

WEDNESDAY, MARCH 18, 2020

PERSPECTIVE

The lag is real

By Jacqueline Goodman

We are in the throes of a deadly worldwide pandemic. Make no mistake, COVID-19 is already here. It has a substantial incubation period and testing in the U.S. has been, for all practical purposes, nonexistent. Infected people who appear healthy today and who will still feel fine next week are spreading the virus right now. Likely in one of the several courts remaining open.

Suffering around the world offers a glimpse of what awaits if drastic action is delayed (and maybe even if it isn't). Epidemiologists worldwide are in unanimous agreement: the only way to prevent a disaster of potentially biblical proportions is to begin extreme social distancing at the first sign of outbreak. Some worry about overreacting, and in an effort to balance the need for access to justice against the need to protect public health, leaders in the justice community have been paralyzed.

Yet even as this deadly contagion began to show itself in the U.S. on Jan. 21, our lack of testing lulled many into a false sense of security. Early responses were anemic and ineffective. People weren't getting it.

But then on March 4, Gov. Gavin Newsom declared a

public health emergency. The stock market crashed. Schools closed. Disneyland closed. Concerts were cancelled. Some local governments declared their own health emergencies. No more NBA, NHL or March Madness. (Wait. No March

Courts are unique in that they force, on threat of incarceration, throngs of people to gather in confined spaces — the accused, witnesses, lawyers and citizens conscripted to answer the call to jury duty, to name a few.

Madness?) Tom Hanks and Rita Wilson made headlines.

Finally, everyone seemed to get it.

Tani Cantil-Sakauye, chief justice of California, leader of our third branch of government and chair of the Judicial Council, issued a directive initiating implementation of the procedures outlined in the 2006 manual designed for just such a situation: Epidemics and the California courts.

Just kidding. She issued no directive.

Turns out, pretty much everyone got it except the leaders of our state's judiciary. Indeed, despite the President having declared a national emergency on March 13, it was largely business as usual in many California courts as of March 18. And that's a shame.

Courts are unique in that they

force, on threat of incarceration, throngs of people to gather in confined spaces — the accused, witnesses, lawyers, and citizens conscripted to answer the call to jury duty, to name a few. Courts don't just allow or invite people to gather — or, like hospitals, allow people to enter to receive life-saving aid — courts require people to gather. And at a time when social

distancing is the only defense to this pandemic, it's notable they've been the last to heed the calls to action.

The challenge in California is that authority to adjust or suspend court operations rests with each county's presiding judge, subject to permission of the chief.

Government Code Section 68115 vests in the chief justice and the presiding judges of each county certain emergency powers. It allows for extensions of time for civil matters as well as arraignment, preliminary examination, trial, restraining orders, juvenile proceedings, and more. But there are stated guidelines in place since 2006 to deal with just such a pandemic emergency. Indeed, from the moment the governor declared a state of emergency on March 4, the courts were

free to exclude each of these days from the calculation of speedy trial rights. And still, like violinists on the Titanic, our judicial leaders failed to take swift, meaningful action. Gathering at some courts continues unabated, ensuring the spread of the virus.

Despite increasing local, state and federal government-imposed restrictions and recommendations from the Centers for Disease Control and Prevention and the World Health Organization, there was deafening silence from the chief justice, day after virus-spreading day, for nine days.

You Do You

When the chief justice finally emerged with her own overdue Friday-the-13th message, she punted, stating, "Each entity within the court system is relying on the guidelines recommended by local and state health departments ... The authority to adjust or suspend court operations rests with local court leadership."

That was technically true, and a summary of Section 68115. But the PJ's-- most of them, anyway-- needed guidance.

So in the absence of leadership, counties were forced to deal with this on an ad hoc basis. Presiding judges in some of the 58 counties answered the call to take swift action for the safety of their communities (and there have been some heroic efforts by many trial judges). But Los Angeles County

Presiding Judge Kevin Brazile and Orange County Presiding Judge Kirk Nakamura were not among them. Failing to understand their role in facilitating the spread of the virus in the largest and sixth-largest counties in the country, respectively, until March 16, 2020, two weeks after the Governor declared a state of emergency, it was effectively business as usual in the criminal courts. And they remain miles ahead of other counties, such as Inyo, Kern, Kings, Mendocino, Monterey and others, where jurors and litigants are still being required to gather. Concerned lawyers urging the courts to act were told to “rest assured,” that judges had been in meetings for several days. Unfortunately, meetings without ensuing action does nothing to slow the spread of the virus.

The situation across the state is evolving by the minute, and lawyers and litigants are left to try to gain up-to-minute information for themselves as we chase this moving target.

If Only We'd Had a Christmas Pandemic

Would that this national emergency had had the impact of the holiday season, where judges uniformly display calendars with big red X's and glare at attorneys who dare to request settings that might interfere with their celebrations.

Criticism of some in leadership positions in our justice system derives from their apparent lack of understanding that (1) time is of the essence; and (2) we are not wholly

indispensable. Court leadership often view the courts as an essential institution “more like hospitals than schools.” No, they are not.

True, there are essential functions of the courts which, like hospitals and first responders, must continue. And those who perform those functions are brave. But we don't send people into hospitals without appropriate masks and gloves when they're dealing with a global pandemic. Both for their safety and to stem the spread of the disease, it would be unthinkable to do so. Even hospitals and other healthcare facilities have, for a while now, taken steps to stop people from gathering there unnecessarily. So should we. There's nothing smart or heroic about helping spread the virus.

Non-essential functions should be paused uniformly throughout the state, and courts should immediately take steps to limit the gathered crowds, not mandate them. Stop requiring people to gather in small spaces and spread the contagion.

Barring uniform closures, in criminal courts remaining open simple measures that do not invoke violations of the constitution could vastly reduce the crowds. During the crisis, matters could be continued wherever possible, especially upon stipulation of the parties; lawyers could be permitted to appear for clients whenever possible; telephonic and facsimile appearances could be encouraged; good cause to continue could be found whenever a defendant requests it; jury duty

could be deferred for anyone at risk and there could be a vast reduction in the number of jurors summoned. None of these measures even require invocation of the special rules in existence for this type of emergency. None of them raise any due process or constitutional concerns. None of them are novel. They should have been in place long ago.

Moreover, given that Los Angeles County alone incarcerates more people than all the jails in 37 other states combined, every person in pretrial detention ought to be reviewed for release immediately. Persons in custody for non-violent offenses should be released on his or her own recognizance except in extraordinary circumstances. Persons on no-bail holds for probation violations should be released or reasonable bail set. And as to bail, the consideration of “danger to the community” should include the very real, potentially catastrophic danger to the community that is posed by the spread of the virus among the incarcerated, many of whom will soon be released.

On Sunday, Newsom issued another apparent gubernatorial nudge, this time not as subtle as the issuance of a full-on state of emergency directing the closure of certain businesses and the quarantine of people over the age of 65. And on Monday, the Chief Justice issued a directive, this time suggesting the presiding judges recognize the inevitability of disruption of the courts' operations. That prompted some, but not all, to act. Presumably

action is on the horizon in all counties. But until then, the forced spread of COVID-19 at the courthouse in this state of emergency continues.

Perhaps the very habits perfect for leading the judiciary in times of peace and safety -- careful introspection, measured response, and an aversion for judicial activism -- are the very traits that prove harmful in a disaster where time is of the essence. At a time when decisive action is necessary to protect the public, delays in response by the courts of the most populous state in the nation could lead to Katrina-like consequences.

Good leaders lead. We only know whether extreme measures were unnecessary in retrospect, and it only seems like hysteria if it works. But in the case of a worldwide pandemic, immediate measures to help “flatten the curve” seem the most prudent. Time will judge the judges. ■

Jacqueline Goodman is a criminal defense attorney in Orange County.

