

CO-MANAGING EDITOR'S COLUMN

Realistic Trial Dates, Not an Unrealistic Expectation

by Charles F. Vuotto Jr.

How many times has the following scenario played itself out: On the day scheduled for trial, you appear on time, lugging heavy and cumbersome trial binders and trial boxes ready to proceed. The clients have taken off from work and are paying someone to watch the children—first to prepare for trial and then to appear in court. You have already submitted a trial brief along with numerous pre-marked exhibits to the court and your adversary. The cost to prepare these documents, as well as the copying and delivery charges alone are staggering. You have spent substantial time meeting with your client and your witnesses to prepare them for trial. You have contacted the judge's secretary and/or law clerk to get an idea of how crowded the docket is and to confirm that you are actually going to proceed. You were told that your trial will proceed as scheduled.

When you arrive at court, however, you find that you are number 35 on the list comprised mostly of domestic violence matters (initial temporary restraining orders, dismissals, and final hearings) along with a smattering of family matter pre- and post-judgment hearings and conferences. Unless the judge is a miracle worker or operates on a different timeline than the rest of reality, there is absolutely no way the judge will have time to speak to counsel, let alone to start a trial in your matter.

Why does this happen, and what can be done to improve the process? Would we tolerate this in any other setting? Imagine scheduling a doctor's appointment and being told to

engage in hours and hours of preparation in advance and arrive at 8:30 a.m. for an examination, which *may* occur anytime between then and 4:30 p.m. Would we tolerate spending a few thousand dollars each year on season tickets to a sporting event, only to be told each week that the game might have to be rescheduled? What if every week you tuned in to watch your favorite dramatic series on television to learn that the writers were too busy to complete this week's show? What if you went to get burgers and fries at the local fast food chain, placed your order and waited in line, only to be told when you arrived at the window that they were closed, come back tomorrow? I doubt we would tolerate any of these situations.

I believe that there are various explanations for this occurrence; some are intended and some are not. Certainly, the court has little control over how many priority matters (e.g., domestic violence complaints) are filed, and only slightly more control over when these matters must be heard. Obviously, domestic violence, children in court, juvenile matters, Division of Youth and Family Services matters, and orders to show cause take priority because of statutory or Rule requirements. (See for example N.J.S.A. 9:6-8.22.) This fact is emphasized in smaller counties where the family part judges must handle more than one of these case-types.

Further, it is an unfortunate fact of life that some attorneys do not make earnest efforts to resolve their cases until they are required to

appear for trial. I submit, however, that these attorneys are in the minority. The vast majority of our colleagues make every effort to resolve their cases, both directly with their adversary and through the assistance of the Early Settlement Program and mediation. Yet, all too often, upon appearing in court prepared for trial to commence, having exhausted the various alternate dispute programs, counsel and the parties are still asked to "go outside and talk," or otherwise 'encouraged' by the court to settle, continue talking, without any real hope of testimony commencing. Although it certainly puts great pressure on litigants to settle their case while they are paying their attorneys to cool their heels in court, we must ask ourselves whether this is an appropriate method to move matrimonial matters through the docket to completion. Perhaps we can turn up the heat and force everyone to stand on one foot as well. This will pressure litigants into settling too, but is it appropriate?

Simply put, realistic trial dates should be set; and perhaps equally importantly, cases should be tried on *consecutive days*, consistent with Rule 5:3-6, as opposed to cases being tried on 'partial' days, over months—a fate that is unfair not only to the parties, their witnesses, and counsel, but also to the family part judges themselves. A litigant should not need to be a professional football player or other public figure to obtain consecutive trial dates.

Further, if a realistic later date becomes untenable, counsel should

be advised immediately, and an alternate course required. Attorneys and litigants should not be required to appear in court when there is no hope of being reached for trial or at the very least a *meaningful* judicial settlement conference (*i.e.*, with a judge familiar with the issues who has read and considered position statements by the parties). Causing litigants to incur such unnecessary expense undermines the great institution of our judicial system. Clients ask: "Why did the court schedule this matter for trial if there was no hope of it being reached?" This is part of the reason why lawyers and the court system receive such negative press. One of the goals of best practices was to address the negative views by the public of the matrimonial court. A recognition of the judiciary as a service industry runs through the recommendations. The proliferation of unrealistic trial dates undermines this laudable goal.

The solution to this situation is to schedule meaningful pre-trial judicial and other mandatory settlement conferences. If those conferences are not successful, then set realistic trial dates. Further, in order to encourage settlement, the court could consider the reasonableness of the settlement positions when counsel fees are sought. If a realistic trial date is not possible due to the court's significant other commitments (*i.e.*, domestic violence matters, children in court, juvenile matters, Division of Youth and Family Services matters, and orders to show cause), it is understandable.

As the complexity of cases increases and the number of filings continues to rise, a greater demand has been placed on the judiciary to provide quality and expedited service to New Jersey families seeking relief through the courts.¹ The court system is overburdened due to the growing population, decreased budget,² and increased litigation in all areas, but especially with regard to domestic violence. Statistics regarding domestic violence filings, which, according to the judiciary's website include abuse/neglect, adoption, child place-

ment review, juvenile/family crisis, kinship, termination of parental rights, criminal/quasi-criminal/other matters (formerly family matters received from other courts) average 58,981 per year over the four years between 2004 and 2007.³ In 2008, there are 126 family part judges.⁴ Therefore, if spread evenly, each judge must handle 468 of these emergent matters in a year, in addition to dissolution and FD non-dissolution matters, which average 223,152 filings per year over the same four-year period.⁵ If spread evenly, this means that each judge must handle 2,239 filings per year for dissolution, non-dissolution, and domestic violence. This is a daunting task.

The solution, however, is not a massive cattle call in the hope that cases will settle and the end of the year numbers will look better. Rather, the response should be the scheduling of other alternative dispute resolution mechanisms that litigants and their attorneys should be required to attend and that are calculated to result in the productive utilization of counsel's time working toward a reasonable settlement until the matter can be reached for trial. For example, if a realistic trial date cannot be fixed or is far into the future, the court can provide one or more of the following alternatives: 1) meaningful pre-trial judicial settlement conferences; 2) mediation; 3) mandatory settlement conferences in one attorney's office; and/or, if the parties agree, 4) arbitration.

If, while reviewing the judge's schedule for the week, the calendar coordinator recognizes that the judge will be unable to address all of the scheduled cases, a more reasoned approach is to form an alternative plan and re-schedule cases for another date. Judges will argue that attorneys can productively use the waiting time to try to settle their cases. If the court has no time at all to even conference the case, however, is it reasonable to expect that a case that is ready for trial can actually be settled, particularly if one party is *pro se*? If the court cannot provide even the minimum attention to a case needed

to conference it with the attorneys, it is more reasonable to require counsel, the parties (and experts when they are involved) to employ one of the options stated above? The trial should be re-scheduled to a later date, when the court can give it and the parties the attention that is deserved. ■

ENDNOTES

1. Excerpt from the Supreme Court Family Practice Committee Judicial Education *Final Subcommittee Report* co-chaired by Hon. Linda R. Feinberg, A.J.S.C. and Frank Louis, Esq. Submitted on Oct. 30, 2001: "*Comprehensive Judicial Orientation Program for Newly Assigned Family Part Judges.*"
2. "The proposed budget requires the judiciary to absorb a reduction of \$27 million for FY [fiscal year] 2009." (Testimony by Judge Philip S. Carchman, acting administrative director of the courts Senate Budget and Appropriations Committee, Fiscal Year 2009, Wednesday, April 30, 2008, www.judiciary.state.nj.us/pressrel/budget_speech.pdf).
3. New Jersey Judiciary Superior Court Caseload Reference Guide 2004-2008, Family Division, Domestic Violence, www.judiciary.state.nj.us/quant/5yrdom.pdf.
4. www.judiciary.state.nj.us/pressrel/GAO2009.pdf.
5. New Jersey Judiciary Superior Court Caseload Reference Guide 2004-2008, Family Division, <http://www.judiciary.state.nj.us/quant/5yrmenu3.pdf>.

Charles F. Vuotto is a shareholder with the Woodbridge-based firm of Wilentz, Goldman & Spitzer; chair-elect of the Family Law Section, co-managing editor of the New Jersey Family Lawyer and co-chair of the Matrimonial Section of ATLA-NJ. This column represents the opinions of the author and not necessarily those of the NJSBA.