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May 15, 2020

Honorable Joyce D. Hinrichs  
Presiding Judge, Superior Court of California  
County of Humboldt  
825 Fifth Street  
Eureka, CA 95501

Re: CAL-ABOTA's Call To Improve Accessibility To The Courts During The Pandemic

Dear Judge Hinrichs:

We write on behalf of CAL-ABOTA, representing its over 1,700 members and the 8 independent local ABOTA chapters, who are personally struggling with their clients under the many, varied and inconsistent shut down orders issued by the various trial courts throughout the State of California.

ABOTA is a leading civil trial lawyer organization in California. It is comprised of both plaintiff and defense lawyers. ABOTA stands for the protection of the right to a civil jury trial and the independence of the judiciary.

The members of CAL-ABOTA have served in a variety of leadership roles in many Bench/Bar organizations and have long been a leading voice in the support of the judiciary. Our record in that regard is well-known, and we know we are appreciated by the Bench. It is for this reason we hope that CAL-ABOTA's call to implement improved accessibility and to open up the Courts by the use of remote means will hold some weight.

During these difficult times, it has become all the more important to employ the many methods of remote working, seemingly available and in broad use across all public and private sectors. We fully understand and appreciate that each court has its own unique issues, in terms of size, location and technology. To those courts which have been responsive to lawyers and their clients by remotely opening up courtrooms, we are very thankful. For those courts which have been slow to employ such methods, or have not done so, we write to encourage them to do so immediately, if at all possible.

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In our view, the time has come to employ reasonable remote working methods. Case management conferences, informal discovery conferences, and voluntary settlement conferences, just to name a few, via Zoom, CourtCall, or by other remote means are definitely possible. In that regard, we are particularly concerned about the flood of cases and hearings that will come to the courts once the opening, staged or otherwise, begins.

On March 28, 2020, the Judicial Council voted to direct the Superior Courts to “make use of available technology, when possible, to conduct judicial proceedings and court operations remotely . . .” On April 8, 2020, CAL-ABOTA, the Consumer Attorneys of California and the California Defense Counsel jointly wrote the Judicial Council requesting “. . . a clarification, possibly by circulating order that these judicial proceedings include important civil matters, such as urgent discovery disputes or settlement conferences, to ensure cases can progress during this uncertain time.” These same Bar groups wrote again on May 14, 2020, expressing concern about the delay in implementing rules and procedures to immediately improve access to the Courts. As these Bar groups said “Our California Courts must find a way to (1) operate during the crisis, and (2) ensure justice for civil litigants does not come to a complete halt.”

Furthermore, we wish to acknowledge and thank the work of a select group of trial lawyers acting in their leadership capacity in various Bar organizations, who authored a working document entitled “Suggestions for Processing Civil and Probate Cases”, a copy of which is attached. This document was sent via letter to Your Honor in your capacity as Chair of the Pandemic Continuity of Operations Working Group and in your role as Chair of the Trial Court Presiding Judges Advisory Committee of the Judicial Council. CAL-ABOTA strongly endorses these suggestions as best practices for all Courts in dealing with the growing backlog of cases and the failure to implement reasonable remote working methods.

The Bar, businesses, and individuals have all adapted to working remotely, even though that has meant great inconvenience.

To those courts who have yet to initiate any or significant remote accessibility, we implore you to encourage them to act swiftly to do something about this situation. CAL-ABOTA, its chapters, and its members, stand ready to help in every way possible.

Respectfully submitted,



Christopher P. Wesierski  
President, CAL-ABOTA 2020

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Encl.

cc: Martin Hoshino  
Administrative Director, Judicial Council

Hon. Marsha G. Slough  
Associate Justice, Court of Appeal

## Suggestions for Processing Civil and Probate Cases

### **Civil Case Issues:**

These are suggestions for temporary modifications of procedures and rules that we believe may assist the courts in dealing with the backlog that has occurred as a result of the lengthy court closures for civil matters.

#### **1. Better Guidance on what trial courts can do under the Chief Justice's Emergency Rules**

- a.** Can courts order the parties to meet and confer where the statute does not otherwise require it;
- b.** Can courts declare holidays for dates that the courts are not hearing civil matters other than emergency hearings? There have been inconsistent orders in various counties that make calendaring deadlines very confusing, depending on which court a case is pending;
- c.** Can courts require remote appearances as opposed to having it be voluntary?

#### **2. Scheduling and conducting of motions and hearings**

- Require remote conferences on a platform that has video capability for all matters.
- Ex partes may be handled on paper only – papers submitted electronically by a set time, opposition by a set time and then ruled on by the court and orders sent electronically to counsel. This should exclude hearings on minors compromises which are now being heard ex parte and which may require the court to inquire of the parties or counsel. Possible limits to the length of the papers.
- Motions that were set for hearing during the closures:
  - For contested matters that were scheduled but not fully briefed prior to closure, establish a process for the parties to submit stipulations for new hearing dates/deadlines electronically and receive signed orders approving stipulations within a short period of time.
  - Courts are handling rescheduling hearings for matters that were postponed in various ways. One example is San Mateo County, which appears to be an efficient method of getting these matters resolved with fewer appearances and court intervention:
    - For contested Motions previously calendared when courts were closed that were fully briefed, post tentative rulings on the motions. If no party contests the tentative ruling, court to adopt the tentative ruling by a set date. Any party who wishes to contest the tentative ruling must meet and confer with the opposing counsel regarding dates when involved counsel are available for hearing on the motion during a

specified month and a joint estimate of the time needed for oral argument on the contested motion. Party contesting the tentative ruling must email notice of the party's intent to contest to all counsel of record, self-represented litigants and the Court<sup>1</sup>. The contesting party must state in the subject line of the email the case name and case number. In the text of the email, the contesting party must state the specific motion, the party contesting, the joint time estimate of counsel for oral argument, and the dates when involved counsel are not available for hearing during the month of June 2020 . If the tentative ruling is timely contested, the Court will email the parties notifying them of the date and time that oral argument will take place via video conference or court call.

- Motions for which no reply has been filed – set a specific date by which all replies must be filed and follow same procedure as above.
- Motions for which only the moving papers have been filed, set specific dates by which opposition and reply papers are to be filed and following procedure above.

These or other proposals which may include meet and confer requirements and issuance of tentative rulings a day or 2 ahead of the hearing may allow reduction in the number of appearances and hearings which need to be scheduled.

- Addressing the backlog of motions that had not yet been filed or had been filed but not set for hearing:
  - Many motions such as demurrers, discovery motions and motions for summary judgement or adjudication had been due to be filed during the court closures, and counsel for the parties stipulated to hold off on filing and extend the time for filing. These matters need to be scheduled in the near future. Some process needs to be established to obtain hearing dates for matters that counsel agreed to postpone during the closures, such as allowing counsel to request a scheduling conference or some method of corresponding with the court to obtain a hearing date.

### **3. Cases with Trial Dates and Operative Deadlines Triggered by Trial Dates**

- For purposes of calculating deadlines, Code of Civil Procedure section 12b says that if any county office is closed for “the whole of any day, insofar as the business of that office is concerned, that day shall be considered as a holiday for the purposes of computing time under Sections 12 and 12a.” Some counties have declared the pandemic time period to be a period of a holiday. In light of this, there will be a huge number of filings triggered by trial dates that will become due the date the courts

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<sup>1</sup> For non-represented parties service of notices would continue to be by mail rather than electronic service.

open, which will put undue pressure on the courts and lawyers. Issuance of appropriate Orders in advance of this date to avoid this consequence will be of benefit to all.

- Certainty regarding pre-trial filing due dates is needed as to cases that were scheduled for trial during the courts closure time periods or are scheduled for trial during the 90 day period following the courts' return to handling civil matters.
- Make available options to the parties to conduct Voluntary Settlement Conferences and Mandatory Settlement Conferences on a remote basis to facilitate settlements and relieve pressures on the post-pandemic court calendars.

#### **4. Removing impediments to discovery and reducing burden on the courts related to discovery disputes**

- Issue clear rules regarding remote depositions that would reduce the need for counsel to seek court assistance in compelling remote depositions. As an example, San Mateo County has issued the following emergency rule that eliminates many of the roadblocks that counsel have been experiencing
  - San Mateo Emergency Rule 3-101:
    - Unless otherwise stipulated in writing by counsel for the parties and for the deponent, or unless technologically infeasible, oral depositions shall be conducted remotely, in that the deponent, the court reporter, each attorney for any party, and any party, shall “attend” the deposition remotely by appropriate audio-video conference method – which method shall be selected and identified by the noticing party.
    - If needed, any interpreter shall appear remotely. If the deposition is noticed for video recording, the video operator shall perform such services remotely.
    - All communications with the deponent during the deposition shall be on the record, other than communications between the deponent and his/her attorney of record during breaks. During the deposition there shall not be direct or indirect communications with the deponent off the record, including but not limited to text, email, chat, instant message, etc. The deponent and his/her attorney may choose to be in the same location for the deposition, if they conduct themselves consistent with “social distancing protocols”, but not requiring the deponent to wear any mask while giving deposition testimony.
    - If the notice of deposition or subpoena includes a request for production of documents at any oral deposition, such documents shall be produced electronically by the deponent to counsel for all parties at least three (3) business days before the deposition date, unless otherwise agreed by counsel for the parties and for the deponent in writing.

- Establish process for Informal Discovery Conferences:
  - San Diego model using retired judges, judge pro tems, and lawyers from plaintiff and defense bar, by stipulation of parties and without court involvement;
  - San Mateo model – no motion to compel unless first a meet and confer and IDC. Time for filing a motion is tolled starting on the date a party makes an email request for IDC. Within 5 days of the initial email request for an IDC, the disputing parties shall jointly or separately email correspondence to the court and to the parties of an electronic letter no more than 5 pages (without attachments) summarizing the discovery dispute. Court will set the IDC, if the dispute is not resolved, a party may file and calendar a discovery motion. The foregoing applies to parties, if the dispute is with a non-party, non-parties may elect to participate in the procedure but are not required to do so.

## **5. Status of Filed Cases with no scheduled hearing or trial dates:**

- For cases that have not had any activity in the past 24 months, we propose that the Judge's clerk/assistant email all parties stating that the Judge intends to hold a remote Informal Status Conference, offering the parties a span of potential days and time slots, directing the parties to meet and confer and reply within [x] days as to two dates/times chosen. The parties would also be directed to meet and confer as to key topics to be discussed at this Informal Status Conference. Once the Status Conference time is confirmed by the Court, the parties will then register with remote conference system or courtcall. No pre-conference filings would be required. At the Informal Status Conference, the parties would be expected to efficiently apprise the Court of case status and provide the Court with sufficient information for the Court to set parameters for case scheduling going forward.
- For any case that is appropriate for a MSC or a VSC, the Court issue an MSC order, returnable in 90 days, with the settlement referee to be either: (i) assigned by the Court as part of the Court's standard MSC process, or (ii) selected by the parties. Remote participation would be strongly encouraged.

## Probate

Probate generally has the following types of hearings:

- Unopposed matters that are reviewed by the court and are ready for approval without appearance in the absence of objections;
- Unopposed matters where the court has questions and require the attorney's appearance;
- Unopposed matters which are not ready for hearing, generally because of technical defects that will need to be continued;
- Opposed matters that may be briefly argued and submitted for a ruling;
- Opposed matters where the parties expect that the court will continue the hearing for discovery or mediation; and
- Opposed matters that will need either longer argument or an evidentiary hearing and need trial setting
- Opposed matters that need an evidentiary hearing.

The first six matters can be handled by court call or another kind of remote appearance with the possible exception of confirmation of sale which involves overbidding. Often counsel do not know if overbidders will appear but an appearance is often needed. Opposed matters that require a substantive hearing are more likely to require the appearance by counsel in order to conduct a trial.

At some point, those matters that cannot be settled or resolved by argument will need to be tried. It is unlikely that counsel will want to attempt a remote trial of any serious matter because of the impediments to being able to view the witnesses, the court and counsel at all times.

Making certain that Probate cases are processed timely is important for the beneficiaries who may be in need of the finances due as a result of the resolution of the case, as well as counsel who require court orders in order to be paid for court supervised estate work.