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American Board of Trial Advocates

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March 30, 2021

Re: CAL-ABOTA's Position on Forced Remote Civil Jury Trials

Ensuring Open Access to The Courts During The COVID Crisis

On May 15, 2020, CAL-ABOTA issued its call to improve accessibility to the courts during the pandemic. We encouraged those courts in the State who were not employing reasonable remote working methods to do so immediately, as lawyers and clients were suffering from the shutdown of our courts. We recommended and endorsed best practices to handle case management conferences, informal discovery conferences, settlement conferences, and other court hearings, via remote means.

We did not, however, endorse forced remote civil jury trials. As we are now witnessing some trial courts institute remote civil jury trials, we are compelled to express our concerns about court orders that force parties to participate in remote civil jury trials, as we believe such is inconsistent with the obligations of civil advocacy for our clients.

The Mission of CAL-ABOTA

CAL-ABOTA is the umbrella organization of the 8 independent California chapters of ABOTA and the over 1700 plaintiff and defense lawyers who are members.

Our members have held numerous leadership roles in virtually every lawyer organization and every bench bar organization in California, ranging from local bar association groups to the Judicial Council of California.

ABOTA is a leading civil trial lawyer organization in California. Among the many missions of ABOTA is the independence of the judiciary, and we have long been a leading voice in the support of the judiciary. Our record in that regard is well known to the bench.

The overarching mission of ABOTA, however, is the effective representation of individual litigants and the protection of the civil jury system as embodied by the 7th amendment of the Constitution of the United States.

* Deceased

The Pitfalls of Remote Jury Trials

All one needs do is to review rules and guidelines issued by some courts to discover the numerous problems, pitfalls, and lack of due process, that can result from a remote civil jury trial. There have been numerous instances of problems occurring during the few remote trials that have occurred. Evidentiary exhibits are a critical part of a trial, and parties are denied the ability to effectively use exhibits during examinations. The total inability to refer and utilize physical evidence has also been cited as an obstacle. Additionally, jurors are routinely being distracted by their home environment, thereby preventing the parties' ability to have a full and fair trial.

Moreover, as part of ensuring a fair and impartial tribunal and fostering participation in government by the People, all litigants have the right to a jury selected from a fair cross section of the community, and all citizens have the right to serve on a jury and obligation to do so when summoned. All prospective jurors take an oath to answer truthfully to the questions posed during the jury selection process. To ensure that the prospective jurors are conforming to their oath, the Court must provide a forum wherein the Court or the attorneys can effectively obtain truthful answers. As with examination of witnesses, answering questions in open court exerts a powerful force for truth telling. And the ability to evaluate the prospective juror's demeanor face-to-face has immeasurable value.

Additionally, the fundamental role of the jury is to determine facts based upon determining the credibility of witnesses and weighing the evidence introduced at trial. With respect to judging the credibility of witnesses, the jurors are instructed to consider the manner in which the witness testified, e.g. how the witness looked, acted or spoke while testifying, the attitude toward this case or about giving testimony, whether the witness' testimony reflected truthfulness, or whether the witness had a bias, hostility, or some other attitude that affected the witness' testimony. (CACI 107). The tools for making these determinations are things such as who and/or what the witness is looking at while testifying, fidgeting or reading from a script, and many other physical manifestations that happen while in person with others. In a remote setting, jurors cannot tell what the witness is doing with their hands. The Advisory Committee for the Federal Rules of Civil Procedure long ago admonished: "The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition." (FRCP 43 Notes of the Advisory Committee (1996).) To suggest that non-verbal communication plays a minor a role in a civil jury trial and that it can be easily demonstrated in a remote setting is plainly wrong. No matter what the proponents of remote civil jury trials say, it is not the equivalent in any respect of an in-person trial that is three dimensional with physical presence.

Finally, remote jury trials create significant concerns regarding accessibility and equity. This has been seen during the pandemic, where many people in our communities either don't have access to the internet or have unreliable access.

Ensuring That In Person Jury Trials Are Conducted Safely Should Be The Rule, With Remote Jury Trials The Rare And Limited Exception

To be clear, we are in no way suggesting that courtrooms for jury trials should be open at the expense of sound medical advice or common sense. To the contrary, courts should work with local health organizations to be sure that when in-person civil jury trials resume in earnest they are done in accordance with all health and safety protocols. In this regard, National ABOTA has issued a white paper entitled “Guidance for Conducting Civil Jury Trials During the COVID-19 Pandemic,” (https://www.abota.org/Online/Resources/Guidance_for_Conducting_Civil_Jury_Trials_During_the_COVID-19_Pandemic.aspx) which provides thoughtful and reasoned guidance to courts and parties in proceeding with in-person jury trials.

Furthermore, we are not suggesting that there is no place for the temporary use of remote accessibility. In this regard, we make note of the following:

1. We strongly discourage forced remote jury trials, but do not object to parties stipulating to them.
2. Preference cases, or other extraordinary situations involving the parties, their lawyers or the court, could require the use of a remote jury trial.
3. While CAL-ABOTA very much wishes to return to in person hearings of any type, we appreciate and understand that certain non-jury hearings or court trials may well be the subject of remote practice. What we ask for here is that the lawyers representing their clients be made part of that decision making. If the parties can agree to implement remote practices for hearings and court trials, then courts should use best efforts to accommodate agreements reached between lawyers. If the lawyers cannot agree, then of course the court has to call balls and strikes.

Rather than forcing parties into a remote jury trial, we encourage the courts to focus on implementing shorter and expedited civil jury trials that honor the importance of trial by jury while saving precious court resources and addressing what is obviously a back log of civil cases. Courts should encourage practices that generally encourage shorter trials through agreement, cooperation, stipulation and pretrial rulings. Courts should consider focusing on agreed or judicially defined limits of trial presentation in terms of time, witnesses, evidence and in some cases smaller jury panels. Our members are prepared to volunteer to assist the courts in any way to reduce the backlog of civil cases, including acting as voluntary settlement officers or in any other capacity that the courts would find helpful.

Finally, CAL-ABOTA is concerned that some courts will institutionalize remote practices in the future, irrespective of whether there exists any health and safety concerns to justify such. In-person oral advocacy is at the heart of what trial lawyers do and it is fundamental to our civil jury system.

Conclusion

Having a one size fits all philosophy in implementing remote jury trials interferes with and is a denial to access to civil justice. It promotes a less than human interaction that contravenes the foundation of our judicial system. It also interferes with attorney's ability to advocate zealously for their clients as required by the rules of professional conduct.

To those courts who have instituted forced remote jury trials, we respectfully ask you to instead focus on how to safely reopen our courtrooms.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Walter M. Yoka', with a stylized flourish at the end.

Walter M. Yoka

President, CAL-ABOTA 2021

And the 2021 Executive Committee:

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