Let's End The Discovery End Date In Civil Litigation

August 27, 2019 | by Christopher Musmanno

As published in the New Jersey Law Journal by Law.com, August 22, 2019.

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In a time not too far removed, court-imposed discovery end dates did not exist, and we practiced in an environment of greater civility between attorneys and the judiciary. Discovery motions were rarely filed because attorneys generally worked out such trivial issues by telephone or over lunch. Cases were regularly settled, especially if a sitting judge recommended it.

Compare this past practice with today; the parties are given 300 days to complete discovery in a simple automobile negligence case and must thereafter request additional discovery time by motion or letter. In practice, defense counsel does little, if any, discovery during the initial 300-day allotted period, and then the court routinely grants multiple motions to extend discovery. This leads to a backlog of the civil trial calendar and impatience by some trial judges to adjourn trials. Small cases are deemed “no pay” by defense counsel, even if judges recommend a nominal settlement. This leads to too many trivial trials and not enough civil judges to try these cases.

For a simple automobile negligence case, in practicality, it should take no more than three or four months to complete the necessary discovery if the attorneys work diligently. One alternative, which has been implemented in other jurisdictions with some success, is: if the plaintiff’s attorney can stipulate, upon the filing of the complaint, that the value of the matter is $50,000 or less, then the case is removed from the trial calendar and proceeds to court-imposed mandatory mediation. Such an approach would leave trial Judges with more time to try substantial matters, lessening the already crowded court docket, and smaller verbal threshold cases would be handled summarily in mediation

without a jury. The discovery end date system presently in place would no longer be needed, and the civility of old would return to the practice of law amongst attorneys. Such an approach would be well received by Abraham Lincoln, who wrote on July 1, 1850, “Discourage litigation. Persuade your neighbors to compromise whenever they can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time.”

The concept of mandatory mediation is nothing new, but it would be a new approach to remove a case from the trial docket to mediation upon the filing of the complaint if plaintiff’s attorney can stipulate to a nominal amount. Whether the defense bar actually participates in the mediation process in “good faith” is a concern. The mediation award could be made binding, but this would detract from the voluntariness of the process and the defense bar would likely oppose such a proposition. A potential compromise could be that if a case does not resolve in mediation, it would be subject to a non-jury expedited trial before a judge using expert reports only. Such an approach would limit the trial expenses and trial time required on a small case, and remove a monetary risk at trial. A simple automobile case could be tried in a day if it was expedited and no jury was needed.

In Pennsylvania, by way of example, all civil lawsuits involving a claim for money damages only, and for $50,000 or less in larger counties, and $35,000 or less in smaller counties, must be heard by an arbitration panel of three lawyers chosen from the local county bar association. Their decision is filed in the courthouse and is generally final, but may be appealed under certain circumstances. The approach I am advocating takes the Pennsylvania model one step further.

However, a serious problem with the implementation of a mandatory mediation statute remains. Often these statutes do not define the level of party participation necessary to satisfy the statute. The result of this lack of guidance is that most parties are forced to determine for themselves what level of participation constitutes compliance. Some states have attempted to more clearly define the necessary standard for participation, yet still characterize participation in amorphous terms such as “good faith.” Kansas is such a state under §72-5430(c)(4). However, this attempt at establishing a standard level of proper participation can create dangers of its own. One danger of an amorphous participation standard is that it may spawn satellite litigation over compliance, which could undermine the effectiveness of the mediation process. Additionally, enforcing an unclear participation standard may require the neutral

third party to testify about what transpired during the mediation, which can destroy the elements of neutrality and confidentiality so vital to the process.

There is no doubt that the idea of mandatory mediation has been met with some criticism. Some argue that it is an exercise in futility if one of the parties enters the mediation determined not to settle. Another argument against mandatory mediation statutes is that a mandatory process simply creates another legal obstacle for parties to overcome on their way to litigation. However, there are many advantages to mandatory mediation, the most obvious of which is that it may in fact accelerate the settlement process. Mandatory mediation shifts the settlement impetus by requiring parties to think about compromise at earlier stages in the dispute process, rather than settling a case "on the courthouse steps."

Mediation is a cooperative process and in order for it to be successful, the process requires satisfactory participation by the parties. However, if we can reduce the number of cases on the court docket, leaving only more complex cases to be tried before a jury, and redirecting smaller auto negligence cases to a mandatory mediation docket by consent, it would restore congeniality to the practice of law, reduce the current court case backlog, and lead ultimately to the abolishment of the "mandatory discovery end date." With only more substantial cases left to be tried before a jury, it would reinforce the integrity of the jury system as jurors would participate only in more complex and substantial matters. Moreover, if the mediation process fails to achieve a settlement, the case would then be redirected to a trial judge for a non-jury expedited trial using only expert reports, saving judicial time and trial expense.

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