

The Enhanced Role of Mediation as Courts, Counsel and Litigants Confront Delayed Trial Listings

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Beginning in March 2020, trial courts nationwide were impacted by COVID-19 shutdowns and scheduling delays which continue to affect the pace of civil litigation in Pennsylvania and throughout the United States. Recognizing a “virtual shutdown of the court system”, one commentator observed “civil trials have been suspended, court appearances are not taking place. In essence, cases have been left in limbo.” Kaplan, *“Thoughts on ADR in the Face of the COVID-19 Pandemic – A Neutral’s Perspective.”*

Philadelphia County’s experience was no less severe. Civil Trial Division Supervising Judge, Honorable Daniel J. Anders, assessed the initial impact of COVID on the business of the Court and the practice of law:

(i) During the pandemic, the Court relaxed case management protocols in recognition that both the business of the Court and the practice of law were “upended by the pandemic”;

(ii) Jury trials were suspended, thereby eliminating a “primary driver of settlements”;

(iii) Discovery motions were decided on the papers, resulting in lengthy delays before decisions were rendered;

(iv) Case management deadlines were routinely extended either by agreement of the parties or team leadership orders, a practice which became so extensive that a “culture of continuances routinely being granted” took place;

(v) Lawyers did not return to offices for months and were challenged with the demands of litigation by remote technology; and

(vi) Clients and experts who also served as front-line medical professionals and first responders were unavailable for litigation needs, resulting in additional postponements and continuances.

As trials resumed, courtroom protocols were adjusted in compliance with CDC guidelines. Social distancing, modifications in courtroom furnishings, enhanced ventilation, strict enforcement of courtroom capacity limits and adherence to masking guidelines affected every aspect of renewed trial practice from jury selection to verdict.

By February of this year, the Philadelphia County Court of Common Pleas had identified over 920 cases which remained active on its docket with pretrial conferences that had either been scheduled or projected to take place in 2020. Three months later, 711 of these cases remained for disposition, the balance having settled during the preceding 90 days. Included among the more than 700 cases pending in May 2021 were 353 *expedited track cases* filed in or before 2019; 210 standard track cases from the same time period; and another 148 *complex track* matters also filed prior to 2020.

Philadelphia County's situation was by no means unique. On March 11, 2021, Law 360 reported a projection by the Florida state court system, that as of July 1, 2021, "there will be 1.1 million more cases pending than normal." Similarly, the *Austin American-Statesman* described "Texas judges [painting] a grim picture of the pandemic's impact on justice, warning state senators ... that there will be a high price to pay – in money and time – to deal with a still growing backlog of cases." Closer to home, jury trials in neighboring counties and states were suspended until late May 2021 (Bucks and Lehigh Counties); early May 2021 for Delaware state courts; and as late as September 2021 for Allegheny County.

One Philadelphia lawyer's experience with the difficulty presented by pandemic-related delays is instructive. A standard track personal injury matter was filed in August 2019. The defendant City of Philadelphia was represented by the City Solicitor's Office; a second defendant, an out-of-state manufacturer, was represented by an experienced products liability lawyer with 30 years' trial experience in Philadelphia County. In November 2019, 4 months before the pandemic impacted the country in March 2020, a Case Management Order was entered assigning a trial date in March 2021. The case proceeded with discovery and motion practice until November 2020, when the Court granted plaintiff's petition for extraordinary relief, extended all deadlines 90 days, and a new trial date of June 7, 2021, was assigned. By April 2021 both the litigants and their respective counsel were under significant pressure to determine if the trial date was "real" as Philadelphia County had only recently renewed trial litigation. Settlement discussions continued even as arrangements were made – and costs incurred – to reserve hotel rooms for out-of-state witnesses and prepare for a June 2021 trial date. The case settled in early May with none of the trial lawyers knowing if the case would have been tried a month later.

Several weeks ago, the Philadelphia lawyer in question reported to me that a Philadelphia County Judge with knowledge of the number of “aging” cases assured him that the June 7 date was real ... “only it would have more likely been 2022, no chance for 2021”.

Such anecdotal evidence should not, by any means, be misinterpreted as evidence that Judge Anders and his colleagues on the Philadelphia County Bench have failed in their commitment to reduce the pending case backlog. To the contrary, the case example cited above speaks to the importance of ongoing settlement efforts to reduce the “aging case population”. Multiple factors relevant to use of alternate dispute resolution techniques warrant renewed consideration at this time, when so many litigants and their counsel are unable to identify a realistic trial date or means to the end of seemingly endless litigation.

Rule 3.2 of the ABA Model Rules of Professional Conduct states: “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” Litigation in the pandemic era now includes use of Zoom depositions, conferences, and trial proceedings in contrast to more traditional courtroom settings. “Courtroom settings” have also been impacted, with jurors seated outside the jury box in order to accommodate social distancing requirements. The challenges presented by such factors must be addressed by trial counsel, clients, and witnesses alike each day of trial. Further complicating the analysis is the very real potential for any such participant in the trial process, not to mention judge and jury, to contract COVID during trial and raise the potential for another continuance or mistrial.

As a trial lawyer with 45 years’ experience in multiple state and federal courts, I share with my clients the frustration created by years of expensive litigation made even more painful by last-minute continuances of key procedural events and/or trial. As litigators we become, over time, somewhat more accustomed to such developments, but that is rarely the case for clients, especially individuals with limited experience in the judicial system. In the words of a Florida litigator:

“ [T]he psychological and sociological interests of clients need to be in our collective focus. The elderly involved in personal injury litigation, important product liability disputes affecting the welfare of the public, contract actions impacting the daily business operations of small businesses, and a host of other controversies require swift attention. Parties often do not want to live under the cloud of litigation for protracted periods with prolonged expenses with lengthened emotional stress.” Mitchell A. Chester, *“Confronting Mounting Case Backlogs Using Creative Strategies and Virtual Jury Trial Technology.”*

In response, mediation offers a viable alternative designed to achieve an expeditious, far less expensive means for the resolution of pending litigation. Lawyers and litigants alike have since March 2020 labored under restrictions which time and again reflected our collective loss of control in the face of a pandemic which masked our faces and shuttered our courtrooms. Court calendars, case deadlines, time periods governing filing and response dates, all were erased for months on end. In a word, the element of

control was lost as our focus shifted to an uncontrolled virus raging through our country, overcrowding our hospitals even as it emptied our courtrooms.

It is just that factor, **control**, which I believe to be the most important consideration for parties in litigation considering alternate dispute resolution. Mediation affords litigants their “day in court”, a chance to tell their respective stories, often in a more liberal manner than trial testimony governed by rules of evidence and civil procedure. Mediation offers litigants the opportunity to speak privately with an experienced attorney or retired judge able to share his or her opinion of the strengths and weaknesses of each party’s case, a discussion which seldom occurs during the trial process and in most instances is expressly prohibited from taking place. Mediation provides litigants with an experienced neutral’s recommendations for the *end of litigation, a negotiated settlement or resolution accepted by all sides*, as compared to the winner-take-all reality of a jury’s verdict. In all of this, it is the client who controls the extent to which they will be invested in the process and whether they will accept the recommended outcome.

For the court system, referral of pending civil cases to mediation not only provides a reasonable means to reduce the number of aging cases awaiting trial but may also improve the anticipated time period for final disposition of cases still awaiting a trial date. The data provided by Judge Anders reflected a 200-case reduction in pending cases between February and May 2021. The extent to which mediation assisted settlement of these matters is unknown, but a renewed focus upon alternate dispute resolution for aging cases still pending at this time may reasonably be expected to increase this percentage as we close 2021 and enter 2022. Recent, updated statistics provided by Judge Anders are also relevant to the scheduling considerations impacting the decision whether to pursue alternate dispute resolution.

In Philadelphia County, nearly all trials being scheduled between September 2021 and July 2022 are major jury cases impacted by the pandemic. Standard cases filed on or after January 1, 2021, will be listed for trial starting in August 2022. Complex cases filed during the same time period may expect trial dates starting in February 2023.

The extent of the challenge confronting lawyers and judges alike in Philadelphia County is self-evident ... but so also is a significant opportunity to respond, a viable option that is clearly within our control.

