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The wait for justice - by Jason Scopa

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As the saying goes, justice delayed is justice denied. Certainly COVID-19 is teaching civil litigants just how long the wait may be. It is also forcing many to look outside the box and consider the pros and cons of trying to resolve their cases through jury-waived trials, judicial panels, mediation, arbitration, or any other reasonable method of alternate dispute resolution. Certainly, a few such methods and options have become part of the system and are no longer considered to be outside the box. However, the popularity of virtual mediation and virtual arbitration is soaring to new heights. With pandemic restrictions, there is only so much that judges, administrators, magistrates and clerks can do to keep the wheels of justice spinning inside the courtroom.

Despite the Herculean efforts of those clerks and judges, civil cases remain at a virtual standstill. Please forgive the intended pun. Virtual hearings are what have kept the court system functioning to the extent possible. This civil litigation attorney had a virtually-held Trial Assignment Conference with Essex County Superior Court while drafting this article in late January. The client, who is awaiting a jury trial in a case arising from a transaction that occurred in 2014, had to choose whether to accept an uncertain jury trial date this summer or waive her right to a jury and take her case to a judge or panel of judges on a firm date. With one of the other parties to the case unwilling to waive her own right to a jury trial, the case will stay in the court's cue for civil jury trials, and only time will tell if juries are assembling this summer to hear this case.

The year 2021 will certainly have an unprecedented number of litigants entertaining offers of settlement that had previously been considered unreasonable and willing to enter forums they had previously rejected. As another example, a client of ours in a dispute involving a real estate broker's commission was initially not fond of the idea of mediation. Based on previous discussions, all indications were that it would be a waste of time and money. Perhaps not, especially when compared to the additional time and expense caused by COVID-related court closures and delays. In a pleasant surprise, a global settlement was reached in a matter of hours. Neither side left the table particularly thrilled, which is the tell-tale sign of a good mediation. Expensive, uncertain

litigation is now in their rearview mirror.

NEREJ readers may recall a recent story about another notable settlement our office obtained through mediation, which was a case in which we represented a religious order in Waltham. The property was taken by eminent domain for \$18 million. For many months, the taking authority would not agree to mediation. Eventually, after the Superior Court implored the city to give it a shot, mediation was booked and, again, the case was over in a matter of hours. There is no doubt that the case would still be pending and no trial date would be in sight. Instead, finding another road to justice, the client received an additional \$12 million, for a total of \$30 million.

Although the Commonwealth of Massachusetts has had to scale-back its two-month Phase 1 re-opening, reducing the number of jury trials and locations, on January 11, 2021, juries of six began empaneling in courthouses identified as meeting certain environmental recommendations. A single jury trial is planned to be held each week in each listed courthouse. Courthouses are open, with restrictions set forth in certain SJC Orders, but parties must conduct business virtually whenever possible. While criminal bench trials will be held in person, state courts will continue to hear civil matters virtually, and the backlog will continue to grow, much like the COVID-19 statistics.

Will there be any sense of normalcy once the weather breaks again in a couple of months and the number of those vaccinated increases from thousands to millions? Will prospective jurors line up outside courthouses throughout the Commonwealth at 8:30 a.m. at any point in 2021? While this civil litigation attorney remains hopeful, it is certainly hard to envision any such thing before I purchase my 2022 desk calendar. Unless and until there is a major turnaround in the pandemic, it seems quite certain that the longest road to justice for parties involved in civil litigation is going to be the boulevard of the jury trial.

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