

BURDEN OF PROOF

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Help Is Here, Whether You Want It or Not

Introduction

The September *Journal* is devoted to issues of law practice management, a topic of ever-increasing importance for most attorneys. After all, who among us, looking back at bygone law school days, does not rue the fact that we were not taught something, anything, about time management, accounting or human resources? In retrospect, most of us would gladly have sacrificed studying the Law Against Perpetuities or the Rule in Shelly's Case for something a bit more practice-minded and practical. Taught to "think like lawyers," many of us failed, during our legal spawning, to develop an appreciation for those non-sexy, non-stimulating, and generally non-remunerative (in the immediately gratifying sense) skills of law practice management.

Then, newly minted and proud as peacocks and peahens, we eagerly arrived at our first jobs where our bosses railed against our lack of business acumen, constant re-invention of the wheel, and all-around naiveté. Of course, those now seem to be the good old days, since advancement in the profession inevitably brings the pressure of increased responsibility and, eventually, individual case management responsibility.

Moving a civil case from timely commencement to the point where it is ready for trial in our New York state court system involves many challenges, not least of which is the need to proactively move cases forward in the face of competing cases and clients. All too often we spend all or most of any given day putting out fires and responding

to the demands of adversaries, clients, and the court system. Then, just when it's time to leave for the two-hour commute home (often, the best part of the day), we realize we have done nothing to advance the individual cases we are responsible for.

Now, the general purview of this column is disclosure and evidence. For readers, depending upon their practice area or areas, day-to-day case and office management issues will vary significantly and don't necessarily lend themselves to uniform systems or solutions.

However, there is one constant for the civil litigator in New York state courts that can provide help in managing and moving civil cases forward. It doesn't cost anything, requires no fancy equipment, and is guaranteed to move cases along, with or without effort on the part of the attorneys involved. I am writing, of course, about Differentiated Case Management (DCM), and its built-in scheme of preliminary, compliance, and pre-trial conferences.

Differentiated Case Management

Pursuant to Uniform Rule § 202.19—Trial Courts,¹ enacted in 1999, DCM was implemented statewide. DCM applies to categories of cases, as well as to counties, courts or parts of courts, as may be designated by the Chief Administrator. While the manner of its implementation throughout the state has not been uniform, there are certain characteristics shared by courts in all counties where the program is in effect.

DCM has transformed the court system during the disclosure phase

from a time during which parties only appeared in court to resolve disclosure disagreements, to one in which nearly every facet of disclosure is regulated and supervised. DCM has also, as it is evolving in many counties, meant the effective end of the Individual Assignment System (IAS) model, although some counties, such as New York County, have struggled to maintain a "pure" IAS system, while operating within the time limitations imposed by DCM. Once a request for a preliminary conference is filed, many counties now assign all cases in the county to a centralized "intake part," when the initial scheduling order (the preliminary conference order) is drafted by the attorneys, to the extent they are able to agree. The case is then conferenced, and issues in dispute are resolved either by agreement or by the court. If a law secretary conducts the conference, the parties have a right to see the judge for a final determination of any disputed issue or may consent to have the law secretary decide the issue or issues in dispute.

Cases falling under DCM are assigned to one of three "tracks," each corresponding to the perceived complexity of the case and each with its own time frame for completing disclosure. The first track, "expedited," requires that all disclosure be completed within eight months.² The second track, "standard," requires that all disclosure be completed within 12 months.³ The third track, "complex," requires that all disclosure be completed within 15 months.⁴ Uniform Rule § 202.19(b)(2) requires compliance with the time frames unless they are

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"shortened or extended by the court depending upon the circumstances of the case."⁵ As with any court rule, except when expressly prescribed by law, "upon such terms as may be just and good cause shown," the court may extend a DCM time frame.⁶

Thus, at the time of the first conference, when a case is assigned a track, the parties know how much time they have to complete disclosure. In fact, since the assignment of a particular case to a particular track is usually preordained, litigants will know, from the outset of a case, how much time will be allotted for disclosure.

Although many aspects of DCM are inflexible, there is an element of flexibility when it comes to the assignment of a case to a particular track. For example, if the case would typically be assigned to an "expedited" track, and the parties have reason to believe that disclosure cannot be completed in the allotted time, a request can be made at the preliminary conference to have the case assigned to the "standard" track, thereby obtaining, at the outset, four additional months for disclosure.

Another area of flexibility is where, in the course of conducting disclosure, it becomes clear that a case assigned either to the "expedited" or "standard" track will not be ready for trial within the allotted time. In this situation, a request can be made at a compliance conference to have the case re-assigned to a longer track, *i.e.*, from "expedited" to "standard," or "standard" to "complex." In this way, the parties obtain additional time for disclosure without the case running afoul of the court's deadlines.

Scheduling

Uniform Rule § 202.19 sets forth the schedule for conferencing a DCM case. It provides the following:

1. A preliminary conference shall be held within 45 days of filing a request for judicial intervention (RJI).⁷
2. A compliance conference must be scheduled no later than 60 days before the date set forth in

the preliminary conference order for completion of disclosure.⁸

3. A pretrial conference must be held within 180 days of the filing of the note of issue.⁹
4. At the pretrial conference, a trial date must be set, which is to be no later than eight weeks after the pretrial conference.¹⁰

While the scheduling of preliminary and compliance conferences in DCM courts generally occurs as set forth in the rules, many courts are not able to schedule the pretrial conferences as required or, if they do hold the conference as required, set a trial date within eight weeks. In that case, the pretrial conference becomes merely the "first" pretrial conference and subsequent conferences spread over varying peri-

ods of time, are typically scheduled before a "real" trial date is set.

At the preliminary conference, parties devise a disclosure schedule, subject to approval by the court. The Uniform Rules specify five matters for consideration at the preliminary conference:

1. simplifying and narrowing factual and legal issues;
2. establishing a timetable for the completion of all disclosure proceedings, within the time frames set forth in Uniform Rule § 202.12(b) (non-DCM cases) or Uniform Rule § 202.19(b)(2) (DCM cases);
3. adding necessary parties;
4. settlement;
5. removal to a lower court; and

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Leukemia Survivor

6. any other matters that the court deems relevant.¹¹

Compliance conferences are designed to monitor the progress of discovery prior to the deadline for filing the note of issue. Required in DCM courts, they may also be held in non-DCM courts. In addition to enabling the court to monitor the progress of the parties in completing disclosure, the compliance conference provides an opportunity for parties to expand, revise, and otherwise tailor and refine the scope and manner of disclosure. Most important, they provide an opportunity to resolve disclosure disputes in a less formal, and far less time-consuming manner than the making of a motion.

Pretrial conferences are required in DCM cases¹² and non-DCM cases.¹³ The pre-trial conference is an opportunity to discuss with the court any outstanding issues, including any new issues arising since the time of the last court contact, to address potential trial issues, and to explore the possibility of settlement.

While DCM conferences may involve long waits in very busy centralized parts, the opportunity to regularly sit with adversaries and the court to hash out disclosure and other issues, when properly done, can hasten the

time for completion of disclosure as well as provide a forum where, among other things, case resolution can be discussed. Of course, making these conferences work requires preparation on your part, as well as preparation and the active participation on the part of your adversaries and the court.

To ensure that cases are moving in a timely manner through the DCM system, the court must hold a compliance conference no later than 60 days before the deadline established for the completion of disclosure. At the conference, among other things, a deadline for filing the note of issue must be set, if not already set at a prior conference or in a prior order.¹⁴

It is important for practitioners to know the manner in which conferences are scheduled, and deadlines enforced, in the particular county in which an action is pending. Of paramount importance is ascertaining whether or not the court issues a notice pursuant to CPLR 3216 at any of the conferences and, if so, whether uniformly throughout the county or on a case-by-case basis. Failure to do so may result in a dismissal "for failure to prosecute" which, although subject to vacatur on a proper record, will not permit re-commencement under CPLR 205(a).

Conclusion

Many members of the bar do not like the strictures imposed upon them and their clients by DCM. There is certainly a valid debate to be had, at another time and place, over the extent to which case "disposition" has supplanted case "resolution" as a result of DCM in some courts.

Nonetheless, with DCM approaching its 10th birthday, and, for the foreseeable future, here to stay, my recommendation to my colleagues is: "Don't fight it, embrace it." Make the system work for you and your clients. For every one of us who procrastinates, gets sidetracked, and cannot see the forest for the trees, DCM has imposed a roadmap and timetable for arriving at a conclusion in civil cases.

One inescapable fact for most cases in most counties is that the time from commencement to trial has decreased in the DCM era. For every plaintiff's lawyer who has bemoaned delays in getting to trial to obtain justice for a client, and for every defendant's lawyer who has demanded vindication for a client at trial, this change has been beneficial.

So, learn the rules of the DCM system, use them to advantage, and a once-unattainable goal can be realized: A trial date for civil cases that broadly satisfies the "speedy" mandate of CPLR 104.¹⁵ ■

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1. 22 N.Y.C.R.R. § 202.19(a).
2. 22 N.Y.C.R.R. § 202.19(b)(2)(i).
3. 22 N.Y.C.R.R. § 202.19(b)(2)(ii).
4. 22 N.Y.C.R.R. § 202.19(b)(2)(iii).
5. 22 N.Y.C.R.R. § 202.19(b)(2).
6. CPLR 2004.
7. 22 N.Y.C.R.R. § 202.19(b)(1).
8. 22 N.Y.C.R.R. § 202.19(b)(3).
9. 22 N.Y.C.R.R. § 202.19(c)(1).
10. 22 N.Y.C.R.R. § 202.19(c)(2).
11. 22 N.Y.C.R.R. § 202.12(c).
12. 22 N.Y.C.R.R. § 202.19(b)(1).
13. 22 N.Y.C.R.R. § 202.26.
14. 22 N.Y.C.R.R. § 202.19(b)(3).

15. "The civil practice law and rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every civil judicial proceeding."