KEEPING CIVIL CASES MOVING WHILE JURY TRIALS ARE DELAYED

ABA Judicial Division Lawyers Conference Special Masters Committee

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Many courts are going to be unable to schedule civil jury trials in the near future and are concerned about how (without the deadline of a trial) they are going to keep civil cases on track for resolution. From the discussions the Special Masters Committee has been having with judges, we've learned that there is no one-size-fits-all solution this problem. But there are some creative ways of approaching the problem that might help.

Scenario 1: <u>Where Both Sides Share a Desire for Prompt Resolution</u>

When counsel and clients on both sides are professional and share a desire to bring the dispute to an inexpensive and prompt resolution there are many options that might work to facilitate that outcome. Indeed, for those people, the fact that a jury trial will take a long time to schedule is reason enough to look for another option. Those parties may already be looking to solve the program -- for example, by attempting to settle, or deciding to arbitrate or perhaps agreeing to a bench trial.

Additional resources could make that easier. For example, the bar in San Diego has offered to make senior lawyers available pro bono to adjudicate either entire disputes or particular disputes (for example, over discovery). Courts could encourage senior attorneys in other bars to do the same or schedule a "mediation/settlement conference" day or week to see what cases can be resolved.

The court could also either use court staff (if not already stretched too thin) or enlist members of the bar to perform a different function – perhaps to review files and identify ones that fall in the categories for certain type of action. For example, these individuals could do a form of triage to recommend cases that have pending motions that could benefit from quick court resolution or appear ready for settlement discussions. These individuals could identify cases that might be appropriate for a different type of approach in which the parties focus not so much on what information they would need to try to case, but what information they would need to settle the case effectively. Or the individuals could identify a neutral expert that might help the parties come to terms with a particular issue that will enable them to resolve the case (for example, damages or the existence of a defect).

The fact that trial dates may be delayed does not mean that cases must be delayed. Cases or significant issues in them may be resolved through motion. The court can still set a schedule for the progress and completion of discovery, and the filing and adjudication of motions. This has a number of advantages in case management. The motions themselves may resolve or narrow the case either actually or as a practical matter. Motions also force parties to develop their own case and understand their adversary's case, thereby facilitating consideration of settlement. And undecided motions create their own incentives. For example, even if the trial is not going to take place in the near term, the parties may wish to avoid the risk that the case will or will not summary judgment; that a critical issue (such as patent claim construction in a *Markman* hearing or the applicability of a statute of limitations) will be resolved or another; that a critical expert will or will not be permitted to testify; or that evidence will or will not be permitted upon resolution of a motion in limine. It can be a part of case management to identify these critical issues at the outset and schedule them for resolution.

The court can also make and enforce other deadlines besides the trial date. Whereas the common practice has been for courts to set trial dates relatively early in the case and then set intermediate deadlines back from the trial date, the operative date could be a "firm-trial-ready" date with its own consequences. For example, absent extraordinary circumstances, the court could bar additional discovery, designation of experts or motions after that point. It could also require parties to file pretrial orders expected to be binding delimiting issues and arguments that would be permitted in the case.

The "firm-trial-ready" date could also be used for other purposes. For example, once the parties are fully prepared to take the case the trial, they could be required to attempt some other form of alternative dispute resolution. This need not be limited to mediation. It could also include, where it might useful, neutral evaluation (of some or all issues) or non-binding arbitration, agreement to a binding proceeding to resolve particular issues or employment of a neutral expert to advise parties – for example, on what damages appear to realistic.

The "firm-trial-ready" date could also be used as its own incentive. Courts that are not in a position to schedule civil jury trials in the near future, could still be in a position to lock in trial dates for the time when they do open up. Courts are not required to schedule trials based on the oldest case. They could establish a queue based on which cases are trial-ready first. That could incentivize parties to do the preparation quickly, and, in the process obtain information that might lead them to seek other forms of dispute resolution.

Scenario 2: <u>Where One of Both Parties Does Not Wish To Move the Case Forward</u>

The situation in which one or both parties have reasons to welcome either delay or increased expense is more difficult, but there are potential solutions there too. To begin with, where at least one party is incentivized to obtain a faster resolution, some of the same methods may help avoid having another party delay unnecessarily. For example, a "firm-trial-ready" date is still a deadline that one party can push to set and enforce and the other cannot easily ignore. The situation in which one party is incentivized to delay the other may require more careful case management to avoid the ("going into the four-corners" defense) tactic of using delay to limit the adversary's practical ability to obtain necessary information in the time available. But that problem exists regardless of whether there is a jury trial date.

One possibility is to expand the file review discussed above and determine cases that require more close monitoring. For example, the court could appoint a monitor to review discovery and responses when they are exchanged and schedule calls with the parties to discuss its reasonableness, to discuss dates for completion in advance of trial, to attend depositions if necessary, and, at a minimum to report back to the court.

The court or an adjunct may also wish to address this situation by imposing tighter or more focused intermediate deadlines or benchmarks. For example, especially without the jury trial date, the court may wish to set early firm dates for document production with efficient means of resolving disputes without a formal motion (e.g., by contacting the court or letter-briefs). The court might set party expectations by requiring an early identification of potential witnesses and schedule of dates for depositions. Parties could be instructed to provide earlier in the litigation some of the type of information frequently contained in a pre-trial statement. For

example, they could be required early in the case to identify factual and legal issues they expect to be in dispute. This could help the court or adjunct determine what issues are actually in dispute, what discovery will be needed and perhaps what approach to discovery might be most efficient.

In deciding on these approaches, the perfect does not have to be the enemy of the good. It may well be true that a counsel dead set on raising every objection to every action that might speed the resolution of an action will find ways to make it more difficult for courts to implement these kinds of processes. But that does not mean that every counsel will go that length, and, in any event, there is a salutary effect in putting in place a system (especially when generally supported by the local bar) that sends a different message about what the court expects.

Issues Raised by the Size and Type of Cases

Cases do not come in one size. Methods used to deal with large, complex, commercial cases may ill-serve the resolution of smaller or simple disputes. It has long been very common for states to have separate small claims courts. More recently, some states have developed other procedural distinctions between cases – e.g., establishing commercial courts or dockets or specialized procedures for particular types of cases. A large percentage of the cases in the federal system are have been managed through multi-district litigation procedures that operate differently from other adjudications. The constraints the pandemic has imposed on court resources and ability to conduct jury trials, in particular, may make that this type creativity even more desirable or necessary. Courts could conduct a review of each of their dockets and adapt procedures or practices to each. Or courts could employ the docket review process discussed above to direct cases to procedures that make sense.

Some General Comments

These suggestions are intended as examples. The courts across our country differ dramatically in many ways. Among other things, they have different mandates, dockets, needs, resources, practices and stakeholders. There cannot be a one-size-fits-all solution to a problem like this and some solutions that work well in one jurisdiction might not even be possible, much less successful, in another. Accordingly, our goal is not to delineate a particular set of "best" practices, but to highlight possible practices and suggest a creative way of thinking about the problem to be solved.

Nor does suggesting an idea automatically resolve all issues necessary to implementing it. For example, to the extent these ideas involve the use of adjuncts, courts would also need to work out whether and how the adjuncts would be paid and how to vet, choose, and evaluate those who do this work to make sure the people who do it do it well, and the program can be improved.

The Judicial Division is available to work with courts and organizations to discuss these many issues and assist in helping to find solutions. Anyone with questions should contact Special Masters Committee Co-Chair Merril Hirsh, merril@merrilhirsh.com, (202) 448-9020.