



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

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*Published on January 6, 2022, in The Legal Intelligencer*



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.” See Kaplan, “Thoughts on ADR in the Face of the COVID-19 Pandemic—A Neutral’s Perspective,” National Arbitration and Mediation, <https://www.jdsupra.com/legalnews/thoughts-on-adr-in-the-face-of-the-90464/> (April 21, 2020).

Philadelphia County’s experience was no less severe and deserves closer consideration as an example of sound judicial administration supported by alternate dispute resolution strategies that remain relevant to litigators in 2022 and beyond. Civil Trial Division Supervising Judge Daniel J. Anders, assessed the initial impact of COVID on the business of the court and the practice of law as follows:

- 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”;
- Jury trials were suspended, thereby eliminating a “primary driver of settlements”;
- Discovery motions were decided on the papers, resulting in lengthy delays before decisions were rendered;
- 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;
- Lawyers did not return to offices for months and were challenged with the demands of litigation by remote technology; and
- 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. Against this background, and given March 2020 as the onset date for the pandemic, Philadelphia County's record for adjudication of its civil case filings through December 2021 is not only instructive, but offers significant guidance for trial lawyers as they advise clients awaiting trial dates in 2022 and beyond.

Before in-person civil jury trials resumed in Philadelphia, the Philadelphia County Common Pleas Court 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. As of December 2021, nearly all of these cases with scheduled events in 2020 have been disposed through a jury trial to verdict, settlement or binding arbitration.

The Philadelphia County experience in 2021 provides helpful insight for management of the caseload going forward. First, Anders confirmed that more than 70% of pandemic impacted cases referred to mandatory settlement conferences were amicably resolved without picking a jury. A continuing focus upon alternate dispute resolution for aging cases still pending in December 2021 should continue to assist the court in eliminating this specific inventory as we enter 2022.

Philadelphia County also implemented a dual-track case management system in which Judge Anders supervised major jury cases filed in 2021, successfully maintaining both expedited and standard track filings as "current" according to their respective case management orders. The second element of the "dual-track" system consists of "pandemic impact cases" from the 2018, 2019 and 2020 major jury programs. Pretrial conferences for these matters were scheduled for the fall and winter of 2021, with most cases listed for trial throughout 2022. It is here, however, that Anders has sounded a cautionary note, recognizing that factors such as individual judge's calendars and trial counsel attachments may postpone trial listings until 2023, especially for complex cases such as medical malpractice, where trials often extend into a second or third week. It is here, with an inventory of cases pending in 2022-23 that were filed in the pandemic year of 2020 and even before, that the proven success of mediation supporting the court's ongoing effort to reduce its backlog offers a meaningful alternative to lawyers and litigants caught in this unfortunate "litigation limbo." Multiple factors relevant to the 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 possibility that any key participant in the trial process may contract COVID during trial proceedings, thereby raising the potential for yet 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:

“The 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.” See Mitchell A. Chester, “Confronting Mounting Case Backlogs Using Creative Strategies and Virtual Jury Trial Technology,” <https://www.americanbar.org/groups/litigation/committees/access-justice/articles/2021/winter2021-confronting-mounting-case-backlogs-using-creative-strategies-and-virtual-jury-trial-technology> (March 25, 2021).

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 that 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.

The use of remote technology is relevant to mediation in equal measure to its employment in the courtroom setting. With vaccinations now available, in-person mediation conferences are becoming more commonplace when all parties agree to this format. Selection of alternate techniques, “virtual” mediations, need not diminish the potential for resolution of cases proceeding with this format. In the words of my colleague, Ed Gray:

“Communication technology’s evolution has gifted us the ability to do virtual mediations. Whatever the platform, we can now gather in our virtual conference room. Our face to face distant in space but immediate in time. We see each other, we talk

to each other, we separate, we conference, we tell stories, we confide, we build intimacy and trust. We disagree and ultimately agree, either in settlement or good faith differences.” Edward A. Gray, “[Mediation in Exile](#)”, (May 13, 2020).

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 with mediation, a viable option that is clearly within our control. •

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