

## Evaluating Alternative Avenues to Verdict in the COVID-19 Legal Atmosphere

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As the COVID-19 pandemic continues to reshape nearly all walks of life, the legal profession has likewise adapted to the new practicalities facing litigation. Perhaps no facet of the law has been more affected than jury trials, which have largely been postponed indefinitely and are not likely to see a wholesale return in the immediate future. Despite that reality, there are numerous alternative ways to posture cases to resolve them. While a jury trial may ultimately prove to be the most advantageous method in a particular instance, attorneys and their clients should be mindful of the potential benefits of other means, including bench trials, summary trials and more creative avenues that mix multiple approaches.

### **JURY TRIALS VERSUS BENCH TRIALS**

At the outset, one must initially consider whether an alternative approach to a jury trial is best under the circumstances at hand. Weighing the benefits of a jury trial against those of a bench trial is a unique evaluation, but one in which many overarching truths help to inform the decision.

Jury trials are often preferable to plaintiffs and defendants for a variety of reasons. From a plaintiff's perspective, jury verdicts are more prone to be colored by sympathy rather than be guided by a more dispassionate analysis. From a defendant's perspective (especially in commercial cases where there are commonly counterclaims), a jury consisting of a cross-section of individuals may be perceived to be a fairer judge of the facts than a single judge who may have a personal bias on a particular issue or who may be jaded, intemperate or inexperienced in the subject matter of the lawsuit. From an appellate perspective, jury trials lend themselves more easily and effectively to the assertion of appellate rights. Finally, the greater human element of jury trials can allow for more impactful opening and closing statements and witness testimony.

On the other hand, bench trials can potentially present their own set of advantages for litigants, especially if the judge is well-known to the attorneys. Most pragmatically, bench trials regularly result in a shorter lifespan for a case than jury trials. Implicitly attendant to that lesser duration are lower costs. While jury trials are notorious for their volatility and potential for outlier awards, bench trials carry with them the possibility of more predictable results and have less tendency to result in social inflation associated with large jury awards. When complex and highly sophisticated legal issues are at hand, a bench trial may provide the more appropriate forum for their adjudication. Bench trials may also afford counsel an opportunity to dispense with some of the procedural and evidentiary formalities that are maintained in jury trials. Further, bench trials are less likely to garner media attention, a key consideration when maintaining the confidentiality of sensitive information or the reputation of a litigant is an important goal.

In short, there are numerous factors to consider in determining whether a jury trial or bench trial is preferable for a specific case. A thoughtful analysis may result in a conclusion of which is the best approach.

## THE EVOLVING WORLD OF SUMMARY TRIALS

There are also alternative dispute mechanisms that may be utilized to further expedite the processing time for litigation. Several jurisdictions allow for summary proceedings, including summary jury trials. A summary jury trial is generally a one-day trial that involves relaxed rules of evidence and no live witnesses. An attorney typically presents his or her case to the jury and then asks the jury to return a verdict at the close of the presentation. Depending on the jurisdiction and the parties' preferences, the summary jury trial can either be binding or non-binding.

Summary jury trials have become increasingly utilized across New York state courts. For instance, in Bronx County, summary jury trials are binding. Although live witnesses are permitted, each party is limited to ten minutes for opening and closing arguments and up to one hour to present its case. Unless otherwise agreed by counsel and approved by the trial court, the parties must stipulate to the summary jury trial rules, which provide, among other things, that the parties waive the rights to appeal and to file any motions for directed verdicts or to set aside the verdict. This type of finality is often viewed as one of the best features of the summary jury trial procedure.

Massachusetts courts similarly utilize summary trial procedures as part of a comprehensive scheme of rules for alternative dispute resolution (ADR) services. Under the rules, parties may submit to a non-binding summary jury trial that is facilitated by a third-party neutral. Counsel presents a summary of the evidence and arguments they expect to give at trial to a six-person jury chosen from the court's jury pool and the jury returns a non-binding decision. Counsel are permitted to poll the jurors about their reaction to the evidence and their reasons for the verdict. The neutral party overseeing the summary jury trial may then be available to conduct a mediation with the parties if the case does not subsequently settle.

In New Jersey, a party may move the court for an order to proceed summarily before a trial court judge. If the court is satisfied that the matter may be completely resolved on the record (which may be supplemented by interrogatories, depositions and demands for admissions) or by way of minimal testimony in open court, it will fix a short date for the trial of the action. Furthermore, where there is no objection made by any party or the affidavits show there is no genuine issue of material fact in dispute, the trial court may dispose of the matter without a hearing.

In Pennsylvania, county bar associations have periodically discussed the possibility of introducing summary jury trials in the trial courts, but such programs have yet to be implemented. With the sudden backlog of civil cases caused by the COVID-19 pandemic, however, Pennsylvania courts and bar associations may opt to take another look at introducing summary trial procedures.

Summary procedures should be considered as viable alternatives to simply taking a case to trial, especially in light of the current climate. Where the value of a case is in significant dispute, even non-binding summary trials can be useful to demonstrate how a live jury may react to the evidence and to provide an objective assessment of case value. The procedure may be more easily converted to virtual platforms given the limited number of witnesses and the minimum inconvenience to jurors to "attend" virtually. Additionally, parties can benefit from resolving their disputes in a prompt and cost-effective manner that allows them to save thousands of dollars in expert witness fees, along with many other logistical fees that are associated with lengthy trials held at the courthouse.

### **GETTING CREATIVE – UTILIZING UNIQUE AVENUES TO REACH RESOLUTION**

A particular situation may not cleanly lend itself to a simple choice of proceeding with a bench trial in lieu of a jury trial or an agreement to take advantage of summary procedures. Oftentimes, there are impediments that create a complexity that seemingly leads to an impasse in any dialogue about alternative trial settings. In such instances, it may still be possible to forge an alternative path by way of creativity and resourcefulness.

By way of example, perhaps defendants in a personal injury action would prefer proceeding to a bench trial, summary proceeding or even a traditional form of ADR, such as arbitration. The only roadblock towards doing so is the presence of a plaintiff who is adamant about maintaining his or her right to a jury trial. By way of mediation, it may be possible to come to a global settlement with the plaintiff while preserving the rights of the defendants to determine their respective shares of the agreed-upon settlement fund by way of bench trial, summary proceeding or arbitration.

In the same vein, indemnity rights among defendants may be the focal point of a commercial dispute or may lurk in the background of an underlying personal injury action. Oftentimes, determination of those indemnity issues could be dispositive in and of themselves or be so significant that they essentially constitute the endgame of a litigation. Once again, creatively and carefully tailoring an agreement to proceed to an adjudication of those claims – for instance, through the Philadelphia County Commerce Court Program, which frequently hears such disputes – may provide an alternative avenue to expeditiously bring an action to its conclusion.

### **BE EXPLORATIVE AND AVOID ROTE PROCEDURE**

There is a natural tendency to follow the course that is known and most traveled. Especially in the current legal environment, where the traditional means of a jury trial may be presently unavailable or may not present the most advantageous route, attorneys and their clients should maintain an open dialogue on other approaches. While a decision to proceed in an alternative fashion necessarily depends on a thoughtful analysis of the individual circumstances, it might very well be that the road less traveled is the most effective path.

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As we continue to monitor COVID-19, White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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