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Getting to Trial in Supreme Court, Civil Term

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GETTING TO TRIAL IN SUPREME COURT, CIVIL TERM



By Hon. Gerald Lebovits and Michael V. Gervasi, Esq.



The subject of this article is how Richmond County attorneys proceed to Supreme Court jury selection, and ultimately trial, after the preliminary discovery process is complete. Although the Civil Practice Law and Rules (CPLR) is silent on the issue statewide, the Uniform Rules for the New York State Trial Courts provides the general procedure across New York State, and the respective counties' local rules supplement that procedure.

New York Uniform Rules for the Trial Courts § 202.21(a) provides that “[n]o action or special proceeding shall be deemed ready for trial or inquest unless there is first filed a note of issue accompanied by a certificate of readiness, with proof of service on all parties entitled to notice.¹” In Richmond County, the court, called the Differential Case Management (DCM) Part, issues a certification order that concludes discovery and directs the filing of a note of issue within a specified time. The note of issue signifies that the case is trial ready and begins the process of proceeding to jury selection. Upon receiving the note of issue, the court will schedule a pretrial conference under Uniform Rules, Trial Courts, § 202.26(a).² The pretrial conference “shall be held within 180 days of the filing of the note of issue.”³

Filing the note of issue starts the case's 15-month disposition deadline imposed by the Office of Court Administration's standards and goals. In Richmond County, the case must be fully disposed of by trial, settlement, or otherwise within 15 months of the filing of the note of issue. The New York State Unified Court System's E-Courts Web site⁴ displays a case's disposition deadline date once a party files the note of issue. Practitioners should note the case's disposition deadline date in their case-management systems. In Richmond County, the DCM part transfers the case by written order to the Jury Coordinating Part (JCP), formerly and in some counties still known as the Trial Assignment Part (TAP), at the conclusion of the pretrial conference.

The JCP supervises a host of practical aspects necessary to schedule a trial, such as attorneys', clients', and expert and lay witnesses' availability and whether subpoenaed records

have been received, to name a few. Justice Philip G. Minardo, Administrative Judge of the Supreme Court, Richmond County, presides over Staten Island's JCP on Monday mornings at the courthouse located at 18 Richmond Terrace, Room 210. Justice Minardo uses a three-appearance system to guide cases from the JCP to jury selection.

Explaining how a Supreme Court civil case proceeds to jury selection requires discussing individual JCP appearances. The transfer order the DCM court issues at the pretrial conference sets the case's first JCP appearance. Generally, the transfer order schedules the initial JCP appearance to a date about three months after a party has filed the note of issue. Upon the filing of the note of issue, practitioners can therefore approximate the date of the first JCP appearance. At the first appearance, the JCP assesses the remaining time before the disposition deadline date. The court also advises parties to exchange demands for authorizations that are required to be attached to subpoenas for certain records – such as medical records the party intends to use at trial – before or at this first JCP appearance. The JCP will usually adjourn jury selection for another three to four months. If the parties consent or if insufficient time remains before the 15-month disposition deadline expires, the court might order the second JCP appearance to be “direct select.”

Direct select requires the parties to check in with the JCP clerk, bypass the JCP calendar call, and proceed directly to jury selection on the date the court orders. Even a direct-select date ordered at the first JCP appearance, however, is usually about three to four months later. A direct select date is a date certain, and the court will grant an attorney's application to adjourn a direct-select date only on a showing of good cause, in the court's discretion.

If the second JCP appearance is not for direct select, the court expects the attorneys to give the court an available date or dates to begin jury selection. The court expects communication and active scheduling by the attorneys between the first and the second appearances. Attorneys should consult with each other, with their clients, and with their witnesses to determine potential jury-selection dates before the second JCP appearance. The JCP affords attorneys an opportunity to exert more control over the scheduling of the trial. The court usually accepts the attorneys' suggested date for jury selection if the date is about one to two months before the disposition deadline. The court usually also designates the attorneys' suggested date for direct select.

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Attorneys should be mindful of the courts' calendar in selecting the proposed jury selection date at the second JCP appearance. For example, attorneys should be aware that jury selection or assignment to an available trial part might take longer during the summer (July and August) and holiday seasons. Attorneys should also consider the inherent delay in the assignment of an available trial part after the attorneys have selected a jury, given the volume of cases and the limits of judicial resources. These factors, among others, can alter the attorneys' planned trial schedule. Attorneys should make allowances for these factors in selecting the jury selection date and scheduling witnesses.

Exerting control over the jury selection date at the second JCP appearance permits attorneys to optimize the ability to select an acceptable jury. Richmond County currently receives new potential jurors each Monday and Wednesday. Choosing a Monday or Wednesday gives attorneys the opportunity to examine prospective jurors whom other attorneys have not already questioned, rejected, and dismissed. At the second JCP appearance, attorneys can reserve a Monday or Wednesday for their jury selection months in advance. Doing so allows attorneys to voir dire potential jurors from a new jury pool.

The court is also available at the second JCP appearance to resolve any issue that might arise between the parties in trying to schedule the trial. If the parties are unable to select a date for jury selection at the second appearance, the court might adjourn the case again and set either another JCP appearance date (i.e., the third appearance), or the court might order a direct select date. The court's decision depends primarily on how much time remains before the case's disposition deadline expires.

At the third appearance, the case is usually approaching the disposition deadline. Often a third JCP appearance is necessary when the attorneys are unable to agree on a jury-selection date. At the third JCP appearance, the court is likely unilaterally to set the jury selection date and order direct select on that date. The court-selected date is a date certain. That date certain might require the attorneys, clients, and witnesses to rearrange their schedules on much shorter notice than if the parties had worked together to schedule the trial and minimize, if not wholly abate, scheduling conflicts.

Richmond County's JCP recognizes that even good-faith efforts by all involved might not succeed in scheduling a mutually acceptable jury-selection date. The JCP also recognizes that unforeseen events beyond anyone's control might prevent the case from proceeding to trial within 15

months after a litigant files a note of issue. Under these circumstances, the parties might have no choice but to request the court to mark the case "off" the JCP calendar. Once marked off the calendar, the case remains dormant until a party moves to restore it to the calendar.⁵ CPLR 3404 provides that a case "not restored within one year [of the court's marking it off], shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute."⁶ CPLR 3404 requires the court to restore the action to the calendar if a party has so moved the court within one year of the court's marking the case off calendar.⁷ Restoring the case to the calendar after one year is possible, although doing so requires exacting and persuasive proof and is subject to the trial court's discretion.⁸ The court can also restore cases to the calendar upon a stipulation executed by all the attorneys and filed within one year of the court's having marked the action off calendar.

If the JCP, whether or not at an attorney's request, marks a case off the JCP calendar, the attorneys should restore the case to the calendar only when they are ready to proceed to jury selection. The stipulation or motion to restore the case should contain a proposed date for jury selection. Practitioners "should not, both as a matter of practice and quite frankly to guard one's malpractice exposure, rely on either [their] adversary's willingness to stipulate to restore to the calendar, or the court's willingness to routinely grant leniency if this deadline is missed."⁹ Practitioners should request only sparingly that the case be marked off the JCP calendar. Doing so merely delays, and does not avoid, jury selection and the attendant scheduling issues, and it causes the attorneys, clients, and witnesses to incur further delay and expense.

Richmond County Supreme Court jury selection generally takes place at 130 Stuyvesant Place. A Judicial Hearing Officer (JHO) presides over the process. In some circumstances, jury selection takes place in the courtroom before the assigned trial judge. If jury selection proceeds under direct select, the attorneys must check in with the part clerk in Room 210, when all attorneys are present, and then go to 130 Stuyvesant. Once the attorneys have selected a jury, the attorneys must inform the JCP clerk of the selection. The JCP then assigns a trial part, depending on availability, and the trial part will contact the attorneys to schedule the trial and determine pretrial matters. Usually the trial part contacts the attorneys within a few days after jury selection. Practitioners should recognize and consider when scheduling witnesses that given the volume of cases proceeding to trial and the limited number of Richmond County judges,

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some delay will necessarily occur between the time the attorneys select a jury and the time the trial begins.

Richmond County's JCP places the scheduling of jury selection largely within the attorneys' control. The system requires that attorneys consider the time of actual trial, coordinating attorney, client, and witnesses' respective schedules, at least upon the filing of the note of issue – if not sooner. The attorneys' early and mutual scheduling of jury selection eliminates some of the stress inherent in trial practice and results in efficiently run trials by giving all involved adequate time to prepare.

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Endnotes

1. N.Y. Unif. Rules, Trial Cts. § 202.21(a).
2. N.Y. Unif. Rules, Trial Cts. § 202.26(a).
3. N.Y. Unif. Rules, Trial Cts. § 202.19(c)(1).

4. See <http://www.courts.state.ny.us/webcivil/ecourtsMain> (last visited Aug. 28, 2008).

5. See CPLR 3404.

6. *Id.*

7. See, e.g., *Hirsch v. Monroe Bus Corp.*, 24 A.D.3d 609, 609-10; 808 N.Y.S.2d 342, 343 (2d Dep't 2005) (mem.) (citing *Basetti v. Nour*, 287 A.D.2d 126, 134-35; 731 N.Y.S.2d 35, 41-42 (2d Dep't 2001)).

8. See, e.g., *Builders Apt. Corp. Condominium v. Gingold*, 37 A.D.3d 635, 635-36, 831 N.Y.S.2d 448, 449 (2d Dep't 2007) (mem.) (“A case stricken from the trial calendar pursuant to CPLR 3404 and subsequently dismissed after one year may be restored to the trial calendar provided that the plaintiff demonstrates a meritorious cause of action, a reasonable excuse for the delay in seeking restoration of the action to the trial calendar, a lack of intent to abandon the action, and a lack of prejudice to the defendant.”).

9. Howard Strongin; Expert Analysis (Lexis 2008) (examining CPLR 3404).