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Trials should start, but only after changes that have advantaged plaintiffs

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It was heartening that on June 15, one of the most influential lawyers in the state called for jury trials to commence in Cook County.

In his column, Robert Clifford pointed out that "[a]cross the country, one sees the judicial systems opening up in unique ways — utilizing high school gymnasiums, local athletic stadiums and even hotel ballrooms that are being turned into makeshift courtrooms to accommodate social distancing and offer a greater sense of trust in the health and safety of jury trials. This type of creative thinking has been necessary for the justice system to try to continue to afford parties on both sides of the aisle some semblance of cases moving forward."

Following this column, on June 17, the new president of the Illinois Trial Lawyers Association stated that "[m]y primary goal as ITLA president is to assist both bench and bar in any way possible to achieve the rapid and safe resumption of jury trials throughout our state."

I agree with both and indeed, in this space on Aug. 5, 2020, Aug. 12, 2020, and Sept. 16, 2020, that is exactly what was urged. In those columns specific locations were identified that could be used to alleviate the backlog. Contrary to the claims of some, it was never the desire of the defense bar to delay trials as a result of the pandemic. In contrast, from the beginning of the pandemic, tactical advantage has been sought and, as articulated in this space last week, there is now a proposal to instantiate the "temporary" change to Rule 206 in a permanent modification to the Supreme Court rules.

However, instead of wielding their considerable influence to push for in-person trials over the past year, the plaintiffs' bar sought and obtained changes to the rules, laws and procedures to advantage their interests.

First, after having been rebuffed by Chief Judge Timothy C. Evans and Judge James P. Flannery Jr., the plaintiffs' bar successfully obtained a change to Rule 206 that was then immediately sought to be used to bar defense counsel from being physically present with their clients at deposition.

Then, the case management order in the Law Division was changed to, among other things, include simultaneous expert disclosures and disclosure of audit trails. The inclusion of the requirement for production of audit trails had nothing whatever to do with the conditions created by the pandemic. The impropriety of the blanket production of audit trails was articulated in this space on Sept. 2, 2020 and Sept. 9, 2020 and will only lead to further litigation that will slow — not speed — the resolution of litigation.

Next, mandatory pretrial conferences in the Law Division were ordered, a plan previously tried and failed when the civil trial backlog grew to epic proportions in the mid- to late 1980s. According to the Administrative

Office of the Illinois Courts, the average time to verdict for law jury cases in 1982 was 52 months. That rose to 84.2 months in 1989. When abandoned by Judge William D. Maddux in 1995 the delay had essentially returned to where it begun. Maddux imposed the Black Line System, that was almost universally reviled by practitioners, but the delay got as low as 35.1 months in 2011 after being in that range for about a decade. When Flannery was appointed in 2014, he scrapped the Black Line System and imposed one rule: firm trial dates. His plan needed time to take effect, but the time to verdict was reduced from 40.2 months in 2015 to 30.1 months in 2018. The evidence of this experience shows the only way to clear backlogs is with trial dates and that is what has been advocated in this space since last August.

Finally, the plaintiffs' bar successfully advocated for the passage of Senate Bill 72, which imposes prejudgment interest and no meaningful ability to make settlement offers to offset the interest that might have encouraged settlements to clear court dockets. This was an item long threatened in negotiations over civil justice issues and not some new idea uniquely suited to the conditions created by the pandemic.

After having gotten substantial changes to the civil justice system (and seeking more) only now are calls for jury trials to commence being voiced. There are two sides in every civil matter, both deserving of justice and trial may be the only way that is achieved, particularly in the most complex matters. Indeed, short of trial, settlements are often motivated by an impending trial and parties are forced to look at the reality of their case. To clear the current backlog, the sooner trial dates are set, the better for all involved.
