

1-1-1981

The Law's Delays: Reforming Unnecessary Delay in Civil Litigation

Melvin M. Belli

Follow this and additional works at: <http://scholarship.law.nd.edu/jleg>

Recommended Citation

Belli, Melvin M. (1981) "The Law's Delays: Reforming Unnecessary Delay in Civil Litigation," *Journal of Legislation*: Vol. 8: Iss. 1, Article 2.

Available at: <http://scholarship.law.nd.edu/jleg/vol8/iss1/2>

This Article is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE LAW'S DELAYS: REFORMING UNNECESSARY DELAY IN CIVIL LITIGATION

*Melvin M. Belli**

INTRODUCTION

Trial delays are the bane of the American legal system. The system has become so backlogged that a typical plaintiff may have to wait five years for trial of a simple personal injury claim.¹ If there is an appeal, a final disposition of the case may occur ten years after plaintiff has been injured.

While many practitioners acknowledge the severity of the problem, little has been done to reduce unnecessary delays. This article appeals to legislators to address this crisis before the judicial system deteriorates to the point where laymen will be tempted to circumvent the legal process entirely.

Lawyers are so accustomed to the law's delays that they tend to disregard the message of the cliché, "Justice delayed is often justice denied." Consequently, they treat a delay in litigation as an occupational disease or as an inside joke. Yet, access to a fair hearing is not a joke. Most lawyers and judges familiar with civil or criminal trial practice agree that the most critical problem is delay in either trying or disposing of the cause.

A recent case brings that point into focus. A year ago I traveled to San Diego with witnesses, experts, and clients, having been assured that we would go to trial. The presiding judge practically laughed at my naïveté. The case was continued to a date two months later. On that date I appeared once again before the presiding judge. While not chiding my naïveté, he assigned the case to a "day certain" three months hence. Appearing with the litigants "three months hence," I was told, with a measure of sympathy, that the case would indeed be

* Senior partner of Belli, Choulos & Sayre, San Francisco and Los Angeles, California. B.A., University of California, 1929; LL.B., University of California, Boalt Hall School of Law, 1933.

The author would like to thank Allen P. Wilkinson and Paul Kleven, members of the California bar, for their assistance in the preparation of this article. This article is a project of the Belli Society.

1. ABA ACTION COMM. TO REDUCE COURT COSTS AND DELAY, REPORT. (Oct. 1980).

An attorney interested in psychology should consider comparing the description of the incident giving rise to a cause of action by a witness immediately after the incident occurred with the narrative supplied by the same witness after five years has passed. For an enlightening report of the psychology of memory and the problems of the passage of time on witness recollection, see Loftus, *The Eyewitness on Trial*, TRIAL, Oct. 1980, at 31. Professor Loftus describes tests on memory retention conducted at the University of Washington which suggest that the passage of time is a critical factor in witness reliability.

tried if I came back December 5. Nevertheless, the clerk took me aside and told me, "There's no chance that you will be heard on that date."

This case was four and one-half years old. Although the litigation was nearing California's mandatory five-year limit for dismissal, little could be done in the face of the bureaucracy's inertia. This experience at the San Diego Superior Court is neither novel nor extraordinary. It is not uncommon in United States courts for a case to be called four times before it is litigated. Indeed, in Chicago, New York, and other jurisdictions, a case initiated today would not be heard for four or five years. This delay will result even if both parties are ready for trial within six months.²

After a five-year delay, the judgment becomes more a reward to a diligent litigant than an award to a deserving victim. A worker, who is permanently incapacitated and has a family to support, can hardly afford to wait five years to receive an award. Hospital bills, doctor bills, house payments, food bills, and educational fees must be paid in the interim. If a claimant cannot be "carried" by his lawyer and is ineligible for governmental relief, he must discount his eventual award to an extent that would be usurious in a commercial transaction.

Such delay produces little respect for the American judicial system and raises questions about the quality of justice. How can a witness, assuming that he can be located, testify accurately after so many years of delay? Ignoring inaccuracies in proof, a plaintiff can obtain a judgment on paper after a five-year delay. The case is usually appealed, however, and in a jurisdiction such as the Ninth Circuit, an appeal is not decided for three to five years. During this period further changes occur not only in the plaintiff's everyday world but also in the legal world. By the time the appellate decision is reached, the legal climate could be completely different from that which prevailed at the time of trial. I am convinced that the time between filing a complaint and proceeding to trial could be reduced to less than one year. Bold steps are required, however, to halt the disintegration of the legal system.

THE CAUSES OF THE PROBLEM

It is manifestly unfair to require a litigant to wait ten years for a decision. The legal process, trial or appellate, need not consume so much time. Although trial delays have been recognized as a problem for years, little has been done to reverse the trend toward the decade-long lawsuit.³ It is not enough to observe that these delays are unnecessary. Legal scholars and respected practitioners should identify the causes of the current problems and then work to eliminate them.

The following four factors are principal causes of trial delays: (1)

2. T. CHURCH, *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* 94-95 (1978).

3. E. FRIESEN, JR., E. GALLAS & N. GALLAS, *MANAGING THE COURTS* 4 (1971) [hereinafter cited as FRIESEN].

the inefficient management of the court system by the judiciary; (2) a tremendous increase in litigation; (3) the philosophy of procrastination of many judges and lawyers; and (4) the priority of criminal over civil cases on the court calendar. In order for cases to be heard within a reasonable period of time, these four problems must be corrected.

Concern over trial delay was evident in the late Nineteenth and early Twentieth Centuries, when court delay was the subject of intermittent courts of inquiry. These inquiries effected changes in the rules of procedure, but addressed few of the other causes of delay.⁴ The situation has become progressively worse, as intervals between incident and judgment lengthen.⁵

The Judge as Administrator

In the middle of this century, a change occurred which transformed trial delay from a problem into a crisis.⁶ This was a new philosophy regarding the role of judges. The efficiency of the court system became as much a part of the judge's responsibility as the wise administration of justice.⁷ As one commentator noted:

In part, the new outlook is a complement to basic changes in procedural doctrine to permit easy pleading, easy amendment, and easy discovery, with attendant risks that a lawsuit may produce waste or abuse if left to the unsupervised control of the lawyers. In 1938, the Federal Rules of Civil Procedure had confirmed the coming of age of the new procedural philosophy. It was in that context that a decade or so later the custodians of American justice looked closely at the way the civil courts were discharging their duties—and recoiled.⁸

Sadly, few judges today are better administrators of the court system than were those of thirty-five years ago. Cases are delayed for little or no reason, and discovery is allowed to run amok, with only a pretense of control. Few efforts are made to employ modern management theories. As a result, the chaos continues.⁹

The Rise in Litigation

The need for competent judicial management of the court system either has been caused by or, at least, accompanied by an explosion of

4. Rosenberg, *The American Assembly, the Courts, the Public, and the Law Explosion*, 2 COURT CONGESTION: STATUS, CAUSES, AND PROPOSED REMEDIES 30 (1965).

5. *Id.*

6. *Id.* at 31.

7. FRIESEN, *supra* note 3, at 8. "The Institute of Judicial Administration which exists in an academic climate has from time to time contributed substantially to the growth of thought about the administration of the courts." *Id.*

8. Rosenberg, *supra* note 4, at 31.

9. FRIESEN, *supra* note 3, at 13. "Judges and lawyers—except where educational efforts have been expended, interpersonal skills developed, or unusual attributes possessed—are not particularly suited to deal with the problems of management. Their interests are channeled toward their professional training. This causes them to see legal problems where management problems exist and to apply legal-authoritarian solutions where management solutions are needed." *Id.*

litigation. From 1962 to 1970 the number of civil cases awaiting trial in California's eighteen largest counties practically doubled.¹⁰ Each year the number of civil cases filed in California exceeds the number of cases decided by the courts.¹¹

Federal courts have staggered under a similar increase in the number of cases filed. Statistics released by the Administrative Office of the United States Courts show the dramatic increase in litigation over the last ten years. In 1969, 87,321 civil cases were terminated; as of June 30, 1970, 93,207 civil cases were pending. At the end of 1979, 154,666 civil cases had been filed, an increase of 77.1% over the same period in 1970. During that same year, 143,323 civil cases were terminated; 177,805 civil cases were pending. Thus, over the nine-year period ending in 1979, although the number of civil cases terminated rose 78.2%, the number of civil cases pending increased 90.8%.¹²

While blaming the unnecessary litigiousness of the American people for trial delays provides a convenient scapegoat, this explanation merely begs the question. Despite obvious excesses, much of the increase in litigation results from belated judicial or legislative recognition of valid causes of action. Contingency fees and more realistic appraisals of anachronisms such as privity of contract have made it possible for almost anyone to "have a day in court." Most of these cases are legitimate, and the judicial system must adapt to the volume of cases litigated.

Attitudes of Lawyers and Judges

The increase in litigation undoubtedly exacerbated the problem of trial delays, but that increase is not the crux of the issue. As the National Center for State Courts states, the "single most important factor in delay is not lack of judges, number of cases per judge or use of a particular calendaring system—it is the climate in which judges and lawyers operate; they become accustomed to a particular pace and ex-

10. [1971] REPORT OF AD. OFFICE OF CAL. CTS. 100-26. The 1980 Report of the Judicial Council of California indicates that for the fifth successive year, some of the metropolitan superior courts reported a worsening of the conditions of civil calendars. [1980] REPORT OF THE JUD. COUNCIL OF CAL.
11. *Id.* at 100-26. See Doyle, *Battle of the Backlog*, COURT CONGESTION AND DELAY SELECTED READINGS 92 (G. Winters ed. 1971) [hereinafter cited as SELECTED READINGS]. Doyle discusses the backlog problem in Colorado and the Colorado Assembly's attempt to solve the problem. Colorado has created a Judicial Department in charge of improving the administration of justice in Colorado. Doyle suggests once a long period of waiting is an established fact, the filing rate increases and many reviews are filed for strategic purposes. Delay serves to improve the bargaining power of the parties. Thus the battle of the backlog becomes even more a losing fight by reason of the existence of a bulk of undecided cases. *Id.* at 93.
12. [1979] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 4-7. It should be noted the same does not hold true for criminal cases. For the year preceeding 1970, 39,959 criminal cases were commenced, 36,319 were terminated with 20,910 pending. For the year ending 1979, 32,688 criminal cases were filed, 33,411 were terminated with 15,124 pending. The implementation of the Speedy Trial Act resulted in an increased rate of dispositions.

pectations."¹³

Most trial lawyers procrastinate by nature. When a case comes into a lawyer's office, an automatic response is to file a stipulation for an extension of time. The case file then lies on the lawyer's desk while discovery and investigation is delayed for months, to the detriment of the case and ultimately of the client. Once the trial lawyer has been retained, he may fail to work on the case as assiduously as he had worked to secure it. Furthermore, judges (*nisi prius* and appellate) often adhere to the same philosophy of lethargy, which must be changed before we can cut through the Gordian knot of trial delays.

The problem, at least on the part of plaintiff's lawyers, is one of attitude rather than of reality. Even the most complex case can be prepared for trial within a year. The average case can be fully prepared within six months.¹⁴ There is no need for delay at the client's expense. Indeed, as the end of a mandatory dismissal period approaches, a case is tried with alacrity. Few cases in California are extended beyond the five-year period.

Economic reality often makes it beneficial for defense attorneys to delay trial as long as possible. Even if the plaintiff's counsel is diligent, the defendant usually attempts to blunt the opponent's initiative, and judges are generally quite amenable to the postponement. Any solution to the problem of trial delays must make this delay unattractive to the defendant as well as to the plaintiff.

Civil versus Criminal Cases

When civil litigants are prepared to go to trial they are often thwarted, even after they enter the courtroom. Pressing criminal proceedings, made more urgent by such legislative enactments as the Speedy Trial Act,¹⁵ routinely force civil litigants to postpone their trials. Any criminal matter automatically takes precedence over a civil suit. Litigants who are prepared, even eager for trial, must await disposition of the most trivial criminal matter. This results in further delay.

Unfortunately, the framers of the Constitution were unable to predict society's evolution. Had they been more prescient, they would have recognized the importance of having the courts negotiate peace and common sense in the daily living patterns of the citizenry. Prompt resolution of civil disputes has become as important as the efficient dispatch of criminal justice. Regrettably, the Constitution does not guarantee that in all civil litigation, the parties shall enjoy a right to a speedy and public trial.

13. Hufstедler & Nejelski, *ABA Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 969 (1980).

14. FRIESEN, *supra* note 3, at 63. The "rule of thumb" norm of six months reflects the period that is commonly considered adequate for preparation of most cases.

15. 18 U.S.C.A. §§ 3162-3174 (West Supp. 1980).

SUGGESTIONS FOR REFORM

The causes of trial delay appear, therefore, to be fourfold: inefficient judicial administration; a vast increase in litigation; the attitude of lawyers, fostered by incentives for defense lawyers to delay; and, finally, the priority of criminal over civil matters. In order to relieve the resulting congestion, procedural changes must be effected in the judicial system. Broad and innovative reforms, reinforced by effective sanctions, are necessary. I recommend four proposals as solutions:

- (1) Appointment of surrogate judges (auditors, referees, judges *pro tempore*) to handle certain cases;
- (2) The imposition of interest accruing retroactively from the time of incident, rather than from time of judgment, to remove defendants' incentives to delay;
- (3) The elevation of civil cases to parity with criminal cases so that civil cases will not be usurped; and
- (4) A requirement that judges set definite trial dates and honor them, so that litigation cannot be delayed by one of the attorneys.

Surrogate Judges

While people must be able to protect their legal rights, adequate protection does not necessarily require adjudication under formal trial procedure. Many cases do not justify such a significant investment of time and resources.

We should draft court rules to provide either for compulsory arbitration or for some other quasi-judicial disposition of certain lawsuits. New York initiated a system in which suits for damages of less than a statutorily determined amount must be submitted to arbitration. The arbitrator decides these smaller cases; any dissatisfied litigant can return to court to obtain a trial by jury. Only 5% of the litigants in Bronx, Broome, Monroe, and Schenectady Counties of New York requested a trial after pursuing the arbitration procedure.¹⁶

The concept of relying upon substitute judges promises relief from court delays, whether or not arbitration proceedings are required. Massachusetts has pioneered the use of auditors or referees in lieu of judges in motor vehicle tort cases.¹⁷ Under Massachusetts practice, the court-appointed auditor hears and reports on a variety of cases. Auditors are practicing attorneys who take time from their practice to serve in that capacity. They report their findings of facts and conclusions of law to the court. The parties may accept the auditor's report as final or request a trial. If the case goes to trial, the auditor's findings are *prima facie* evidence and may be read to the jury.

16. Press release of State of New York Court of Appeals in Albany, N.Y. (Feb. 7, 1980). The New York Plan also calls for shorter vacations and increased bench time for judges and for expanded arbitration of civil cases involving \$6,000 or less to 17 additional counties.

17. Allessandroni, *Arbitrators, Auditors, Referees, Pro-Tem Judges*, in *SELECTED READINGS*, *supra* note 11, at 164.

Appointing *pro tempore* judges from the ranks of commissioners, retired judges, and lawyers is another variation of this theme. Trial judges, who cannot hear the case on the appointed trial date could assign it to a "*pro tem*" judge. This judge would be empowered to make a ruling subject only to the normal avenues of appeal.

The use of surrogate judges would greatly reduce the pressures on trial judges. It is axiomatic that more traditional judges must be appointed as the number of claims continues to rise. Substitute judges, however, should be able to handle many simple suits, allowing trial judges to adjudicate more effectively those cases which require a trial judge's expertise.

Delay by Counsel

Both plaintiffs' and defendants' counsel tend to delay trial, albeit for different reasons. Often delays are caused by mere laziness on the part of plaintiff's attorney. To combat this, I suggest that the 40,000 members of the American Trial Lawyers Association pledge that they will try their cases when called and that they will not continue cases for any reason. To enforce this pledge, the rules of professional conduct could be amended to permit imposition of sanctions by the court in clear cases of delay by attorneys. Given these incentives, plaintiffs' attorneys would be much more likely to pursue their cause diligently.

Any plaintiff's attorney who unnecessarily delays a trial is almost certainly doing his client a disservice. Often, counsel will plead impossibility: the office's only trial lawyer is occupied elsewhere. Because it is so important to speed up court calendars, a trial lawyer who is unavailable when his case is called should substitute someone else in the office. If that is unavailing, an outside lawyer should be hired. The cost to both attorney and client would be returned in increased and speedy litigation.

Defense counsel, on the other hand, often serves his client best by delaying trial indefinitely. Delay not only exhausts plaintiff's resources but also allows defendant to keep his money and draw interest from it. To counter this incentive for delay, we ought to follow the Alaska rule: interest on any judgment accrues from the date of the incident, rather than the date of judgment.¹⁸ Alaska provides for eight percent interest on a judgment from the date of injury. I also suggest that the rate of interest be raised to at least ten percent, with a five percent surcharge if the judgment was higher than the settlement offer.

18. *State v. Phillips*, 470 P.2d 266 (Alaska 1970). As the court explains, "For a cause of action to accrue, one party must have breached a duty to the other, and the other must have been injured at the moment the cause of action occurred; the injured party was entitled to be left whole and became immediately entitled to be made whole. Whenever any cause of action accrues, therefore, the amount later adjudicated as damages is immediately 'due'. . . . All damages then, whether liquidated or unliquidated, pecuniary or nonpecuniary, should carry interest from the time the cause of action accrues, unless for some reason peculiar to an individual case such an award of interest would do an injustice." *Id.* at 274.

Today, an insurance company which must pay a million dollar award can earn the amount of that award, if it can hold the client's money during protracted litigation. Thus, the insurance company obviously seeks postponement of trial. Its desire to delay would wane considerably if its ultimate liability were increasing at the rate of fifteen percent. In many tort suits, this reform alone might end the problem of trial delays.

Parity of Civil Suits with Criminal Cases

Throughout the United States, all action in a civil suit must halt whenever a criminal action comes before the court. Recently, I tried a case in federal court in Orlando, Florida. One of the witnesses had been flown in from Australia at a cost of \$5000 per day. On the "day definite" for trial, I was told that a criminal case had usurped our place on the calendar. We waited over six months before the second calling. By that time I was unable to try the case; other counsel handled the litigation.

Civil cases should have equal status with criminal cases. Generations of lawyers have respected the slogan, "human rights above property rights," but we must recognize that in many cases property rights—that is, rights adjudicated in civil suits—are just as important as speedy criminal justice.

A modern bail bond system could help insure a workable court docket. Bail should be used in conjunction with more extensive personal recognizance programs. These two alternatives, when used as they were intended, would prevent the criminal defendant from usurping the civil litigant's place on the trial calendar.

Efficient Administration of the Courts

Mandatory Pretrial and Settlement Conferences. The most effective way to avoid trial delays is to insure that only cases requiring trial ever reach that stage. Mandatory pretrial conferences held within ninety days after the suit is filed are an excellent means of avoiding senseless litigation. Even if settlement is not the main objective of the conference, it is often a result of the conference. This practice also saves court time by shortening those trials that subsequently take place. The conference expedites the ensuing trial by eliminating surprise, sharpening issues, and increasing knowledge of the case. For these reasons, some legal scholars consider the pretrial conference the salvation of the judicial system in the Twentieth Century.¹⁹

19. Wright, "The Pretrial Conference," *Seminar on Practice and Procedure*, 28 F.R.D. 141, 142 (1960). Wright advocates pretrial as "one of the greatest steps forward, but he warns of the burden that is now placed on the pretrial conference. Pretrial was intended to make cases easier, to save lawyers' time, to save litigants' expense. It wasn't intended that pretrial be just another layer on the judicial cake [P]retrial was intended to eliminate some of the paper work that goes into litigation, into the preparation of a lawsuit [U]nless some

Other commentators, however, view the conference as a waste of time, another procedural hoop for counsel to leap through before reaching trial. They point out that local custom often treats these conferences as superfluous exercises attended by junior associates who lack authority to enter into binding stipulations. Thus, the pretrial conference can be a senseless duplication of effort for which the client must pay.²⁰

Pretrial conferences need not, however, be mere formalities. In New York City's Conference and Assignment System, pretrial conferences have played an integral part in court reform.²¹ Inaugurated in February 1970, this system assigns teams of three judges per caseload. One judge serves as Conference Judge, a rotating position. The other judges share the responsibility of hearing the civil case. Every team disposes of 450 to 750 cases each month.²²

The Conference Judge calls between twenty-five and fifty cases per day, four days a week. His goal is to settle, adjust, or otherwise dispose of sixty percent to seventy percent of these cases. The remaining cases are either held for further conference or assigned for immediate trial to one of the two assignment judges on the team. This system stresses that "now" is the time for settlement, rather than "later." It is the court's business to clear its calendar. Counsel on either side do not have the prerogative to delay.

Critics of the system say that New York's "crash" program pressures settlements, that it is a method bred of despair. They claim that it is unfair to both parties and, indeed, makes the court a marketplace for bargaining and chaffering.²³ I am convinced, however, that such a system could decrease court delay. A specially trained Judicial Administrator could supervise the progress of civil litigation within any court system. The administrator would assign cases to specific conference and assignment teams based on their expertise in various stages and types of litigation. For example, one team might be expert at settlement conferences in divorce cases; another might be more experienced in pretrial conferences in personal injury cases. The civil litigant could expect his case to conclude within a reasonable time. The problem lies in enforcement of such a solution: how does one insure that attorneys and parties to a civil suit do their utmost to settle at the pretrial conference?

In 1972 California's Select Committee on Trial Court Delay recom-

effort is made to bring the pretrial back in focus, it is going to suffer the same fate as common-law pleadings." *Id.* at 142.

20. See, e.g., M. ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE: A CONTROLLED TEST IN PERSONAL INJURY LITIGATION* 12 (1964).

21. *New York Breaks Court Backlog*, in *SELECTED READINGS*, *supra* note 11, at 136. "The civil court of the City of New York has had dramatic result in cutting delay. Not only has there been a considerable decrease in the courts' pending caseload, but there also has been a sharp drop in the number of months it takes to bring a case to trial."

22. *Id.* at 136.

23. Oleck, *What to Do about Delay in Court*, in *SELECTED READINGS*, *supra* note 11, at 73.

mended a method producing effective pretrial conferences.²⁴ In the nine years since it was proposed, no action has been taken on the Committee's recommendation. As a result, the congestion in California courts has continued to increase.

The Committee's proposal is not unique. It uses substantial monetary incentives to insure that all parties to an action enter the pretrial settlement negotiations in good faith. The Committee suggested that

[a] new section should be added to the Code of Civil Procedure providing that all civil actions in the Superior Court in which money damages are sought, the parties shall enter into good faith pretrial settlement negotiations accompanied by written demands and offers filed with the clerk of the court, and that after trial these demands and offers shall be presented to the court, which may in its discretion after a hearing award to any party, or apportion between the parties, all costs, attorneys' fees, expert witnesses' fees, or any of these, which were incurred after the demands and offers were filed, as well as interest on the amount of the judgment.²⁵

After conclusion of a case, the court could analyze all aspects of the case, whether at the pretrial and trial stages. As the Committee explained,

After the trial, the trial judge examines the demand, the offer, the judgment rendered, the evidence heard at the trial, the proceedings in general, the costs and fees incurred by the parties, and the settlement negotiations undertaken. If the court finds, based on its examination of these items, that the defendant was unreasonable or acting in bad faith in making his offer, the court may then order the defendant to pay the plaintiff's costs, attorneys' fees, and expert witness' fees which were incurred after a specified date, or any portion thereof, along with interest on the amount of the judgment from any date after the complaint was filed.²⁶

Pretrial Procedure and Discovery Modifications. Assuming that the case cannot be settled at the pretrial conference, a timetable must be established for the litigation. At the outset, it would be quite valuable for courts to differentiate between simple and complex cases (for example, slip and fall cases versus antitrust matters). Although complex litigation cannot be completed within six months, the average personal injury case can easily be accommodated within that time. These simple cases should be processed more rapidly, with shorter periods between each successive stage of litigation. In this way, those cases which require time will receive it, while those that do not will be disposed of quickly and efficiently.²⁷

24. CAL. SELECT COMM. ON TRIAL COURT DELAY, REP. 6 (1972).

25. *Id.* at 44.

26. *Id.* at 47.

27. SONOMA COUNTY SUPERIOR COURT ANN. REP. (1979) (available upon request from Superior Court, County of Sonoma, 200-J Hall of Justice, Santa Rosa, California 95401). The Sonoma County Court system consists of: a vigorous settlement program, requiring all long

Each phase of the litigation is slowed considerably by the necessity of arguing motions in court. This process could be streamlined in civil cases by arguing motions in telephone conference calls. The judge could make tentative ruling over the telephone after papers had been filed. If the ruling is not contested, it would become final. This practice has been adopted, with some success, in at least one California county.²⁸

The litigation process could be further shortened by imposing limitations on the number of pages filed or issues addressed in memoranda and trial briefs. Because judges are often overwhelmed by the supporting papers filed in many cases, a restriction on verbiage in required pleadings would help to eliminate or shorten delays. Indeed, judges might find that they have time to consider concise legal arguments presented by diligent counsel. The purpose of filing trial briefs would be to sharpen issues, rather than to obfuscate them.

A significant cause of court delay is abuse of discovery procedures.²⁹ To avoid this egregious waste of time and energy, the court should limit the number of interrogatories, depositions, and requests for admissions in a typical lawsuit. In an extraordinary case a petition might be granted to relax these limits, but generally the parties would observe the limitation on discovery. In addition, at a certain point following the filing of the suit, a time limit should be placed on all discovery proceedings. Again, exceptions would be granted in exceptional cases, but discovery would be completed within a set period of time in the majority of cases.

To make these constraints effective, I suggest imposition of stiff penalties for the improper use of discovery. Much discovery is merely a tactic for delay or harassment. If a lawyer chooses to employ such tactics, he should be prepared to suffer certain consequences. Court delays will never be reduced if discovery can be used for purposes other than its intended one, the acquisition of information necessary to conduct a lawsuit.

Definite Trial Dates. With the possible exception of imposing interest on awards, the most effective procedure for accelerating trial dates

cause civil cases to undergo settlement conferences; restrictions on continuances; and mandatory appearance of parties at settlement conferences. The backlog of short cases was reduced from 330 cases in 1978, with a five-month period between memoranda to "set for trial" and trial, to a backlog of 94 cases in 1979 with a 45-day period between memoranda to "set for trial" and trial. Mandatory arbitration is now required for all civil cases with a value less than \$15,000. The program is expected to remove up to 30% of the cases from the court's long-cause civil calendar.

28. Hofstедler & Nejelski, *supra* note 13, at 967. "Los Angeles Superior Court Judge August Goebel has combined telephone motions with a tentative ruling procedure to reduce in-court argument substantially. In more than seventy percent of cases having an oral argument, the telephone is used by one or more parties. The telephone is used similarly in Baltimore, Md., United States District Court in Spokane, Wash., Court of Appeals, Division III."
29. *Id.* "Existing rules deal with discovery abuse, but recent studies have confirmed the general feeling that lawyers are reluctant to ask for and judges are reluctant to use these sanctions."

is to require courts to both set and keep definite trial dates. On the date for trial, plaintiff's and defendant's counsel (or their substitutes, if necessary) would be required to appear. The judge could not delay the case, in the absence of a substantial showing of prejudice. Presiding judges should place severe restrictions on all continuances. If such a rigid system is to function effectively, institution of a system of substitute judges, as well as a requirement for substitute attorneys, is a necessity.

Bifurcated Trials. Under a bifurcated trial procedure, the issues of liability and damage are tried separately. If the defendant obtains a verdict on the issue of liability, there is no need to present evidence regarding the amount of damages.

The United States District Court for the Northern District of Illinois used this split trial procedure for the years 1960-61.³⁰ It was found that juries brought in verdicts of no liability in about forty percent of the personal injury trials. By employing the split trial procedure, the district court saved the amount of time required to prove the amount of damages in that percentage of trials.

Some commentators consider split trials a powerful remedy for court congestion.³¹ A bifurcated appellate system may also reduce delays in the disposition of civil cases. Texas has such an appellate system, with a Court of Criminal Appeals and a separate Court of Civil Appeals.³² The advantage of this bifurcated system is that the appeal of a civil case can move at its own pace, without yielding to the precedence normally given criminal cases.

Computer-based Information Systems. Finally, inadequate court information and communication techniques have contributed to the backlog in our civil courts. The application of computer-based systems for handling judicial information has revolutionized court procedures in jurisdictions such as Chicago, Philadelphia, and Los Angeles County.³³ The computer's ability to store, process, transmit, and docu-

30. Rosenberg, *supra* note 4, at 46.

31. Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963).

Separation of issues will save, on the average, about 20 percent of the time that would be required if these cases were tried under traditional rules. This savings derives from the fact that in many cases separation makes the litigation of damages unnecessary. This group includes all cases in which liability is denied, but also the majority of cases in which liability is affirmed, because two out of three of these cases are likely to be settled without trial of the damage issue. There is no evidence that this savings is offset by a change in the settlement ratio prior to trial, in the frequency of jury waivers, or in the proportion of hung juries, any one of which factors—if affected—could increase the courts' trial load.

Id. at 1624.

32. Todd, *Appellate Delay in the Criminal Courts of Texas*, 37 TEX. B.J. 454 (1974).

33. Blaine, *Computer-Based Information Systems Can Help Solve Urban Court Problems*, in SELECTED READINGS, *supra* note 11, at 1 & 79. Blaine also suggests that "[t]he changes that

ment large amounts of data at great speed is highly adaptable to the high-volume, complex administration of urban courts.

Such a computer system would facilitate the processing of cases and thus minimize delay in the following areas:

(a) **Judicial Information System:** The system would process judicial data promptly and make it immediately available to judge-administrators for evaluation and action.

(b) **Indexing:** As each civil case is opened, the computer automatically generates a unique index listing all relevant information.

(c) **Docketing:** When a civil suit is filed, required information is recorded at each stage through ultimate disposition. Data made available in this manner could include status of the case, type of trial requested, type of case, names of attorneys, continuances of motions, data on settlement negotiations, demands by plaintiff, and offers by defendant.

(d) **Scheduling:** The computer helps maintain a conflict-free assignment schedule. Information is fed in daily and coordinated with data on attorney commitments and on the status of current cases. As a result, more cases are called and settled.

(e) **Jury Management:** Names for jury duty are taken from county records and loaded into the data bank. This master list is run against lists of persons generally not used as jurors to produce a mailing list of eligible jurors.

(f) **General Accounting:** The judicial information system routinely handles all calculations necessary for general accounting functions. It provides the necessary controls on the collection and disbursement of the millions of dollars received annually in satisfaction of litigant claims and support payments. Trusts set up under computers can also manage trusts set up under the court's jurisdiction.

The accounting functions involve such operations as the allocation of expenses and the proper assignment of interest accruals. The computer tracks these functions from one trust account to another. Audit trails are enmeshed in the tracking process. The allocation and disbursement of monies received are highlighted as they pass through the various accounting statements of the trust, such as the income statement.³⁴

CONCLUSION

Bold steps must be taken to eliminate the unnecessary delay in civil litigation. Congested court dockets, delaying tactics of counsel, and inertia in the legal system have worked great hardships for citizens whose injuries our court system was designed to recompense. At present, the system only rewards the culpable, at the expense of the deserving. In order to remedy this stagnation, the article has proposed four reforms:

have created great problems for our judicial system can be matched by the changes implied in our new technologies." *Id.* at 138.

34. *Id.* at 179.

first, the development of surrogate judges and referees to handle certain matters; second, the imposition of interest, retroactive to the incident giving rise to the cause of action; third, the elevation of certain civil cases to parity with criminal cases; and fourth, a requirement that judges set definite trial dates and honor them. The use of modern computer-based administrative techniques will also help to unburden the court systems. By adapting these proposed reforms, the American legal system can once again provide speedy and effective relief to its civil litigants.