same day it makes the assignment. Depending on how many courts are available, it may be necessary to send a case to a courtroom when it is expected that courtroom will then have completed a trial it is currently conducting. Generally, this will be no more than five court days later. Therefore, you will need to take this extra time into account in determining if you, your client and all witnesses will continue to be available during that extended time period and will not, for example, be going on vacation and hence becoming unavailable. A case is not ready for trial if any of these persons is unavailable during the time estimated for trial to conclude.

By necessity, some judges will be engaged in trial and unavailable when your case is ready for trial, while others may be off on an upcoming future date. Therefore, again, the time estimate is critical to finding an available courtroom. If the time estimate proves to have been shorter than the receiving judge finds realistic after review, the judge may have to return the case to Dept. 1 for re-assignment.

Where a party exercises a peremptory challenge to the judge assigned, this can sometimes make it more difficult to find another judge who is available the necessary number of days given the limited number of judges available, particularly to hear long cause cases.

Thus, litigants should be mindful of when a peremptory challenge is available and how to properly assert the challenge. In particular, once a case is referred for trial, the parties are required to personally appear in Dept. 1 on the trial date to give parties an opportunity to file a challenge if they wish and to avoid further delay. A peremptory challenge must be filed in the courtroom within 20 minutes of the assignment, and cannot be filed electronically. (See also Local Rule 2.5(c)(1).) Compliance with these requirements is critical to ensure a challenge is timely filed and resolved.

Trial can be further delayed when a party files a peremptory challenge not authorized by statute, requiring unnecessary further hearings on the validity of these challenges. A party may file only one peremptory challenge in each case. (Code Civ. Proc., § 170.6, subd. (a)(4).) Thus, having challenged one judge, a party may not pursue a challenge against the newly assigned judge. Moreover, "each side" may file only one peremptory challenge in a case, unless parties on the same side have "substantially adverse" interests. (Code Civ. Proc., § 170.6, subd. (a)(4); *The Home Ins. Co. v. Superior Court* (2005) 34 Cal.4th 1025, 1035.) When one party has timely challenged a judge, other parties on the same side must consider this issue before filing another peremptory challenge. Repeated challenges by parties on the same side may delay referral for trial by requiring further proceedings to determine whether the parties' interests are truly adverse.

In the same vein, a peremptory challenge may be available on remand after a successful appeal if the "trial judge in the prior proceeding is assigned to conduct a new trial on the matter." (Code Civ. Proc., § 170.6, subd. (a)(2).) A "new trial" occurs when remanded proceedings involve reexamination of issues of fact or law from the earlier proceeding.

Hence, a party should consider whether the remanded proceedings will require a "new trial on the matter" before filing a peremptory challenge after remand in order to avoid unnecessary hearings on an improper challenge. The validity of a peremptory challenge is determined on a case-by-case basis, but significant time is wasted for the court and parties when the challenging party is unaware of or unprepared to address the foregoing issues (where applicable). While a proper peremptory challenge can delay trial by limiting the pool of judges available to hear the case, an improper peremptory challenge can similarly delay trial by preventing Dept. 1 from timely referring the matter.

Finally, as a component of also assisting parties with case resolution, the Court has instituted a number of different MSC programs depending on case type and location; in the PI Hub, by volunteer lawyers through the Resolve Law LA remote platform. These take place between the FSC and trial dates to increase the prospects for resolution. (See Seventh Amended PI Hub Standing Order.) In addition, prior to start of long-cause cases, an MSC will likely be set with an available judge who is not able to fit in a new trial on his or her calendar. Please confer with your assigned judge about what opportunities there may be; by the FSC date, counsel should be fully informed about the merits of the case so that they are able to intelligently advise their clients about the risks, time and expense involved in going forward to trial.

To conclude, Dept. 1 serves its gatekeeping function of scrutinizing trial readiness with the goal that trials can proceed more expeditiously after such review and that the Court can hear more of them more quickly by sticking to these requirements. The Court appreciates your cooperation and understanding in the process of finding you an available courtroom for trial.

Judge Cowan is Supervising Judge of the Civil Division of the Los Angeles County Superior Court. Judge Cowan received his BA from Columbia University and JD from Univ. Calif., Hastings College of the Law. Prior to going on the bench, Judge Cowan practiced business litigation for seventeen years; initially, with Rogers & Wells, and later in his own office. In 2005, the judges elected him a Commissioner. In that capacity, he handled primarily family law cases in the Santa Monica Courthouse. In 2014, Gov. Jerry Brown appointed him a Judge. Until his move to Civil, Judge Cowan was assigned to the Probate Dept., where he became the Supervising Judge.