

It's been quite a year of change to the courts

By Donald P. Eckler

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One of the first tasks a young litigator has is how to find the courthouse and what to do once arrived. A familiarity with how decisions are made and how to practice develops over time as experience is gained in each jurisdiction, within divisions in each jurisdiction, before particular judges, and in various kinds of cases, that may, to one degree or another, reflect the rules as written or the practice in that place on that type of matter.

As procedure is so fundamental to litigation, even, or perhaps especially, experienced practitioners have been left befuddled with the rapidity and nature of the changes that have occurred, and it has felt to many like they are learning how to practice all over again.

Professor Richard Epstein draws a distinction between the original Constitution and the "prescriptive" Constitution, that is the Constitution as written and the long practices that have grown up around the Constitution and that may be contrary to the plain meaning of the text. Since mid-March, the challenges of practicing at distance have tested the written rules and the actual practice of law and the rules in Cook County and around the state (indeed the whole country) have resulted in a multitude of written and unwritten changes to adjust to the current reality.

Among the most important changes that have been instituted in Illinois and Cook County specifically are the following:

- March 13, suspension of jury trials after March 17 in Cook County.
- March 24, extension of filing deadlines in the Appellate Court and the Supreme Court.
- April 29, amendment to Supreme Court Rule 206(h) with regard to remote depositions by the removal of Section (h)(3) and the inclusion of a comment.
- May 20, the Supreme Court issued an order allowing for the reopening of Illinois courts effective June 1.
- May 22, the Supreme Court adopted Rule 45 and amends Rule 46 and 241 to allow for remote procedures.
- June 4, inclusion of a comment with regard to the removal of Section (h)(3) of Rule 206.
- June 5, in a compromise between business and labor, the Illinois General Assembly has passed HB2455, Senate Amendment 2 which modified the presumption with regard to COVID-19 and is retroactive in application, but has a sunset date of December 31; becomes Public Act 101-0633.

- July 2, order in the Law Division of the Circuit Court of Cook County and the creation of new case management orders that required in Category 2 cases the disclosure of audit trails, simultaneous disclosure of experts, and deadline to file dispositive motions prior to the disclosure of controlled experts.

- Aug. 26, order in the Law Division of the Circuit Court of Cook County requiring all cases that had been set for trial after March 17, to be mediated or pre-tried.

- Oct. 27, order on procedures for remote jury selection issued by the Supreme Court.

- Nov. 20, Rule 23 is revised to allow unpublished decisions issued after Jan. 1, 2021 to be used as persuasive authority.

- Dec. 16, the Supreme Court adopts Rule 44 and amends Rule 63 dealing with photography and the like of proceedings.

- Dec. 17, order continuing trials in the Law Division of the Circuit Court of Cook County until at least June 30, 2021 and that once trial restart, the parties will be given 30 days' notice, not the 60 days' notice in prior order.

This list is hardly exhaustive as it does not even touch on changes in other divisions of the Circuit Court of Cook County, circuit courts outside of Cook County, and the federal courts.

With the rule changes brought on by the adjustment to practice as a result of the pandemic there will be unwritten manners of practice that will emerge as we all learn how to practice again.

Apropos of such changes, the ABA Standing Committee on Ethics and Professional Responsibility has recently issued Formal Opinion 495, which concerns the question of the ability of lawyer to practice law in a state where they are licensed from a state in which they are not. Finding that so long as lawyers do not give the impression they are licensed to practice in the place where they are located, the committee did not find an ethical violation. As remote practice becomes more common for depositions, court appearances and hearings, and client meetings, lawyers may find themselves in Arizona and Florida for more than expert depositions during the winter.

This adjustment to a new way of practice is necessary, but also could lead to more efficient administration of justice in the long run once protocols are developed to conduct fair and just jury trials. It is the absence of jury trials that must be corrected, or this year of change will simply be change with little benefit to the civil justice system.