Chicago Daily Law Bulletin®

Serving the profession since 1854

September 16, 2020

Mandatory pre-trials won't prove effective in expediting cases

By Donald P. Eckler
Donald "Pat" Eckler is a partner at Pretzel & Stouffer focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of the Illinois Association of Defense Trial Counsel. His views are his own and not those of his firm or its clients.

"I have ordered you to trial; now I can't give you a trial, and you tell me you are not in the mood to settle the case. Now you listen to me. I want to you to settle this case, and I want to settle it right now. I don't have a functioning courthouse, I don't have jurors. You're not the mood to settle your case? Well you get in the mood to settle your case."

The attentive will recognize this as a line from Season 2, Episode 9, "The Deal" of Seinfeld when Jerry tells George some important news and Jerry does not want to provide details. Getting in the mood, this time to settle a case, is essentially what has now been ordered in the Law Division of the Circuit Court of Cook County for cases that had trial dates originally set after March 17.

If the goal of this latest order is to encourage cases to move along that had previously been set for trial, then the court needs to begin to consider, on a case-by-case basis, (1) resetting these cases for trial or (2) begin to prepare cases for trial by assigning trial judges and let those judges decide how to move the case toward resolution, either through ordering the pretrial materials to be submitted for argument and ruling, setting the matter for pretrial settlement conference, or both. Justice cannot be done with a cookie cutter as the general order suggests, but rather should be done by what is justice for each case. If the suggestion previously made in this space to use McCormick Place, the United Center, Wintrust Arena, and the over 200 theaters to conduct safe, in-person trials is not appealing or feasible, then trials should begin to be set for the ceremonial courtrooms of the Daley Center (1401, 1501, 2005, and 2403) that can accommodate trials safely.

Every good mediator or pre-trial judge begins the mediation or pretrial settlement conference with explaining their role to the parties who have not been through the process previously. These mediators explain that they are there to aid the parties in resolving the matter. The process, they often explain, is voluntary and whether there is a resolution is up to the parties, not the mediator. As the parties have agreed to the mediation and are paying for the mediator's time, the parties are likely to listen to the mediator's advice and evaluation of the strengths and weaknesses of the case.

A general order cannot make the parties agree to mediate, agree to a mediator, much less agree to settle a case. Like a surgeon with a bone saw in the era prior to modern medicine, judges have extremely crude tools to entice parties to discuss resolution of a case. Among the tools a judge has are setting a trial date, ruling (or threatening to rule) on dispositive motions, and ruling (or threatening to rule) on motions in limine. The recent order removes even the use of those tools from the pretrial judge because no new trial dates have been set, no prospect of trial dates being set is on the horizon, and the referral to a pretrial judge who is unlikely to be the motion judge, much less the trial judge, renders these pretrial judges essentially powerless to encourage settlement for parties who are obviously not otherwise interested in settling the case.

Settlement is often about leverage for one side or the other, often after, or right before, a critical ruling or event. The timing of a settlement conference is often critical to whether the settlement conference will be successful. Simply ordering parties to sit in a room with a pretrial judge when for the last six months they either have had unsuccessful settlement discussions or no settlement discussions at all, and nothing has materially changed to motivate settlement, is likely to be a waste of everyone's time. In professional liability cases, and medical malpractice cases in particular, the decision to be in a defense posture has been made long ago by the doctor, the insurer, or both, and unless there is a drastic change in circumstances based upon a pretrial ruling, the outcome of the jury selection process, or an unexpected good or bad performance of a witness at trial, that position is unlikely to change.

While Jerry got in the mood and told George what he wanted to know (kind of), he only did so because George was his lifelong best friend. Even the most persuasive pretrial judge, denied any of the powers of a motion or trial judge, is going to have a very difficult time having similar success. In order to relieve the backlog of cases, the effort spent on these pretrial settlement conferences would be better spent getting cases ready for trial and setting trial dates, and there is no reason that cannot be done.
