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Rising to the challenge of the trial backlog in Cook County

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The chief challenge of the coming year is how to move cases forward toward resolution and to clear the backlog of cases that were to be tried in the last nine months but have not been. Fortunately for civil law practitioners, the requirements of the Fifth and Sixth Amendments do not apply, but the obstacles to addressing this problem, which is increasing daily unabated, are nonetheless daunting and of a no less constitutional dimension in view of the Seventh Amendment and Art. I, Sec. 13 of the Illinois Constitution.

With the most recent general order, jury trials will likely not commence in Cook County until at least June 30, 2021. A Dec. 4 memorandum from the chief judge reporting the results of a survey that showed few potential jurors willing to appear in person and the inability of many potential jurors to participate remotely calls into question the court's ability to provide constitutionally acceptable venires whether for remote or in-person trials. Accordingly, without a significant change in the confidence of jurors to safely appear in person or provision of them means to participate remotely (even assuming that such remote trials are desirable and for reasons previously discussed here on Aug. 5, and Aug. 12, they are not), both of which seem unlikely, creativity by the bench, bar, and General Assembly is called for in order to address this problem.

It was suggested here on Sept. 16 that for mandatory settlement conferences to be successful, trial judges must be empowered to decide (or threaten to decide) on pretrial motions in order to change the dynamics of a case to encourage settlement. Further, in the wake of the *Hartley v. NAPCO* decision it was suggested on Dec. 16 that in order to aide in resolving entire cases and achieve the twin goals of encouraging settlement and properly allocating fault, the Joint Tortfeasor Contribution Act should be amended to 1) define factors for the courts to consider in determining the good faith of a settlement, 2) allow trial courts to consider of the value of the claim and liability of settling defendant and 3) allow trial courts to condition settlement on allocation of the settlement and dismissal of claims that could later be used to deprive parties of a setoff.

Even if those steps were taken, they are not likely to be enough. When faced with a similar backlog in the mid-1990's after mandatory settlement conferences failed, the monetary definition of what constituted a Law Division case was changed and, on paper, that seemed to alleviate the problem. There is reason to be skeptical of the constitutionality and practicality of increasing the monetary threshold of a case to $100,000 or $250,000 to be in Municipal Division and thereby pushing cases that were set for jury trial in the Law Division to mandatory arbitration and then trial if the award were rejected.

A variety of voluntary procedures could be employed both within the circuit court and through private entities such as bench trials, arbitrations, and non-binding bench trials and arbitrations. These procedures could be used in conjunction with high-low agreements and limited question specific interrogatory procedures to resolve specific issues in a particular dispute. However, they cannot be constitutionally mandated, but should be on the menu of options that the mandatory mediation judges are empowered to offer the parties to assist them in narrowing the issues and assist in resolving cases.

An additional tool to provide to the parties that should be considered by the General Assembly in its upcoming session is something akin to an offer of judgment rule like Federal Rule of Civil Procedure Rule 68. This rule provides for a judgment to be offered and if rejected and a more favorable result is obtained by the defendant, it allows the recovery of costs incurred from the date of the offer through the verdict. As recoverable costs are limited, this rule may be of little utility in encouraging settlement.

A more aggressive proposal and one that would run in both directions would be something along the lines of Fla. Stat. Sec. 768.79. That statute allows recovery by either party of its costs and reasonable attorneys' fees from the date the offer was served, if the outcome of the case is 25% better than the rejected offer. Whether such rules could be immediately effective would likely be an issue to be considered, but even if not, they could be effective in reducing a further pileup of cases even if they did not have an effect on the current cases in the backlog.

It is often claimed that "justice delayed is justice denied." In our constitutional system however, only criminal matters have a time frame within which they must be decided. As a result, when trials do start again, it is possible the precious resource of potential jurors will need to be allocated to criminal matters before civil matters can be tried. That being the case and under the current circumstances where jury trials are likely at least six months off, justice for both plaintiffs and defendants will likely not come through a jury trial except after a still very long wait. Accordingly, those options proposed above and other means should be considered to address this challenge that will define civil practice in Cook County for the next year and likely years to come.

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