THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL QUARTERLY

President's Message

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"Once you learn to quit, it becomes a habit."
– Vince Lombardi

Jury trials are democracy in action and its lifeblood. We must strive to promote and protect our jury system as lawyers and citizens. If we quit trying cases it may become a habit that hurts us all.

I recently finished a lengthy jury trial. It was a knock-down-drag-out affair that lasted just under a month. There was very good lawyering on both sides (according to the court) and, at the end of the day, the jury got it right (at least in my view).* The jury wasn't right because it found for my client or saw the evidence the same way I did. The jury was right because it fulfilled the promise of the process. The jury weighed the facts, applied the law, and resolved a conflict between two parties. The jurors did their job as most jurors do (if given the chance). Thus, the system worked as it is designed and intended. The trial was time consuming, exhausting, and my client hated every second of it—right up until the judge read the verdict in its favor.

So what does it mean that the system worked? The jury trial not only resolved this particular conflict, clearly and definitively, but it helped resolve countless others simply because it occurred. Without the clear finality that a judgment at the end of a jury trial brings, there is no urgency for a litigant to work hard to resolve their case. There is no hammer at the end of the road threatening to nail an unbending participant. The promise of this hammer (for one side or the other, neither knowing for sure which) drives the system and reasonable resolution of claims that don't reach trial. The larger civil legal system works because trials happen. Unfortunately, trials are becoming the "white whale," the stuff of legend and lore.

We all know jury trials are too rare these days, especially for those who enjoy them. But more importantly they are too rare for the preservation of a healthy civil court system. Our system without civil jury trials is doomed to fail. A civil defense lawyer without trials is like a high school football player practicing for that Friday night football game that never comes. When you play the game you might take some lumps, but just imagine when you win! Never quit on the game.

As the venerable Vince Lombardi said: "Once you learn to quit, it becomes a habit." Settling a case is not quitting. Settlement is appropriate and preferable to our clients in more cases than it is not. Nevertheless, we as lawyers, particularly IDC defense lawyers, *must always be ready* to try our cases. We must in every case be ready, willing, and able to play the game. The system works because lawyers are capable of trying cases, litigants have faith in the system, and trials happen. This integral part of the system—trial—is being lost to the detriment of us all. The byproduct of a trial system, which brings finality outside the parties' control, is that it drives settlement for litigants who want some control over their own destiny and outcome of their cases. Making the system fair and unbiased strengthens it and makes it work quicker and better for the benefit of all litigants. This is a bedrock principle of the IDC.

The jury system is under attack from self-interested groups that seek to eliminate it or twist it so unrecognizably to their favor that it is not fair to all litigants. The jury system is battered from both extremes of the spectrum. One side

would favor no liability ever on those who may be liable, and the other, presses for constant and ever expanding liability on those that are not. These corrupting views are driven by a desire to achieve a particular outcome for self-benefit, not justice. These views are harmful to the health of our system. Litigants fear trial because they are not always perceived as fair, particularly in certain areas of our state.

When litigants, frequently defendants, believe the system is stacked against them, outcomes will be equally slanted and unjust. We know the system is not capable of handling trials for all, or even a substantial portion, of the cases filed. But the fact that any single case may be the one that goes to trial is what makes the system work. Without the potential, the real threat, of a matter being tried—*in a fair process to a fair result*—there is no reason for litigants to be realistic in their negotiations. Where a civil jury system is slanted (or perceived as slanted) reasonable resolution is often hard to achieve. A lack of reasonable resolution because one side either has, or is perceived to have, the upper hand is detrimental to that case and society. It is also a factor in driving business from the areas that are perceived as unjust. We must be ready to lead them through the process with confidence because we have been there and will gladly go there again.

As trials become rarer, so too are actually trial attorneys, to the detriment of the system. Trial attorneys are becoming a thing of the past. It is almost unheard of for young lawyers to actually try civil jury trials and more seasoned lawyers are getting fewer opportunities. How can an attorney appropriately advise a client on the consequences and potential outcomes of a trial if they have never actually been to trial (or at the very least have been only rarely)? As lawyers, this deficiency on our part does a disservice to our clients and the system. Clients over pay (or under recover) because their lawyer is not prepared, willing or capable of taking the case to trial. This is a bad result for everyone. It is a breakdown of the system. And, the breakdown is with us. Lawyers are not holding up our end of the bargain. Lawyers either haven't learned or haven't passed on the trial skills necessary for a participant in an adversarial civil trial system.

What can we do to prevent this lack of trials from becoming a habit? There is a limit to what we can do as lawyers but, having the confidence to play the game comes from experience and preparation. Every case must be prepared for trial from day one as opposed to being prepared for settlement. A case prepared for trial by a lawyer who is known as a capable trial lawyer will undoubtedly settle for a more reasonable number than ones that are not by those who are not. The simple truth is, if you are not known as a lawyer who can (or will) try a case, then your clients are probably settling their cases for more than the bottom dollar. It is akin to stepping into the gunfight at the OK Corral having never pulled your gun out before. We must do our part to be ready when the time comes and not allow the rarity of trials to make poor preparation a habit.

Of course, resolution of cases is often out of our hands and the majority of cases will settle regardless of our preparation and trial skill. Nevertheless, the IDC provides many opportunities for young and experienced lawyers to continue their education and improve their trial skills. We must continue to practice because we know that the game, the elusive trial, will be on the horizon.

In truth, our young lawyers are the key. We must continue to strive to not only better our own individual skills but do everything we can, in our personal practices and our organization, to facilitate the education and training of our young lawyers. A wonderful way for senior lawyers to preserve and hone their own skills is by mentoring and teaching these skills to younger lawyers. Opportunities exist for both through the IDC. The Trial Academy, Deposition Academy, and our mentoring program are only the formal tip of the iceberg. For a young lawyer, the resources of the IDC are invaluable and can provide a head start in their trial practice if time is made for it. Senior lawyers should view this as not only an opportunity to give back to the profession and strengthen the system by teaching others, but also as a way to preserve their good habits.

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The IDC will not quit on its goal to preserve and protect the civil jury system. Our members, IDC defense lawyers, must never quit trying cases and must prepare as if they will try cases. We must hone our craft through mentoring and educational opportunities so that none of us are unwilling to take a case to trial. By trying cases and appealing unjust results we can ensure that trial lawyers are not relics of the past. Most importantly, a commitment to trying cases or at least preparing as if a trial will happen, will serve our clients and the civil jury system itself.

* Of course this was the outcome or else I would have picked a different theme for this column like "ADR—Can't we all just get along?" Or "Give peace (mediation) a chance."

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.iadtc.org or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org.