

"It's Getting Better All the Time": Best Practices in Presenting Delay Claims Bench Trial/Arbitration/Jury Trial

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Woke up, fell out of bed,
 Dragged a comb across my head
 Found my way downstairs and drank a cup,
 And looking up I noticed I was late."¹
 —The Beatles, "A Day in the Life"

A project manager who suddenly "noticed I was late" probably ought to polish a resume and find a new line of work. With schedules having more activities than there are holes in Blackburn, Lancashire,² pressure on the PM to follow the project construction schedule is as constant, and nearly as important, as the life-giving pressure imposed on

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the PM's pulmonary system by his right ventricle. Despite the critical role the project schedule plays in the success, or failure, of a project, delays in construction are commonplace and, more surprising, often ignored or not realized until it is too late to recover. And when recognized or timely realized, causation for the delay and its downstream impacts are often contested. Enter the scheduling consultant and lawyer, who are tasked with presenting a construction delay case to the court in a bench trial, to (hopefully) seasoned construction lawyers and/or consultants in arbitration, or—"well, I just had to laugh"—to a jury.

This article presents recommendations and best practices for presenting a construction delay claim in a bench trial, to an arbitral panel, and to a jury. The latter you should never do. Seriously.

Presentation of a Delay Case in a Bench Trial *The Practical Realities of the Modern Bench Trial*

"Do You Want to Know a Secret?"³ Every year, the Administrative Office of the United States Courts publishes a report of statistical information concerning the caseload of the federal courts for the previous 12-month period ending March 31.⁴ For the 12-month period ending March 31, 2016, the Administrative Office reported a 2.5% decline in civil case filings (274,552), and a less than 1% decline in criminal case filings (79,787).⁵ The total number of civil and criminal pending cases for this period was reported as 344,715 and 97,131, respectively. The nearly 450,000 pending civil and criminal cases are distributed among no more than 678 district judges and 551 full- or part-time magistrate judges, the maximum judgeships authorized by Congress. The federal district court caseload nationally is dwarfed by the civil and criminal caseloads of the state courts, for which comprehensive statistical caseload data is not readily available. These statistics demonstrate what every litigator already knows: that judges have clogged dockets and often lack the time and staff to adequately preside over the cases before them, a problem that has become even more pronounced in the last decade with budget cuts and court furloughs and closures.

Presenting a Complex Construction Delay Case in a Bench Trial

Because judges have such heavy caseloads, and because judges preside over criminal and civil cases of virtually