

Top-notch trial lawyers help launch new, free conciliation program

By: Kris Olson | January 21, 2021

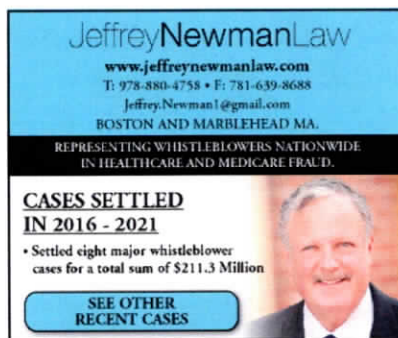
Some have learned how to bake bread. Others have taken up gardening or hiking.

But a group of elite Massachusetts trial attorneys has used the pandemic to become certified conciliators, which may prove invaluable as the court system begins to dig out from a backlog of suspended jury trials.

Ellen Epstein Cohen, vice chair of the Massachusetts chapter of the American College of Trial Lawyers, says the seed for the new Superior Court conciliation program, which officially launched on Jan. 19, was at least somewhat born out of restlessness early in the pandemic, as she and her fellow civil litigators began to see their trial dates might be pushed out — and not by a matter of months, but years.

Even once jury trials resumed, criminal proceedings would take precedence, given the constitutional issues at play.


“As a trial lawyer, you would like to be in court. And all of a sudden, you know that there are not going to be trials for a long time,” the Adler, Cohen, Harvey, Wakeman & Guekguezian partner says.



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Cohen and Chairman Peter L. Ettenberg had a vague sense that there might be a way to fill the suddenly cleared calendars of ACTL's membership and help the court system with its burgeoning backlog.

But the concept truly began to take form once Cohen had a chance virtual meeting with Michael J. Merriam, president of the Essex County Bar Association. As civil litigators on the advisory committee were helping the state plan for the resumption of jury trials, the subject of conciliation came up.

Merriam became a convert — and a certified conciliator himself — after seeing how much the form of alternative dispute resolution helped bring matters to a close as the managing attorney of 20 lawyers representing insurer Plymouth Rock Assurance.



As Merriam recalls, Cohen eagerly offered up ACTL's members, perhaps not fully realizing what she was volunteering them for.

But soon enough, Merriam had his "idols from the trial lawyer world" as pupils in his Zoom classroom.

One of the principal distinctions between conciliation and mediation is the court's heavier involvement in the former, he explains. But the skills to lead either process effectively are "frankly identical," he says.

ACTL membership is by invitation only, with trial lawyers needing to have demonstrated the highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality, according to its website.

Cohen notes that while she has never previously served as a mediator or conciliator, she has been on the other side of the table, representing a party in such proceedings hundreds of times, and the same is likely true for the other ACTL members.

Now, Cohen is part of a stable of nearly 30 top trial attorneys who stand ready to offer the benefit of their practice area expertise to litigants interested in exploring pre-trial resolution of their cases.

Participation by litigants is voluntary — they just need to ask for a referral to the program from the session clerk or the judge — and there is no cost, as the attorneys are donating their time to the program.

The litigants can pick anyone on a roster Merriam refers to as the "conciliation all-stars."

"If I had a medical malpractice case, Clyde Bergstresser would be a pretty good choice," he says.

The depth of experience possessed by the newly minted conciliators should prove to be quite a boon, Merriam predicts.

"The advantage is they can tell litigants, 'I had a case just like this 10 years ago,'" Merriam says.

Cohen anticipates that the cases will not be big, complicated ones, as parties in those can usually afford private mediation. In fact, a bigger challenge may be working productively with pro se parties who ask for conciliation, she notes. But it is a challenge the new conciliators have accepted.

The program will be administered through the Essex County Bar Association, which has had a successful conciliation program up and running since 1986.

Initially, the program is open to litigants in Essex, Middlesex, Norfolk and Worcester counties, but it could be expanded as the year progresses.

As Merriam notes, part of what will be making the program possible is the fuller appreciation of the benefits of Zoom and other videoconferencing technologies, which will minimize the burden on the volunteer conciliators.

"They can do these from the comfort of their own homes," Merriam says.

Cohen says there is "no time limit" for the program; it will continue as long as there is a need and the conciliators have the capacity to meet it.

Superior Court Chief Justice Judith Fabricant is grateful to have the help of both ACTL and the ECBA in providing

the training for and ongoing administration of the program.

"The extraordinary challenge of the pandemic will abate in time, and we will again offer timely jury trials to civil litigants who choose that method to resolve disputes," she says in an emailed statement. "Long after that happens, the Court and the public will continue to recognize the generosity and initiative of these outstanding lawyers, reflecting the highest traditions of the Massachusetts bar."



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