


[Account](#)


Try our [Advanced Search](#) for more refined results





[Search Law360](#)  
[Search News Only](#)  
[Search Cases Only](#)  
[Search PTAB Only](#)  
[Search TTAB Only](#)

[Appellate](#)
[Intellectual Property](#)
[Legal Industry](#)
[Expert Analysis](#)
[In-Depth](#)
[Tax Authority](#)
[Law360 UK](#)
[|| See all 61 sections](#)

[Advanced Search](#)

[Close](#)

- [Account](#)
- [My Account](#)
- [My Feeds and Alerts](#)
- [My Briefcase](#)
- [Newsletter Signup](#)
- [Help](#)
- [Log Out](#)
- [Products](#)
- [Lexis Advance](#)
- [Law360 In-Depth](#)
- [Law360 UK](#)
- [Law360 Updates](#)
- [Law360 Podcasts](#)
- [Beta Tools](#)
- [Track docs](#)
- [Track attorneys](#)
- [Track judges](#)
- [Adv. Search & Platform Tools](#)
- [Browse all sections](#)
- [Banking](#)
- [Bankruptcy](#)
- [Class Action](#)
- [Competition](#)
- [Employment](#)
- [Energy](#)
- [Expert Analysis](#)
- [Insurance](#)
- [Intellectual Property](#)
- [Product Liability](#)
- [Securities](#)
- [Rankings](#)
- [Data-Driven Lawyers](#)
- [Regional Powerhouses](#)
- [Law360's MVPs](#)
- [Glass Ceiling Report](#)
- [Global 20](#)
- [Law360 400](#)
- [Diversity Snapshot](#)
- [Practice Groups of the Year](#)
- [Rising Stars](#)
- [Titans of the Plaintiffs Bar](#)
- [Site Menu](#)
- [Join the Law360 team](#)
- [Search legal jobs](#)
- [Learn more about Law360](#)
- [Read testimonials](#)
- [Contact Law360](#)
- [Sign up for our newsletters](#)
- [Site Map](#)

NANOCELLECT - EXHIBIT 1060  
 NANOCELLECT BIOMEDICAL, INC v. CYTONOME/ST, LLC  
 IPR2020-00545, -00546, -00547, -00548, -00549, -00550, & -00551

- [Help](#)



Make sure you don't miss any Law360 breaking news.

[Download our plug-in for Chrome to get customizable, real-time news alerts](#)

Expert Analysis

## 2 Tested Alternatives To Unavoidable Court Delays

By *Shira Scheindlin*

By Shira Scheindlin June 4, 2020, 4:55 PM EDT

Law360 (June 4, 2020, 4:55 PM EDT) -- The nation's courts have now been closed for "nonessential" matters for nearly three months. All 50 states have closed their physical courts, although a growing number have been holding some hearings remotely, and some are cautiously reopening to handle "essential" matters live — such as criminal cases, domestic violence and other domestic disputes. The same is true of all of the federal district courts, the federal appellate courts and the [U.S. Supreme Court](#).

In addition to the use of virtual hearings in some criminal and civil matters, a smattering of courts have held bench trials in civil cases. But, as of the date of this article, I am aware of only one civil jury trial that was held in Texas. This was a one-day civil proceeding without a binding verdict, as part of a mediation process. The most noteworthy report of this trial was that one juror, attending the trial at home, wandered off during the trial to take a phone call. This first experience with remote jury trials only highlights the many problems that such trials will confront.



Shira Scheindlin

In criminal cases, the constitutional right of a defendant to confront his accuser may be violated by a virtual trial. The right to counsel might also be implicated by the difficulty of an incarcerated defendant being able to confer with counsel throughout the trial.

Even on the civil side, a jury would not be able to observe the interactions between counsel and client, or between counsel and witness, and jurors would not be able to readily discuss the case with the other jurors.

In addition, if the jurors were hearing the case from their homes, it would be very difficult to police their use of the internet or social media to obtain information from sources outside the virtual courtroom.

When the courts reopen, there will be a large backlog of civil matters, and particularly of matters in which the parties have requested a jury. Some courts have predicted that there will be no civil juries in New York until 2021, and there is also a real concern that even criminal juries will not be empaneled within the walls of the courthouse.

How to address the criminal case problem is beyond the purview of this article. Suffice it to say that a solution must and will be found for handling criminal cases in such a way as to provide a fair and speedy trial to all defendants. My focus here, however, is on the civil case backlog, and on the role alternative dispute resolution may play in these unprecedented times.

### Breaking a Backlog

Businesses need certainty, and in most cases long delays in court proceedings are bad for all parties. But there are alternate steps available for those seeking a resolution and closure in commercial disputes that are stuck in an unavoidable but lengthy court backlog.

One step, of course, is to attempt to settle the lawsuit directly. If this fails, mediation with the help of an experienced neutral can be an effective option.

Many mediations are now being held virtually and successfully. A mediator gives the parties an independent perspective on the dispute, has no dog in the fight, and is not beholden to any party. When the parties select a mediator that all sides respect and trust they are often able to reach a resolution, even when direct negotiations fail. The experience that the mediator brings to the process — either as a former judge or an experienced litigator — is invaluable to the parties in providing an informed prediction of how a court or jury might decide the case.

If neither of these steps prove effective, parties should also consider consenting to arbitration, which remains an option even after a case has been filed in court and proceeded through years of high-cost litigation.

Many providers of neutral services have taken steps to adapt to the virtual world during the past few months, when the courts have largely been unavailable to resolve commercial disputes, by publishing detailed protocols for holding virtual proceedings — be they mediations or arbitrations.

These protocols outline detailed procedures for handling witnesses and documents, working with court reporters and interpreters, accommodating parties and witnesses in various time zones, providing private virtual spaces for counsel and clients, and ensuring that the arbitrators have the opportunity to hear and evaluate witnesses using the best available technology.

They also offer a flexible approach to designing the process best suited to the particular dispute. Of special note, they also provide detailed instructions and guidance regarding preserving confidentiality and cybersecurity.

Courts have not yet developed such protocols, and many courts may not have the funds or personnel to ensure a smooth virtual process. This is one advantage of arbitration over court proceedings amid a severe case backlog.

### Taking Control

Another advantage of arbitration is that parties have far more control over the process than they would if the dispute were litigated in court.

Parties in an arbitration are not required to agree to be bound by the rules of any particular dispute resolution provider. They can, for example, choose a sole arbitrator or panel of arbitrators. They can decide the selection procedure and agree on whether there will be discovery, live testimony or post-hearing briefing. They can even determine the appellate process.

I am aware of a number of arbitrations where the parties designed their own process and achieved a speedy and efficient resolution. And, although buy-in has been slow, many virtual arbitrations and mediations have now been held throughout the country. Experienced arbitrators are ready to assist in designing a process that can be tailored to the needs of a particular dispute.

Mediation is also a voluntary process and parties, again, can design a process that suits their case.

I suggest that, given the realities of the current situation, parties in commercial disputes consider arbitration and mediation if they wish to resolve their disputes and return to the business of doing business.[1]

---

*Shira A. Scheindlin* is of counsel at [Stroock & Stroock & Lavan LLP](#), where she maintains a practice as an arbitrator, mediator and special master. She served as a judge of the [U.S. District Court for the Southern District of New York](#) for 22 years.

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Following are some additional resources on arbitral proceedings:

CPRADR: <https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings>.

ADR: <https://go.adr.org/covid-19-virtual-hearings.html>.

Chartered Institute of Arbitrators: [https://www.ciarb.org/media/9013/remote-hearingsguidance-note\\_final\\_140420.pdf](https://www.ciarb.org/media/9013/remote-hearingsguidance-note_final_140420.pdf).

ICC: <https://iccwbo.org/media-wall/news-speeches/icccourt-issues-covid-19-guidance-note-for-arbitral-proceedings/>.

The Seoul Protocol on Video Conferencing in International

Arbitration: <https://irpcdn.multiscreensite.com/ffb7ea18/files/uploaded/Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf>.

The International Council for Online Dispute Resolution: <https://icodr.org/guides/videoarb.pdf>.

For a reprint of this article, please contact [reprints@law360.com](mailto:reprints@law360.com).

[View comments](#)

0 Comments

Add Comment

More Expert Analysis

## Useful Tools & Links

- [Add to Briefcase](#)
- [Save to PDF & Print](#)
- [Rights/Reprints](#)
- [Editorial Contacts](#)

## Related Sections

- [Legal Industry](#)

## Law Firms

- [Stroock & Stroock](#)

## Companies

- [Chartered Institute of Arbitrators](#)

## Government Agencies

- [U.S. District Court for the Southern District of New York](#)
- [U.S. Supreme Court](#)

## Judge Analytics

powered by Lex Machina®

- [Shira A. Scheindlin](#)



#### [Law360 Reveals Titans Of The Plaintiffs Bar](#)

They've represented consumers, companies, and government entities, taken on Goliaths in industries ranging from aerospace to health care to finance to technology to sports, and won landmark victories on behalf of clients across the country.

#### Top 10 trending in Commercial Contracts

- 1 [High Court Takes Up Arbitration Carveout Question](#)
- 2 [Foley & Lardner Hit With \\$1.3M Fraud Suit By Client](#)
- 3 [Koch Affiliate Accused Of Bad Faith In \\$1B Methanol Project](#)
- 4 [Lessons On Force Majeure Application From Past Crises](#)
- 5 [Pa. Eatery Argues COVID-19 Insurance Exclusions Are Invalid](#)
- 6 [Construction Contract Tips For Allocating COVID-19 Risks](#)
- 7 [DePaul University Sued For Tuition Over COVID-19 Closures](#)
- 8 [The COVID-19 Arguments Cos. Are Making In M&A Litigation](#)
- 9 [Travelers Sues Qatar Airways Over \\$81M Cargo Damage](#)
- 10 [Choice Hotels Made \\$61M On 2019 Kickbacks, Hoteliers Say](#)

Hello! I'm Law360's automated support bot.

How can I help you today?

For example, you can type:

- I forgot my password
- I took a free trial but didn't get a verification email
- How do I sign up for a newsletter?

Ask a question!

x

Add this article to my briefcase

## 2 Tested Alternatives To Unavoidable Court Delays

New Folder Name - Required

OR SELECT FROM



[Add Now](#)

x

Sign up for our Commercial Contracts newsletter

You must correct or enter the following before you can sign up:

Please provide a professional email:

Select more newsletters to receive for free

Law360 takes your privacy seriously Please see our [Privacy Policy](#)

[Sign up now](#)

Thank You!