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American Bar Association Action Commission to Reduce Court Costs and Delay

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REDUCING COURT COSTS AND DELAY: AN OVERVIEW

Leonard S. Janofsky*

The American legal system is unparalleled in its efforts to protect individual rights. A citizen's access to the legal system provides the basis for our government of laws. Yet, it must be recognized that serious problems confront the American system and persist despite a long history of efforts at reform by the organized bar, the judiciary, and other interested parties.¹ Years of delay exist in many of the nation's busiest courts. The cost of maintaining or defending a suit has grown at an alarming rate. These infamous twin evils — delay and cost — do more than belie the standard of access; they contribute to a climate of cynicism and mistrust of the legal profession, the judiciary, and our judicial system.²

Cost and delay are closely related factors. On the one hand, reduced litigation costs may encourage more cases to be brought to the court, crowding dockets and tending to increase delays. On the other hand, delays in the court generally mean multiple preparations, preserving testimony and evidence, and increasing the costs to litigants.

Long delays are the norm for both civil and criminal cases, particularly in the larger metropolitan areas.³ Even when speedy trial laws provide for the dismissal of felony cases that remain untried after ninety days, felony trials are routinely delayed for six months or more. Civil cases bear the brunt of the statutory priority given to criminal cases; many civil cases go untried more than three years after they are filed. The right of access to the courts implies that a matter will be resolved

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1. Among the many entities operating at the national level in addition to the American Bar Association are the American Judicature Society, National Center for State Courts, Institute for Court Management, Institute for Judicial Administration, Federal Judicial Center, Conference of Chief Justices, and the Conference of State Court Administrators.

2. A 1978 poll rating public confidence in major American institutions found law firms and the courts at the bottom, along with Congress, advertising agencies and labor unions. See generally Yankelovich, Skelly & White, Inc., *Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders*, in *THE PUBLIC IMAGE OF THE COURTS* (1978).

3. See Sipes, *The Journey Toward Delay Reduction in Trial Courts: A Traveler's Report*, *STATE CT. J.*, Spring 1982, at 5, 33-37 (setting forth criminal and civil disposition time measures for more than 30 courts).

within a reasonable time after its initiation in the court.⁴ Lengthy delays, therefore, are fundamentally incompatible with the continued existence of an effective justice system.

As a practical matter, high costs operate as a barrier to the legal process for many citizens. Current census reports indicate that 65% of all American families have incomes of less than \$25,000 a year.⁵ Thus, unless a claim is covered by insurance or handled on a contingent fee basis, the average person can ill afford the cost of litigation. Small businesses are also affected. The costs of litigation can hamper the pursuit of valid claims, and court delays tie up business assets and personnel, often requiring compromise of legitimate claims out of economic necessity.

High court costs and delay, despite their persistence and pervasiveness, are not inevitable. The National Center for State Courts, for example, has confirmed that increased comity between lawyers and judges can significantly decrease the cost of litigation and court delay.⁶ A key problem is the "legal culture" within a jurisdiction — that is, the expectations of the lawyers and judges concerning the pace and dynamics of litigation.⁷ Existing legal procedures are increasingly seen as an important source of unnecessary costs and delays. Procedures, generally drafted with the most complex cases in mind, are often overdesigned and inappropriate for many cases.

The problem is not so much want of ideas and proposals as it is a want of concentrated and persistent implementation. It was against this backdrop that in 1979 the American Bar Association established an Action Commission to Reduce Court Costs and Delay. The focus of The Action Commission, and the focus of this Symposium, is to identify proposals that hold significant promise for reducing litigation costs and delay. The proposals can be divided into two broad categories: those dealing with economical trial court procedures, and those examining procedures designed to expedite appeals and encourage settlement.

The thrust of the Symposium is action: taking ideas and putting them into operation in actual court settings. The goal in each instance is a practical one; it is not to test theories, but to determine what is feasible, and under what circumstances each solution works best. Equally important, the authors have sought to understand what makes a specific pro-

4. The American Bar Association has set six months as the standard for timely disposition of most civil cases. See AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO TRIAL COURTS § 2.52, at 88 (1975).

5. See generally BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, No. 740 (102d ed. 1981).

6. T. CHURCH, JUSTICE DELAYED — THE PACE OF LITIGATION IN URBAN TRIAL COURTS 53 (1978).

7. *Id.* at 53-58.

posal effective in a given setting, for the alternatives they seek are ones that can successfully be transferred to other contexts.

The Articles illustrate a broad range of ideas and approaches. Five of the Articles focus on experimental projects that are currently being tested in court. A role for attorneys in trial court reform, suggested by the Kentucky court system's adoption of radically new trial court procedures, is outlined and discussed Paul Connolly's *The Organized Bar: A Catalyst of Trial Court Reform*, and questions relating to the feasibility of increased reliance on oral argument in the appellate process are addressed in Joy Chapper's *Oral Argument and Expediting Appeals: A Compatible Combination*. The latter is based on data drawn from expedited appeal procedures adopted in Sacramento, California. Similarly, *Court-Annexed Arbitration*, by A. Leo Levin, relies on data recently compiled by the Federal Judicial Center to evaluate the use of arbitration and mediation procedures as mechanisms for providing early assessment or encouraging settlement. *Colorado's Answer to the Local Rules Problem*, by Justice William Erickson of the Colorado Supreme Court and *Appellate Caseload: Meeting the Challenge in Rhode Island*, by Justice Joseph Weisberger of the Rhode Island Supreme Court, discuss problems confronted by their respective jurisdictions and the solutions undertaken by them.

Finally, Professor Daniel Meador's Article, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, explores proposals for reform as yet untried. His Article examines the possibility of using subject matter organization as an alternative for appellate courts.

Each of the Articles seeks to analyze its respective proposal along several dimensions, examining the effect on time, cost, quality of the process, and acceptability to participating lawyers and judges. Each addresses itself to the process of implementing change — that is, translating the general idea behind the reform into operational procedures and then integrating those procedures into existing ones. Ultimately, this integration is as important as the soundness, relevance, and clarity of the proposed solution.⁸

8. See generally J. PRESSMAN & A. WILDAVSKY, IMPLEMENTATION (1973).

