

Jury Trials and Mediation in Philadelphia County: Virtually in Person

By: Andrew F. Susko, Robert G. Devine and Daniel J. Ferhat

Litigation Alert

6.9.20

When will the trial court in Philadelphia County be open for jury trials in civil actions? While a precise prediction, given the current state of our trial courts in the middle of the COVID-19 pandemic, is difficult to make, what is known is that the use of virtual technology is likely permanently changing the landscape of civil litigation, including depositions, mediation, and other forms of alternative dispute resolution. Even civil jury trials, at least in the near term and during the pandemic, are being conducted virtually, either by private agreement, or through the courts, as is occurring in Texas and most recently in Florida with its pilot virtual trial program in five of its trial courts. While it is necessary at present for the parties to consent to a virtual trial, courts may ultimately compel the parties' participation. Regardless, litigants and their counsel are well advised to understand the complexities and manner of a virtual trial.

Seasoned trial attorneys have long experienced and are comfortable with virtual depositions bringing distant counsel, parties and witnesses together through technology to present testimony. The use of virtual technology as a means for court arguments and hearings, mediation, and alternative dispute resolution, while novel and emerging as the new normal, is territory where a comfort level can be achieved. And while distinctions most assuredly exist, recent experience has demonstrated that court arguments, mediations and depositions can be conducted effectively remotely and virtually. Legal issues certainly do remain in the context of the deposition of parties to a civil action regarding whether a lawyer's physical presence in the same room with a party-witness can be demanded, and whether courts would compel a virtual deposition during the COVID-19 pandemic where such physical presence of a party and their attorney could not be achieved. Undoubtedly these issues will be resolved, likely sooner than later, given the scope of the pandemic in certain areas.

Virtual mediations have been occurring in significant number during the COVID-19 lockdown and whether these types of virtual, remote alternative dispute resolution mechanisms will be used to a significant extent in the future is anyone's best guess. Virtual mediation offers some logistical advantages over in-person mediation, but also has disadvantages largely related to the challenge of "reading the room" and building rapport. On the plus side, virtual mediation is easier for the parties and lawyers to attend, with everyone participating from the safety of their own personal location and using their computer's video capacity to begin the mediation, typically with a joint session while everyone is visible in "gallery" view. Moving between rooms is seamless for the mediator and the lawyers through the use of multiple breakout rooms. Meetings between the mediator and a party and its representatives, as well as an ability of the parties or their lawyers to speak directly with each other where appropriate, is simplified and easy with virtual participation. In addition to the economies of no travel and no physical presence, other than virtually, the parties also have the same flexibility to discuss, by phone or use of the private breakout rooms, the same subject they could in person subject only to the limitations of the technology and the participants' navigation.

Virtual mediation can present time efficiencies as compared to the in-person mediation, potentially allowing a half-day mediation to bring cost advantages as compared to the typical all-day in-person mediation. On the other hand, the participants can be distracted from the virtual mediation, having the ability to multitask and "check out" more easily. Perhaps more importantly, with less invested because there was no travel, and no travel time and effort to get everyone to the same location, it could very well be easier to "walk away" from the mediation without getting the case settled. Some cases require more than one mediation and, looking forward, an initial, virtual, mediation may become standard in a subset of cases where discrete issues can be mediated in advance of the general mediation. Depending on the value of the case, virtual mediation can offer a viable substitute to an in-person mediation. In the difficult

and most complex cases, however, there are advantages in favor of an in-person mediation, including the personal connections made that are not possible to achieve to the same degree virtually, the effort it takes to bring everyone together and the commitment that presence demonstrates to get the case resolved, and the fact that when everyone walks away, unsettled, from an in-person mediation, the impact is felt more dramatically. While it is unlikely that in-person mediations will ever be completely supplanted by virtual mediation, virtual mediations will now occur with greater frequency and will likely continue even when the COVID-19 pandemic is at an end and in-person mediations resume.

As trial lawyers on the civil side know, settlement at mediation often occurs, in large measure, because of an impending or looming trial date. The uncertain COVID-19 landscape puts on hold and effectively eliminates one of the biggest pressure points to getting civil actions resolved amicably. That does not mean that cases designated by either side as one to get settled promptly cannot get settled, but a certain class of cases often requires a firm trial date.

In Philadelphia County, Pennsylvania, exactly when the civil trial courts will resume jury trials is uncertain as we work through the pandemic. Many civil jury trials commence with a jury panel of anywhere from 35 to 45 prospective jurors convened in the same courtroom for jury selection. That number covers, in typical practice, the 12 jurors and two alternates impaneled as the jury, the three preemptory challenges per side, and then enough additional prospective jurors to cover challenges for cause and hardship. The longer the expected trial date the greater the need to increase the number of prospective jurors in the panel. One wonders when, if ever before an effective vaccine is found, civil jury trials with jury selection along these traditional lines can resume, consistent with current social distancing requirements. It is doubtful individual voir dire can completely replace presenting to a panel generally. While the future timing of civil jury trials is very difficult to predict, we know there will be no civil jury trials in Philadelphia County before September 8, 2020, as set forth by Order of President Judge Ilee Fox suspending all civil jury trials through that time because of the pandemic. Trying to predict when a jury panel, for a potential jury of twelve, with two alternates, can go through a standard Philadelphia County jury selection process, is uncertain at best.

The Pennsylvania Constitution guarantees the right to a jury trial, see PA Constitution, Article 1, Section 6. The United States Supreme Court departed from a long history of twelve person juries when it ruled that the jury trial requirement under the Sixth Amendment of the U.S. Constitution allowed a jury of eight in a criminal case. *Williams v Florida*, 399 US 78, 92 n.30 (1970). In civil cases, juries of six have been held to satisfy the Seventh Amendment protection of trial by jury in civil cases. See *Colgrove v Battin*, 413 US 149,159-60 (1973). However, the Pennsylvania Supreme Court, in an Opinion authored by then Chief Justice Robert Nix, concluded that Pennsylvania's Constitution required a jury of twelve. *Blum v. Merrell Dow Pharmaceutical*, 534 Pa. 97, 112-13, 626 A.2d 537, 544-45 (1993).

Recently, the Pennsylvania Supreme Court lifted the declaration of the "judicial emergency" in the state of Pennsylvania, effective June 1, 2020, leaving to the President Judges of the County to determine when the trial level courts, the Courts of Common Pleas, could resume civil jury trials. A jury trial has proceeded in at least one jurisdictions virtually, in Texas, and a new pilot program testing virtual trials in courts in Florida at five locations will be closely watched. With social distancing guidelines recommended during the pandemic requiring social distancing of six feet, it is difficult to see panels of 35 to 40 potential jurors maintaining that distance, much less juries of twelve, with two alternates in the box. And, while issues abound regarding the conduct of the trial itself, including masking and distancing, ultimately jury deliberations, which typically occur in the same and often small room, would potentially need to conform to recommended safe practices regarding group gatherings. The size of the jury, the potential number of jurors impaneled during jury selection, as well as the conduct of the trial itself, all raise significant questions about the resumption of civil jury trials before an effective vaccine is found.

Presently, there is no ability to allow a jury to resolve the dispute between the parties, in those cases where the parties are unable through their attorneys, to resolve the dispute themselves. And the absence of a potential jury resolution of a dispute makes more difficult the settlement of cases, where the press of an upcoming trial date can often bring the parties together. If justice delayed is justice denied, then overcoming the impediments currently preventing the resumption of civil jury trials is required. It is expected that for civil actions where parties are willing to consider alternative dispute resolution, whether on a binding high-low arrangement or not, the number of cases where virtual mediation or ADR is employed will likely increase during the COVID-19 pandemic. Whether civil jury trials can resume safely, exactly when they can resume, and what final shape they will take ultimately under the supervision of our Courts, the requirements of the CDC, and existing case law, is unclear.

Both sides, the plaintiff and the defense in civil cases, rely on the jury system to be the ultimate impartial arbiter of disputes which the parties decide they cannot resolve amicably. While some may see too much uncertainty in virtual jury resolution of their disputes, a significant subset of cases exist where the dispute must be resolved in some adjudicative setting in short order. The traditional system for the ultimate resolution of our civil action disputes, the jury trial, implicit in the "open courts" provision of the PA Constitution, Article I, Section 11, is not available currently. And while the solution is not immediately and readily available or even apparent, all parties have an interest in having the system available and functioning as soon as is reasonably practical.

If you have any questions please contact Andrew F. Susko (suskoa@whiteandwilliams.com; 215.864.6228), Robert G. Devine (deviner@whiteandwilliams.com; 856.317.3647) or Daniel J. Ferhat (ferhatd@whiteandwilliams.com; 215.864.6297).

As we continue to monitor the novel coronavirus (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](#).

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.