The Pace of Litigation

Conference Proceedings

Jane W. Adler, William F. Felstiner, Deborah R. Hensler, Mark A. Peterson
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The Pace of Litigation

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1982
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Foreword

Of all the criticisms of the civil justice system, the charge of unjustifiable delay is probably the most frequently levelled and the most deeply felt. It is so often repeated that examples of seemingly endless proceedings have come to symbolize the reasons for widespread disenchantment with the litigative process and the people and institutions responsible for conducting it.

But beyond the anecdotes that every experienced practitioner can recount, what do we really know about the pace of litigation? Can we even define what we mean by “delay”—a term implying that there is a known or knowable optimal pace? Indeed, is it really important to define it, or is it better simply to measure the actual pace of litigation and identify the principal factors that account for it, leaving it to each citizen to judge whether the pace is satisfactory in the light of his or her own values? If we do elect to gauge the pace of litigation, what are the appropriate measures to use? Where are the data, and how good are they? What are the findings of those who have already made systematic inquiries into these questions? What are the most promising directions of new research?

Although the professional literature indicates dissatisfaction with the pace of legal proceedings in all civilizations that have left written records, and describes isolated attempts to analyze the specific situation in several American jurisdictions, it does not provide the reader with a documented picture of the general nature of the problem today. Neither does it provide much empirical evidence on the costs and benefits associated with various methods used to step up the pace, nor does it establish just how the major actors in the litigation tableau affect the pace of the drama over a sample of cases large or specialized enough to support much generalization that is academically respectable.

We at the Institute for Civil Justice believed that a carefully planned conference on the subject was the necessary first step toward building both the store of substantive research and the sense of shared discipline necessary to expand it in future years. To serve these pur-
poses, it needed to involve leading scholars, practitioners, and jurists. We therefore convened such a meeting at Institute headquarters in Santa Monica on May 14-15, 1981. This volume reports the proceedings of that conference; we believe it is the most comprehensive yet concise guide to past and planned empirical investigation of the delay problem that is now available in the literature.

This is not to say that the conference answered all of the questions asked above. If that could be done within a day and a half, the problem would not so sorely vex so many Americans. Much of the meeting’s value lay in its stark revelations of how little we know and how narrowly based is that which we currently accept as knowledge. But proceeding in order through the pace of court activity, the pace of lawyering, and the pace and effects of judicially mandated arbitration—one of the main accelerating devices being tested in a number of states—the conference participants were able to boil down, into manageable length, the salient factual and normative observations for which they found support in their own research and experience and that of other leading figures in the field.

The result is that rarest of phenomena, a volume of conference proceedings that is both readable and worth reading. The reader who can make do with a recapitulation of the presentations and discussants’ reactions is referred to the short Executive Summary immediately following, or to the longer Synopsis that constitutes Part I of this report. The reader whose interest is sufficiently detailed to demand a full transcript of the presentations and reactions will find it in Part II. In any case, the brevity and clarity of expression on the part of both panelists and audience will impress most readers familiar with the genre, whether or not they concur in the views expressed.

If we are bent merely on denouncing delay, all we need is a pungent horror story or two. But if we aspire to understand the causes and possible cures of delay, this volume provides the best available map of the ground that analysis of litigation-pace has covered, where it is now headed, and what new directions look most promising. It anticipates the day when society will be able to make informed policy decisions on how fast the civil justice system should work, and will have the operational knowledge and capacity to put those decisions into effect. As this volume demonstrates, that will represent quite a change from our current plight.

Gustave H. Shubert
Director
The Institute for Civil Justice
Executive Summary

During the past decade the rate of civil litigation rose sharply in trial courts across the nation. The total number of civil cases filed in the federal district courts doubled between 1969 and 1979. 1 Many state trial court systems reported similarly large increases in the number of civil suits filed during this period. For example, in California the number of civil filings increased by 75 percent. 2

As the number of civil suits has increased, many courts have experienced increasing delays in the time required to move a case from filing to disposition. Social commentators, from Chief Justice Warren Burger to consumer advocate Ralph Nader, have decried the effects of these delays on both individual and corporate litigants, and the trial courts have responded with a variety of reforms in civil procedure intended to promote efficiency and speed up case processing. 3 Advocates of stronger court management over the litigation process have applauded these changes. 4 Other observers, however, have questioned the wisdom of many of the reforms, arguing that they hold the potential for decreasing access to the judicial system, reducing due process, and impairing judges' ability to carry out their role as neutral arbiter of the adversarial process. 5

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3 A recent survey of state court administrators, conducted by the Institute for Civil Justice, found that 48 states have recently adopted or are considering revisions in civil procedure intended to reduce pre-trial delay. P. Ebener, Court Efforts to Reduce Pre-trial Delay, The Rand Corporation. R-2732-ICJ. 1981.
4 For example, see Paul Nejelski, "Reducing Litigation Costs and Delay for the Consumer in the United States," a paper prepared for the Conference on the Cost of Justice, Canadian Institute for the Administration of Justice, Toronto, November 1979.
At the base of at least some of the disagreements about proposed policy changes lies a lack of information about the extent of delay, its causes and consequences, and the effectiveness of procedural reforms in combating it. Although one can find empirical studies of delay appearing in the legal literature as early as the turn of the century, much of what has been written about delay is anecdotal, drawn from the particular experiences of judges and lawyers engaged in the daily routine of resolving cases. More systematic research has been hampered by disagreement over measures, inadequate or ambiguous data, and primitive analytic techniques. In recent years there has emerged a small group of empirical researchers devoted to measuring and explaining court delay, but their contact with those who are engaged in the process of civil dispute resolution has been limited. Neither researchers nor practitioners have been able to develop a broad picture of the litigation process and the behavior of disputants, lawyers, and court officials that could provide a framework for explaining when and why delays occur, and who benefits and loses as a result of delay.

The Institute for Civil Justice conference on the Pace of Litigation was designed to bring together policymakers, practitioners in the court arena, and researchers concerned about court delay so that they might, through presentation and debate on research results and practical experiences, begin to develop such a broad picture. The specific objectives of the conference were to summarize the current state of knowledge on the extent of civil court delay, its causes, and the effectiveness of proposed remedies, and to identify those issues related to delay that require further research and policy consideration. In addition, we hoped the conference would initiate a broader dialogue on the problems of court congestion and delay that would cut across the traditional boundaries dividing the judiciary, the marketplace, and academia.

The conference was held at The Rand Corporation in Santa Monica, California, on May 14-15, 1981. The list of invitees included federal and state trial and appellate court judges, federal, state, and metropolitan trial and appellate court administrators, attorneys practicing in the fields of corporate, tort and public interest law, representatives of the American Arbitration Association, American Bar Association, American Judicature Society, Insurance Arbitration Forums and Alliance of American Insurers and researchers from the Federal Judicial Center, Institute for Civil Justice and various academic institutions. (Conference participants are separately listed.)

sentations and prepared comments were solicited from some participants, but all invitees were encouraged to participate in conference discussions.

The conference agenda was divided into three half-day sessions, each of which focused on different aspects of the delay issue. The first session was titled “The Pace of Court Activity.” It dealt with three recent empirical studies of delay in the courts: the National Center for State Courts’ Justice Delayed, the Federal Judicial Center’s Case Management and Court Management in U.S. District Courts, and the University of Wisconsin Civil Litigation Research Project’s Pace of Litigation in Federal and State Trial Courts. The results of these studies are not entirely consistent; each presents a somewhat different perspective on the causes of civil court delay, and the ability of the courts to control the pace of litigation. The principal participant in each of the studies was invited to summarize his results, with particular attention to answering the following questions:

1. What is the extent of the “delay” problem?
2. What is the relative effectiveness of various efforts to expedite civil cases? and
3. What is the effect of the local legal culture on the pace of litigation?

The commentators on this panel were all active court managers, involved with the day-to-day administration of some of the largest and busiest trial courts in the country. They were asked to indicate the extent to which their own experiences supported the study findings, to assess the validity of the researchers’ interpretations of their data on the basis of these experiences, and to discuss the limitations of the courts' ability to manage the litigation process.

In the second session the conference turned its attention to the pace of lawyer activity. Despite a general feeling that lawyers play a key role in determining the pace of litigation, none of the empirical studies of delay have focused on lawyer behavior. The purpose of this session was to encourage practicing attorneys to step back from their day-to-day routine and reflect on their own role in setting the pace of the litigation process. The format of the session was the reverse of the preceding one: First, four attorneys with widely varying perspectives on litigation were asked to address the following questions:

1. What is the optimal length of time required to prepare different kinds of cases for settlement or adjudication?
2. What incentives do attorneys and their clients have to either expedite or delay cases?
3. How do court management efforts affect attorneys' management of their own practices?

Academic scholars who have conducted research on attorney behavior were then invited to interrogate the practitioners regarding those activities that seem to contribute the most to expediting or delaying cases.

The third session had a narrower focus than the others, directing its attention to a single dispute resolution mechanism that is often promoted as a remedy for court delay. The focus of the discussion was three recent studies of court-administered and commercial arbitration: the Federal Judicial Center's *Evaluation of Court-Annexed Arbitration in Three Federal Judicial Districts*, the Institute for Civil Justice's *Judicial Arbitration in California*, and the University of Wisconsin Civil Litigation Project's research in progress on the pace of litigation in contractual arbitration and other outside-the-court settings. The principal researchers in each of these studies was asked to summarize its results. They were joined by an official of a major private arbitration program, the Insurance Arbitration Forum, who described the status and results of that program. Each of the speakers was asked to indicate what his research results demonstrated regarding the contribution of arbitration to reducing delay.

The commentators on this panel were selected because they had previously articulated strong policy positions on the use of arbitration. They were encouraged to debate the broad policy implications of programs like arbitration which divert cases from trial in the interest of promoting efficiency.

Throughout the conference, debate of the issues was lively and continued from the formal panel sessions on through the social gatherings. Over cocktails and dinner, conference participants could be heard continuing their arguments of the day, speculating on the results of proposed procedural reforms, and designing future studies of the causes and remedies of delay.

As with most conferences, this one produced few firm conclusions. A number of themes did dominate the discussion, however, suggesting critical areas for future policy change and further research.

A major theme of the first panel, "The Pace of Court Activity," was the need for more sophisticated research to measure delay, identify its sources, and assess the effectiveness of changes in civil procedure that are intended to combat it. Eschewing debate over the proper definition of delay, the researchers spoke of measuring the time from case filing to disposition and examining the relationships between this time and various court characteristics. Some in the audience applauded this effort to move away from the value-laden term "delay," while others saw it as ducking the key policy issue: How long should it
take to dispose of civil cases? All agreed, however, that courts should know more than they do about how long it actually takes for different types of civil cases to move through the court process.

Research results confirming the success of strong court management efforts to control the pace of litigation were greeted warmly by judges and court administrators in the audience who had experienced personal success with such approaches. But some conference participants cautioned the audience about overestimating the effect of such measures. Several people noted that a widely touted reform of the previous decade, master calendaring, was now being cited by researchers as a contributor to delay, while individual calendaring, earlier thought to encourage delay, was now being recommended as an expediting measure. One of the panel members stated a strong belief that what courts do to control the pace of litigation is less important than that they do something, and the researchers indicated that there is considerable support for this in the empirical data that have been collected.

Several explanations were offered for the puzzling inconsistencies found in the empirical data on court delay. One panel member noted that the studies conducted to date had fairly short time-frames. While they may provide valid measures of short-term effects of reform efforts, they do not accurately reflect their longer-term success, or lack thereof. Monitoring the effects of changes over a long period of time in a number of different courts might produce data that would explain inconsistencies in previous findings. Supporting this notion, one researcher noted somewhat ruefully that a court that had been held up in his study as a “model” of success in combating delay found itself facing a sizable backlog of civil cases just a few years later.

Another researcher suggested that attempts to draw policy conclusions from apparently inconsistent empirical studies would be hampered as long as the researchers continued to depend on simple analytic techniques such as bivariate cross-tabulations. By adopting multivariate analytic techniques, researchers might be able to tease out more complex relationships among the variables that could both explain these inconsistencies and more accurately reflect the realities of the litigation process.

The effect of local legal culture on the pace of litigation, a theme that had received considerable attention elsewhere, was somewhat dis-

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*Master calendaring is a centralized system for assigning court cases to judges. In master calendar courts, judges often specialize in particular types of activities, such as law and motion hearings or settlement conferences, and a single case may be assigned to different judges at different stages of the pretrial process. In an individual calendaring system, judges are usually assigned batches of cases for which they assume responsibility throughout the pretrial process.*
counted by conference participants. One researcher presented data that cast some doubt on the notion that distinctive local legal cultures exist in different geographical areas. Most participants seemed to share a view that the legal community's expectations regarding pace can be shaped by court efforts to manage the litigation process. They discussed the need, first, to produce a feeling within the court that change is necessary and possible, and then to gain support within the legal community for that change. Some saw the issue of gaining control over the pace of litigation as more political than managerial, more needful of political leadership skills from bench and bar than of operations research or management analysis skills. One panel member noted an almost evangelical quality among judges who have "gotten the religion of case management" and referred to those opposed to this movement as a "vanquished minority."

Most of the panel members in the first session, and most of the audience as well, either explicitly or implicitly assumed that delay in the civil courts is harmful to litigants. A few participants, however, argued against this assumption, noting that delaying case disposition may benefit some litigants. The issue of incentives to delay case disposition was picked up and became the theme of the second conference session on "The Pace of Lawyer Activity." The plaintiff's attorney on the panel argued that he and his colleagues in the plaintiff's bar, and their clients, have little incentive to delay cases. He described the plight of injured clients who have to endure lengthy waits for compensation for medical payments and time lost from work. He noted that younger attorneys who are relatively new to practice in the personal injury area, and who have therefore not had time to build a large inventory of cases, may suffer financially as a result of delay in case disposition, which postpones payment of contingent fees. He described these attorneys and their clients as being at the mercy of courts that are unable to process large caseloads expeditiously, and defendants and their attorneys who profit from delay. His view of the plaintiff's attorney's role in the pretrial process was that it is largely passive: Once the plaintiff's injuries have stabilized and discovery has been completed, the plaintiff's attorney is reduced to "waiting around for something to happen" on the case. Of course, for most plaintiff's attorneys this time is occupied by working on other cases. For most established plaintiff's attorneys, therefore, while there may be little economic incentive to delay, there is also little incentive to expedite particular cases.

Defense attorneys in the areas of personal injury and business litigation differed somewhat in their reactions to this view. One attorney noted that the defendant "is almost always interested in delay." Among the defendant's incentives for delay, he included the desire to
postpone payment of damages (thereby freeing resources for other use), the knowledge that over time some plaintiffs will lose their interest in or financial ability to pursue litigation, and the possibility that managerial changes within the opposing organization may change its perspective on the suit. Another defense attorney, however, saw fewer positive incentives to delay. In his view delay was more often caused by a tendency for disputants' views on the issues to polarize once suit has been filed, and a desire of attorneys to demonstrate "resolve" or "tenacity" in pursuing their clients' interests through the adversarial process.

Although the discussion began with a depiction of large differences between plaintiffs' and defendants' incentives to delay, as the session progressed it became clear that many participants believed that parties and attorneys on both sides share the responsibility for delay. Panel members noted that the typical lawyer's management style, particularly a tendency to pay attention to cases only when there is some pressing need to do so, and a concern about building inventories of new cases that leads the lawyer spreading himself too thin, contributes significantly to delay. Various speakers pointed to the strategic uses of delay, noting that it could be useful to plaintiffs and defendants alike in all fields of litigation, including public interest law. Indeed, one panel member noted that delay might be one of the few tools available to the public interest plaintiff, who often faces a wealthier corporate or government defendant. In his view, court efforts to reduce delay by managing the litigation process would further disadvantage the public interest client.

Most lawyers, however, clearly looked to the courts to counter their own and their clients' predispositions to delay. Efforts by the courts to limit the length and extent of discovery, to force earlier case preparation through such mechanisms as the pretrial status conference, and to promote reasoned consideration of a case's strengths and weaknesses through pretrial settlement conferences, were welcomed. Although some lawyers confessed that they were unhappy to see the passing of a period in which they were in full control of case preparation and development, there appeared to be a consensus that court management of the process is necessary to produce timely case disposition.

Inevitably, the discussion in these two panel sessions focused on efficiency concerns: What are the obstacles to more rapid civil case disposition, and how can they be overcome? But toward the end of the first conference day, participants were turning their attention increasingly to equity concerns: What are the risks for litigants in emphasizing efficiency concerns in the court process? What are the most appropriate forums for resolving different kinds of disputes? What is the appropriate role for judges in the dispute resolution process?
The third and final conference panel, "The Pace of Arbitration," provided a basis for further discussion of this theme. Researchers on this panel presented data on the effects of both private contractual arbitration and court-annexed arbitration on the time required to dispose of cases. The presentations provided a unique overview of recent outcomes of arbitration in the federal district courts, in trial courts of general jurisdiction in the state of California as used to settle intercompany disputes within the insurance industry, and in the variety of private settings in which the American Arbitration Association program operates. Generally, the data showed that voluntary arbitration, within and outside of the court, can expedite civil case disposition by promoting earlier settlement by the parties and by providing for an earlier hearing of the case. In the various jurisdictions that had been studied, intervals of three to nine months from case filing in arbitration to disposition were not uncommon. The results were more ambiguous when parties were compelled to take their cases to arbitration. Particularly in California, mandatory arbitration appeared to speed case disposition only in those courts that allocated resources for assigning cases to arbitration soon after the issues were joined and for monitoring their progress through the program.

The researchers were careful to note that differences among jurisdictions, cases, and arbitration settings preclude easy generalizations from their statistical results. One panelist objected to treating court-administered arbitration under the same rubric as private contractual arbitration, saying the former is a "cartoon" of the classic arbitration concept.

The researchers offered only scanty, anecdotal evidence regarding the acceptability of arbitration to attorneys and litigants, and the effect of the process on case outcomes. Most conference participants, however, saw no reason to believe that arbitration has a negative effect on the quality of justice obtained from the civil justice system. But one panel member cautioned that careful attention should be given to possible constitutional issues that are raised by mandatory arbitration, including abridgment of the Seventh Amendment right of access to the courts. Another participant countered that opposition to arbitration and other alternative dispute resolution procedures that are couched in constitutional terms often comes from those in the legal profession who have "a vested interest in disputatiousness." Several panel members and audience participants made fervent pleas for offering more alternative dispute-resolution forums to litigants, and for providing training in nonadversarial techniques for resolving disputes to law students.

At the close of the conference, participants attempted to sum up the issues that had been highlighted by the various discussions. In the
light of widespread concern about delay and large gaps in our information about it, it is clear that more needs to be learned about the timing of civil case processing. In addition, we need to develop a better understanding of the political and bureaucratic contexts in which litigation takes place. Legislative attempts to reform the courts will founder if they fail to take into account the incentives and disincentives that judges have to manage the litigation process; judicial efforts to manage the process will prove unsuccessful if they do not take into account the incentives of attorneys and their clients to delay case disposition in pursuit of their own interests. Finally, the shadowy figure of the individual litigant, sometimes seen as the victim of delay, sometimes as the culprit, but most often simply ignored in discussions of the problem, needs to be brought into sharper focus. What is the litigant’s proper role in the dispute resolution process? How is he served by the traditional adversarial system and by the various alternative dispute-resolution procedures that are now being put in place? These issues, the politics and bureaucracy of court reform, the incentives of actors to support or resist changes in the litigation process, and the effects of the current system on litigants, might well provide the basis for a future Institute for Civil Justice conference.
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Part I

THE PACE OF LITIGATION
SYNOPSIS OF CONFERENCE PROCEEDINGS
The following is a condensation of the speakers' presentations and of the more important points raised by the discussants. The reader who is interested in a full transcript of the proceedings is referred to Part II.

OVERVIEW

During the past decade, the rate of civil litigation rose sharply in trial courts across the nation. The number of cases filed in the federal district courts doubled, and many state trial court systems reported similar large increases. As the rate of civil suit filings has increased, many courts have experienced increasing delays in disposition, and have responded with a variety of reforms in civil procedure intended to promote efficiency and speed. Advocates of stronger court management have applauded these changes, but other observers have argued that they may hold potential for decreasing access to the courts, reducing due process, and impairing the judicial role in the adversarial process.

Some disagreements about proposed policy changes may be attributed to a lack of information about the extent, causes, and consequences of delay, and the effectiveness of procedural reforms in combating it. Systematic examination of court delay, by a small and recently emerging group of empirical researchers, has been hampered by disagreement over measures, inadequate or ambiguous data, and primitive analytic techniques. Contact between these researchers and practitioners engaged in the process of dispute resolution has been limited, and neither group has been able to develop a broad picture of the process that could help explain when and why delays occur, and who benefits or loses as a result.

The Institute for Civil Justice Conference on the Pace of Litigation was designed to bring together policymakers, practitioners, and researchers so that they might begin to develop such a broad picture, by summarizing the current state of knowledge about civil court delay and identifying issues requiring further research and policy consideration. Invitees included federal and state trial and appellate court
judges, federal, state, and metropolitan trial and appellate court administrators, attorneys practicing in corporate, tort, and public interest law, representatives of the American Bar Association, American Judicature Society, American Arbitration Association, Insurance Arbitration Forum, Alliance of American Insurers, and researchers from the Federal Judicial Center, the Institute for Civil Justice, and various academic institutions.

The conference agenda was divided into three half-day sessions. The first session focused on “The Pace of Court Activity” and dealt with three recent empirical studies of delay in the courts: The National Center for State Courts’ *Justice Delayed*; the Federal Judicial Center’s *Case Management and Court Management in U.S. District Courts*; and the University of Wisconsin Civil Litigation Research Project’s *Pace of Litigation in Federal and State Trial Courts*. The principal participant in each study was invited to summarize his results, with particular attention to the extent of delay, success of efforts to reduce it, and the effects of local legal culture on the pace of litigation. Commentators on this panel, who were active court managers in some of the largest trial courts in the country, were asked to indicate the extent to which their own experiences supported the study findings, and to discuss the limitations of the courts’ ability to manage litigation.

The second conference session concentrated on “The Pace of Lawyer Activity.” Three practicing attorneys and a professor of law who had been in private practice were asked to consider optimal preparation time for different kinds of cases bound for settlement or adjudication, the incentives of attorneys and their clients to expedite or delay cases, and the effects of court-management efforts on attorneys’ management of their own practices. Reversing the format of the first session, academic researchers were invited to question the practitioners about which attorney activities are most contributory to speed or delay in litigation.

The third session dealt with “The Pace of Arbitration.” It centered on three recent studies of court-administered and commercial arbitration: the Federal Judicial Center’s *Evaluation of Court-Annexed Arbitration in Three Federal Judicial Districts*; the Institute for Civil Justice’s *Judicial Arbitration in California*; and the University of Wisconsin Civil Litigation Project’s research in progress on the pace of litigation in contractual arbitration and other outside-the-court settings. The principal researcher in each of these studies was asked to summarize his results. An official of the private Insurance Arbitration Forum then described the status of that program. Panel commentators, selected because they had taken strong policy positions on the use of arbitration, were encouraged to debate the policy implications of such programs as arbitration that divert cases from trial in the interest of efficiency.
As with most conferences, this one produced few firm conclusions, but a number of themes emerged from the discussions. A major topic of the first panel was the need for more sophisticated research over longer time periods, perhaps adopting multivariate analytic techniques in attempting to explain inconsistencies in previous studies and to reflect more accurately the realities of litigation. The effect of local legal culture on the pace of litigation was somewhat discounted by conference participants; most seemed to agree that local legal community expectations regarding pace can be shaped by court litigation management efforts. Researchers indicated that empirical data tend to support the one panelist's assertion that what courts do to control the pace of litigation is less important than merely being seen to do something.

Panelists in the first session suggested the advisability of neutrally measuring pace or time to disposition rather than emphasizing the value-laden term "delay," but the majority of participants appeared explicitly or implicitly to assume that delay is harmful to litigants. In the second session, plaintiffs' and defendants' supposedly opposite attitudes toward delay became a major point of argument. One attorney panelist averred that the defendant is almost always interested in delay, and another described the plight of injured plaintiffs who are obliged to wait years for compensation where courts are unable to process caseloads expeditiously; various speakers, however, pointed to the strategic uses of delay for both sides in all fields of litigation.

Inevitably, discussion in the first two panel sessions focused on efficiency, with most participants looking to the courts to employ a variety of case-management mechanisms for countering predispositions to delay on the part of attorneys and their clients. But during the third and final panel session, the theme of equity emerged as a basis for discussion of the most appropriate forums for resolving different types of disputes, and as an essential consideration in assessing risks to litigants that may result when efficiency is emphasized.

Data on disposition times presented by researchers in both private contractual and court-annexed arbitration provided a unique overview of the effects of various forms of arbitration in expediting resolution either through earlier settlement or earlier hearing of cases. One panelist objected to any treatment of court-administered mandatory arbitration under the same rubric as private contractual arbitration, asserting that the former was conceptually a "cartoon" of the latter. But researchers were careful to note that differences in jurisdictions, cases, and arbitration settings precluded easy generalization from their results.

At the close of the conference, participants summed up the issues that had been highlighted. It is clear that more information is neces-
sary on delay and the timing of civil case processing, and that we also need a better understanding of the politics and bureaucracy of court reform, and of actors' incentives to support or resist changes in the litigation process. These issues will be explored in future Institute for Civil Justice studies, together with a much closer examination of the role and needs of the often ignored figure of the individual litigant.
PANEL 1: THE PACE OF COURT ACTIVITY

Moderator

Deborah Hensler, The Institute for Civil Justice

Panelists

Larry L. Sipes, Director, Western Regional Office, National Center for State Courts, San Francisco

Steven Flanders, Circuit Executive for the U.S. Court of Appeals for the 2nd Circuit, New York

Joel Grossman, Department of Political Science, University of Wisconsin, Madison, Civil Litigation Research Project

Discussants

E. Leo Milonas, Deputy Chief Administrative Judge, New York City Courts

Frank Zolin, Executive Officer, Los Angeles Superior Court

Douglas Dodge, Director, Planning and Development, Administrative Office of the Pennsylvania Courts, Philadelphia

Dr. Hensler, after welcoming conferees, noted that the purpose of the first session was to enable court officials and other practitioners to hear and debate the results of these studies with the researchers. Among questions that might be addressed were the extent to which the courts could and should control the pace of litigation, the role of courts in shaping or reflecting local legal culture, and the feasibility of speeding litigation by means of uniform techniques in all jurisdictions rather than through a particularistic approach, custom-tailored to each court.

Mr. Larry Sipes

Mr. Sipes, as director of the research reported in "Justice Delayed—The Pace of Litigation in Urban Trial Courts" (National Center for State Courts, 1978), and author of "Managing to Reduce Delay"
(National Center for State Courts, 1980), outlined the approach taken in these studies, and commented on their findings.

With a grant from the LEAA, Mr. Sipes and his colleagues began with a mandate to determine what could be done to increase the pace of litigation and reduce delay. After an early determination that courts cannot gauge their caseloads and do not know how long civil cases take to move from commencement to disposition, the researchers decided to gather data on 21 urban trial courts in 14 states. Despite extensive organizational variety among these courts, in both jurisdiction and court structure, an attempt was made to “take a snapshot of comparative case-processing times.” Mr. Sipes noted that the numbers were now obviously dated, but that “Justice Delayed” had provided the broadest snapshot made at that time, and was the first to offer some real comparability as to the pace of litigation within a cross-section of trial courts.

For the study, time calculated backward from termination in the latest year was measured in some 20,000 cases, using 500 cases from both the criminal and civil caseloads in each court studied. Using tort cases, including medical malpractice and product liability cases as the common denominator, median times were measured from filing to disposition. Findings at this point indicated that the slowest case-processing times for comparable cases, where disposition was by settlement, motion, or trial, were three times as long as the fastest.

The researchers moved next to an examination of what such case-processing phenomena suggested about some popular notions of delay. Looking first at court size and then at the percentage of jury trials per court, no reliable correlation could be found between either factor and the pace of litigation.

An attempt was made to measure judicial productivity, but no conclusive answer was reached because of time and money constraints and a lack of consensus as to an appropriate measure of productivity. Mr. Sipe reported some “very crude numbers” that lent themselves to interesting speculation because they indicated that the overall speed of each court bore no discernible relationship to the number of dispositions, by all means, made per year by each judge in that court.

Mr. Sipes’s first general conclusion at this point, as reported in “Justice Delayed,” was that wide variations in processing times are not explained by often-suggested factors such as court size, number of filings, percentage of cases going to trial, settlement programs, or available judicial resources. It was not at all clear that having more judges would necessarily expedite litigation without the courts striving to exploit available resources to the maximum.

The researchers also selected ten courts for intensive study, visiting each for two-week periods with a team of observers and interviewers.
These visits made a great contribution. Mr. Sipes said, to the study's second and "admittedly subjective" general conclusion that processing times, rather than being governed by such factors as the size of the court, were usually controlled, with the acquiescence of the court, by the local bar's determination of what constituted a reasonable time to trial.

For the past two years, Mr. Sipes and his colleagues had been grappling with the question of what, if anything, could be done to alter the expectations and patterns of behavior exhibited in every court by what they had termed "the local legal culture." Experimental work had been initiated in eight courts across the country, with judges in each persuaded to cooperate in undertaking some type of heretofore untried case management. The purpose was to test the hypothesis that courts acting unilaterally, although preferably in cooperation with the local bar, can modify adverse effects of the local legal culture so as to increase the pace of local litigation.

Project goals had ranged from that in Cambridge, Massachusetts, where the objective was simply to identify truly ancient, as opposed to merely old, cases in court files, to a more ambitious undertaking in Phoenix, Arizona, where a group of five out of a total of 12 judges undertook to control the entire pace of litigation from filing to disposition. The results were mixed, as reported in "Managing to Reduce Delay," but those in Phoenix were dramatic enough to convince researchers that "the notion of case management is viable," and that it is worth developing case management techniques that are both sensible and acceptable.

Mr. Steven Flanders

Steven Flanders was the author and project director of the Federal Judicial Center's study, "Case Management and Court Management in the U.S. District Courts," published in 1977. Researchers for that project, unlike those for the National Center for State Courts, had access to the functioning, if imperfect, nationwide statistical system employed by the federal courts since the creation of the Administrative Office in 1939. An initial question was how best to make use of this system, while the underlying problem for researchers was to explain the wide variations it revealed in civil case-processing times among the district courts. They began with "total immersion" visits to five very large district courts, where they followed much the same procedures in observation and interviewing as those adopted by Mr. Sipes and his colleagues.

Their key finding was that the distinguishing feature of the faster courts was the presence of an automatic system that put each case on a
relatively fast track, imposing time limits and a schedule for the completion of pleadings and discovery, followed by an early, firm trial date. Researchers were surprised to discover that lawyers accomplished about the same amount of work in the very fast courts as in the slowest. Judicial case management evidently had little or no detrimental effect on the quality of the proceedings that resulted, the same amount of attorney preparation simply being compressed into shorter periods of time.

Mr. Flanders and his colleagues had explored the hypothesis that a counterproductive use of defensive discovery might characterize the fast jurisdictions, where attorneys were working under pressure to build their cases. Although it did appear that there was more discovery activity in the fast jurisdictions than in the slower ones, the difference was within a narrow range that could easily have been accounted for by the wide differences found from court to court in the amount of discovery activity actually recorded on docket sheets.

Mr. Flanders briefly described a basic failure in his project's research design that had proved interesting and instructive. Central to the development of the data-gathering instruments had been the idea of measuring “dead time” delay in case processing—periods when nothing was apparently pending or being accomplished. When researchers began to look at court records for start and finish dates for each stage in case processing, they found that at almost every point there was, at least nominally, something pending or unresolved. Since court records generally provided no information on how the parties had dealt with such matters, researchers were left with no means of measuring “dead time” without embarking on an “enormous investment of labor and some very tricky definitions.”

Mr. Flanders concluded by reviewing the development of “the doctrine and device of judicial case management.” “It began as a grassroots movement in the early 1950s and continued through the Pre-Trial Committee of the Judicial Conference of the United States, which was largely responsible for the diffusion of what has been termed “the religion of case management.” Rule 16 of the Rules of Civil Procedure, as it would soon be rewritten. Mr. Flanders noted, would impose a specific and explicit judicial obligation to manage cases. What was once a suspect judicial initiative imposed by federal judges on a recalcitrant bar had become, almost imperceptibly in recent years, a demand by the bar for management from the bench.

Meanwhile, “case management religion” had diffused among federal judges in the absence of any conventional incentives of a type likely to be recognized by economists. In place of such incentives, generally thought essential to support administrative initiatives, was the remarkable ongoing experimental approach of each federal court.
as it continually developed and reexamined the efficacy of its own case management techniques.

**Professor Joel Grossman**

Professor Grossman commented that since his data came from work done by the Civil Litigation Research Project, centered at the University of Wisconsin and funded by the federal government to investigate the cost of civil litigation, his effort to discuss litigation pace was derivative.

That project studied a sample of 1,650 middle-range disputes litigated in twelve state and federal trial courts of general jurisdiction. The sample was drawn directly from court records, and supplemented where possible by interviews with attorneys and litigants. Various time periods had been extracted from the data, said Professor Grossman, but his present focus would be on elapsed time from filing to disposition. Rather than use median measurements, researchers had borrowed the technique of survival analysis, first developed in medical research, which allowed graphic presentation of the way in which cases seemed to move through the courts.

Before turning to his findings, Professor Grossman raised the question of why delay was seen as a problem, noting that as a very subjective phenomenon delay did not necessarily create difficulties for all litigants in the same way that it did, for example, for court managers. By using the phrase “pace of litigation,” he and his colleagues intended to suggest that cases were disposed in a variety of ways and at different rates, and that delay should not be thought of as always bad and always to be reduced. They had sought to understand why cases proceeded at different paces, and how pace might affect outcome.

Professor Grossman and his colleagues found that in all of the twelve courts studied, except in the state trial court at Philadelphia, where procedures were anomalous, more than half of all cases terminated within one year from filing, and that in all but two courts no more than 10% remained unresolved after two years. The probability of a case going to trial in both state and federal courts was clearly highest in the 8-to-20-month period after filing; one very tentative conclusion was that a large number of cases, at least in this sample, reach trial within a reasonable time. Indeed, the fastest courts were those that disposed of the most cases early.

Preliminary analysis of disposition patterns by type of case suggested that courts with more tort cases and fewer contract cases were not necessarily faster than those that had the reverse pattern. The Project’s findings about diversity cases were “weak but suggestive.” Striking similarities were found in the disposition pace of diversity
cases that went to federal court and a sample of fairly comparable cases in state courts. The findings had not yet been fully developed, but it appeared that arguments favoring retention of diversity jurisdiction on grounds of swifter disposition were, while not disproved, certainly not supported by the data.

Federal courts, with reasonably comparable rules, were found to be much closer to each other in the pace of their litigation than were the state courts. Statistically, the differences among the five state courts studied were much more significant than was the commonality of the federal courts. The figures generated by the studies were consistent with the theory that the pace of litigation is less determined by court factors, such as management techniques, than by individual factors such as the goals and stakes of a participant and the idiosyncratic characteristics of the local legal culture.

Nevertheless, the data raised questions about the “local legal culture” hypothesis in that they failed to provide substantial evidence of local patterns in litigation pace. Differences in pace were greater between local federal and state courts than between all federal and all state courts, and were most pronounced within the three largest districts. Professor Grossman suggested that such differences might be attributed to the existence of exclusive federal bars in these courts, a factor not as likely to be present in the smaller states, where federal and state patterns were closer and the size of local bars made it most probable that attorneys would practice in both state and federal courts.

Discussion

Following the panelists’ presentations, the three discussants outlined their experiences in attempting to control the pace of litigation in their large metropolitan jurisdictions, each of which had endemic problems of backlog and delay.

Judge Milonas said that since he believed that litigation pace in New York was set by attorneys, in response to judicial attitudes, his goal had been to modify such attitudes to require more active caseload management by the bench. In cooperation with the judiciary and bar, he had formulated a plan to increase judicial productivity and resources. He commented that the specifics of the plan were far less important than the sheer fact that some action was seen to have been taken. The making of “a great fuss” at the judicial level had sufficed to get attorneys to move their cases more expeditiously.

Mr. Zolin described the combination of factors in Los Angeles County courts that had led to an ever-increasing backlog over the past decade, and noted that, given the volume of the caseload, the pace of
litigation was controlled entirely by the capacity of the courts to utilize productive judge time. Management techniques would increase this capacity only so far, and only slowly; the problem of litigant-induced or attorney-induced delay would remain.

One problem in managing judicial resources is to anticipate the proportion of cases that will not be resolved in some fashion without court intervention, and determining at what point such intervention is likely to be most effective. Commenting on the panelists' presentations, where the focus had been on the experience of exemplary courts for brief periods, Mr. Zolin stressed the need for longitudinal studies of total caseloads, with attention to the durability of reforms made to achieve long-term control.

Mr. Dodge discussed the misuse of judicial resources that frequently occurs when courts address difficulties in management by adding new procedures instead of eliminating unnecessary steps. He spoke of the unproductive time that judges often spend on nonjudicial matters, and suggested that the problems courts create for themselves by such practices cause as much delay as the behavior of attorneys and litigants.

Mr. Dodge commented on the situation in Pennsylvania courts, where the practice is to take no cognizance of a case until the certificate of readiness is filed. By 1979, that practice had resulted in 630,000 nominally pending civil cases in the Philadelphia Court of Common Pleas. Mr. Dodge described the dramatic effects of a temporary "housecleaning" move made by the Pennsylvania Supreme Court to reveal the size of the active caseload, requiring that a certificate of readiness be filed in all cases within 240 days of commencement of suit.

Mr. Sipes and Mr. Flanders then responded to comments from participants about the need for more longitudinal research, agreeing on its importance both for the establishment of data bases and the study of longevity of results in various types of court management reform. Mr. Flanders, noting that the resources of most courts did not permit extensive changes in management systems, reported that a massive recent increase in the caseload of the fastest and most efficient court in his study had simply overwhelmed previously effective systems. Mr. Sipes, in response to a comment by Dr. Hensler, agreed on the further need for more sophisticated analyses of variables in studying litigation pace.

Judge Hill stressed the effectiveness of deadlines in case processing, and the importance of creating in the courts an environment conducive to negotiation and compromise if settlement and a reduction in the percentage of cases going to trial were to be achieved.

Judge Wallace asked panelists to comment on their findings as to the relative efficiency of master and individual calendaring. Mr.
Sipes responded that all the fastest courts in his study had used individual calendars, while six of the seven slowest had master systems. Mr. Flanders added that longitudinal studies in the federal system had shown a significant increase in pace after changeover from master to individual systems.

Professor Galanter noted the possibility that "delay," seen as an evil, was in fact the underlying concern of the conference rather than "pace." Mr. Flanders commented that speed is a concern in the context of other values, but that in his experience the quality of justice tended to be superior in the faster courts, where testimony was likely to be sharper, for example, because of more recent recall of events in a given dispute.

Mr. Rosenberg questioned the extent of court responsibility for management of different categories of cases, including those where neither side was interested in speed. Mr. Flanders remarked that such cases were extremely rare, at least from the perspective of the client, and Mr. Olson went on to speak of the often conflicting interests of clients, attorneys, and courts in backlog and delay, noting that attorneys in jurisdictions where there is delay may benefit from the economic security of a substantial work backlog. Before significant change could occur, these attorneys would have to adjust their practice so as to work only from a current caseload.

Mr. Olson and Mr. Rosenberg mentioned the impact of discovery on the pace of both case preparation and trial length, and the hypothesis that limits on discovery may actually encourage its greater use. Professor Grossman commented that only high frequencies of discovery events had a perceptible effect on the pace of litigation in federal courts, while in state courts the line of demarcation was more noticeable between low and medium recovery rates. Mr. Flanders said that in his study the faster courts were also those in which the volume of discovery was relatively high. In his view the interjection of judicially imposed deadlines for discovery was critical in that it was one of the few devices likely to introduce cost-effective calculations into the decisions made by lawyers as they prepare their cases.
LUNCHEON ADDRESS
Controlling Corporate Legal Costs

Speaker

Robert S. Banks, Vice President and General Counsel, Xerox Corporation

Mr. Banks began his address to the conference with some observations on the "unmanageable burden of legal expense" from the perspective of businessmen who were finding, no less than any other segment of society, that the cost of prosecuting or defending an important right had become a key limitation on their access to the courts. A larger current concern of top management of major corporations, he said, is the drain on profits experienced by U.S. industry, which is faced with legal expenses that cannot always be passed on to the consumer without increasing the competitive advantage enjoyed by Japanese manufacturers, who have no such expenses in their cost base.

Since chief executive officers now see reduction of legal expenses as "a profit opportunity that ought to be explored," corporate general counsels have become increasingly concerned with cost-control procedures. Mr. Banks noted that he was inundated with requests for detailed information about procedures used at Xerox after he made presentations on the subject to various groups of corporate lawyers. Law schools and nonprofit institutions were studying methods of controlling the costs of controversy, and Ralph Nader had taken "direct aim at private practitioners" at a recent Washington conference on cost reduction. If a trend is developing, said Mr. Banks, it will clearly have some impact on the pace of litigation. But in any event, he believes that practitioners of all types have a professional responsibility, in an economy with increased pressures on productivity and efficiency, to find their own solutions to the problem of costs.

Turning to his own experience at Xerox, Mr. Banks described the "spare no expense" philosophy that prevailed in the 150-lawyer department when he became general counsel there in 1976. The company was then involved in several major antitrust suits and was spending more than $26 million a year in outside legal fees. Priorities had to be changed in the department, retaining the concern for winning once the company was in the adversarial system, but making cost-containment a priority in the management of cases up to that point. Any system of cost control in litigation also became, he said, a
system for risk-taking, as was appropriate in a business environment emphasizing such an approach.

In Xerox's dealings with outside counsel, with whom its law department shared responsibility for litigation, choices arose every day that bore directly upon expense. It was decided that Xerox would rather risk losing lawsuits than follow the prohibitively expensive approach of "failsafe," which outside counsel would otherwise inevitably adopt, since they had nothing to gain by reducing costs. In applying a cost-benefit measure to every action or decision taken, Xerox now requires that no significant discovery expense be incurred without approval of house counsel. "As a matter of policy," said Mr. Banks, "we do not permit searching for needles in haystacks." To combat redundancy, his department specifies how many attorneys of what type are required for a given task. Motions are not to be filed for purposes of delay, and Xerox does not use delay as a part of its litigation strategy. Mr. Banks commented that delay costs money because lawyers, given more time inevitably do more work, bill more hours to the client, develop more evidence, engage in longer, more expensive trials.

Mr. Banks next described procedures followed at Xerox in estimating future legal expenses, based on assumptions made by inside and outside counsel about the probable course of litigation in each case handled by the department. There had initially been considerable resistance to the requirement for such estimates, with objections ranging from a flat assertion that the task was impossible to predictions that the uncertain results would not be worth the extra effort and manpower. As it happened, no increment in manpower had been needed and the estimates were generally accurate over time, sufficiently precise for the company's purposes and certainly better than nothing at all. As with estimates routinely made by businessmen, Mr. Banks observed, what was called for was simply professional judgment—in this instance, that of experienced trial lawyers.

The key to the system's success, he said, is a flexible budget with separate supplements for large cases, and the transference of estimated expenses from one quarter to another when the pace of litigation proved faster or slower than projected. Quarterly review of case budgets allows continual assessment of the accuracy of their judgments, and provides management with valuable information on cash flow and the probable timing of very large expenditures.

In sum, Mr. Banks said, their system had provided a reliable base for financial planning, and saved significant sums by making cost-benefit tradeoffs. An awareness in counsel, both inside and outside, that expenditures were important and that counsel would be questioned about them, encouraged attention and would of itself reduce
expenses. So far, he was happy to say, Xerox had not lost any cases using this system. The system had proved to be a valuable case-management tool in that the requirement for quarterly reviews of litigation encouraged active rather than reactive attention to lawsuits in progress. Finally, the estimates give the department a more solid basis for assessing costs of settlements, which are always handled in-house while outside attorneys concentrate on their role as trial lawyers.

Discussion

Following Mr. Banks' speech, Dr. Hensler opened a brief question period by asking him to comment on the relationship between cost reduction and the pace of litigation. Mr. Banks replied that delays cost money because lawyers, given more time, would inevitably do more work with more hours billed to the client, and would probably develop more evidence, resulting in an extended and therefore more expensive trial. The key, he said, to preventing legal work from expanding to fill the time available when delay occurs is to rely on the capacity of the lawyer to judge what preparation is essential, and to do no more. Mr. Banks added that he thought delay is in no one's interest, except possibly that of insurance companies. For the sake of his company's image, and as a reflection of the personality of the chairman of Xerox, he pointed out that delay was not deliberately used as part of their litigation strategy.

Mr. Seagraves challenged the suggestion that insurance companies have a greater interest in delay than has any other litigant faced with the possible payment of a claim, noting that the investment value of a delayed award is the same for all litigants. Mr. Banks replied that he did not mean to accuse insurance companies of fostering delay. His thought was only that an insurance company is in the business of either paying or not paying claims. A manufacturing company is not, and neither is it in the business of litigation. His company, if it believed it owed money, would rather sit down and resolve the matter and get on with its regular business.

Judge Kline asked if Xerox had any experience in the development of private dispute resolution systems. Mr. Banks said his company was interested in all methods of lowering legal costs, and would therefore pursue any alternatives to litigation that might present themselves. In a recent major lawsuit, he and his opposite number in the opposing corporation had cooperated in getting the chief executive officers of their two companies to sit down, listen to the issues presented by the two law departments, and settle the dispute between them. The procedure had not been very "scientific"—each executive had written
his assessment of the value of the case on a piece of paper, and eventually settled at an amount splitting the difference. Mr. Banks noted that where there is any willingness to settle, generally a way is found to do so, whether or not a structured procedure is followed.

To questions from Judge Hill and Dr. Rabinovitz on the uses of his cost-budgeting system in assessing the settlement value of a case, Mr. Banks said that he did not attempt, in any systemized way, to include overhead in making such evaluations. He noted that the cost of executive and employee time spent in assisting with litigation, and foregone business opportunities due to the constraints of the lawsuit, would be substantial, and considerably more than the out-of-pocket costs for legal fees.

Settlements generally were handled in-house, he said, with outside counsel concentrating on their role as trial lawyers. Sometimes he continued to conduct settlement negotiations while the trial itself was in progress, keeping the trial lawyers continuously informed on developments. In reaching settlements, for which ultimate authority lay with the chief executive officer, careful attention was given to precedents that might be set. Strike suits in particular had always to be litigated, because the real cost of settling one was likely to become much greater down the line.
PANEL 2: THE PACE OF LAWYER ACTIVITY

Moderator

Dr. Mark Peterson, The Institute for Civil Justice

Panelists

Daniel Fogel, partner, Fogel, Julber, Rothschild & Feldman, Los Angeles
James Hourihan, partner, Hogan & Hartson, Washington, D.C.
C. Stephen Howard, partner, Tuttle & Taylor, Inc., Los Angeles
Charles Halpern, Georgetown University Law Center, Washington, D.C.

Discussants

Marc Galanter, University of Wisconsin Law School, Madison, Civil Litigation Research Project
Stewart Macaulay, University of Wisconsin Law School, Madison
John Phillips, Center for Law in the Public Interest, Los Angeles

Dr. Mark Peterson, after noting the lack of empirically based information on the nature and timing of lawyer activity in litigation, invited each panelist to draw on his own experience in describing the advancement of cases through discovery and negotiation to settlement or trial, the timing of various phases in this process, and the reasons for such timing. He suggested that the session address questions concerning the potentially conflicting interests in the pace of litigation of lawyers, their clients, and the general public, the role of lawyers themselves as pacemakers, and the effects on lawyers of court efforts to expedite case dispositions.

Mr. Daniel Fogel

Mr. Fogel, a plaintiffs' lawyer in personal injury litigation, commented first that the behavior of attorneys has little effect on the pace
of litigation in the courts of any large city in California. In the Superior Court of Los Angeles County, for example, the function of the lawyer, after bringing a suit to at-issue status, is simply to wait out the four- or five-year period before assignment to trial.

By contrast, in the Los Angeles Federal District Court the pace of litigation is determined by the ability of each judge to move his calendar along, consistent with attorneys finishing their discovery on schedule. In this environment, most cases could reach trial within nine to eighteen months, which Mr. Fogel thought remarkably good given the size of the court's jurisdiction. An even faster pace is available to attorneys practicing in many California courts outside the large metropolitan areas. Where trial is possible within seven to eight months of filing, as in these courts, attorneys and their clients have a completely different perspective, with plaintiffs, at least, finding the pace of litigation more favorable to their interests.

Commenting on the differing effects of delay on plaintiffs and defendants, Mr. Fogel noted that the plaintiff has nothing to gain from prolonged litigation unless he needs time for the effect of an injury to become clear and stable. Even then, delay could be a severe burden on disabled plaintiffs without funds to sustain themselves while waiting to get to trial. Attorneys practicing personal injury law are most often dependent on contingency fees, and must continue to advance costs and pay overhead whatever the rate of progress of a trial calendar. Mr. Fogel noted that, in his own firm, because personal injury cases are only a part of the work undertaken, the effects of a court calendar slowing from a three-year to a five-year trial anticipation are not as burdensome as they might be in offices specializing in personal injury litigation.

Defendants, however, have everything to gain from delay and from taking an appeal from any judgment finally reached. If only because when prejudgment interest is awarded, it is payable at the unrealistic bargain rate of 7%. Meanwhile, the defendant still has his money and is making perhaps 20%, 25%, or 30% on it, in an inflated economy. Mr. Fogel said this is an area where there has to be correction, with mandatory prejudgment interest payable and also penalties for frivolous appeals.

Addressing the question of how long it takes to prepare different types of cases for trial, without taking into account what the courts were likely to do, Mr. Fogel noted that simple automobile accident cases are particularly susceptible to adjustment since the disproportionate cost of litigation gives both parties a motive to settle quickly. On the other hand, in personal injury cases, where there might be complex questions of product liability or professional malpractice.
time is required for extensive discovery, the taking of depositions, the reproduction of documents, and the stabilization of the results of medical treatment or surgery.

Mr. Fogel concluded that in his experience the California courts are making strong efforts to expedite their caseloads, and that the rules in both the superior and federal courts were designed to that end. He personally disliked the stringent requirements of some of these rules, but insofar as the new federal local rules, for example, required early conferences between opposing attorneys and made each side think about its arguments in context, he believed that the effects must be salutary.

Mr. James Hourihan

Mr. Hourihan, whose practice is mostly for the defense in personal injury litigation, began by describing the usual sequence of events in settlement attempts made by insurance companies up to the point where negotiations fail and suit is filed. After filing, the positions of the parties are polarized and settlement is unlikely until the case has been evaluated by the defendant’s attorney as to his client’s potential exposure, and until discovery of principal witnesses and parties has been completed, together with expert review of testimony and reports from plaintiff’s doctors.

The personality and experience of opposing counsel could be an important factor in delay in beginning serious settlement negotiations. Some attorneys view early attempts to settle as an indication of weakness, Mr. Hourihan said, while others are so inexperienced in evaluating cases that only a judge’s opinion as to merits can prompt more realistic assessments. The presence of such difficulties, together with complications such as third-party actions, cross claims, or multiple parties, all tend to delay the moment at which a case is ready for settlement. When litigation is moving toward a trial, Mr. Hourihan believes that judges should be more active at an early date in establishing schedules and cut-off dates for discovery. For both sides there is some benefit in completing discovery within a compressed time period, in that the attorneys do not have to reacquaint themselves at intervals over a long period with the facts and backgrounds of the case.

Mr. Hourihan referred to the possibility, raised earlier during the conference, that more discovery is inevitably done in the faster courts than in the slow, and observed that where a trial date is imminent, an attorney has to concentrate on discovery rather than settlement discussions. He might still settle, but only after he has taken all his
depositions. In a slower time frame, settlement is more likely to be reached before the final round of discovery.

Speaking of the tactical uses of delay, Mr. Hourihan mentioned its use as a concomitant of massive discovery designed to exhaust the morale and resources of an opponent, or to deprive the other side of essential information, either by failing to answer interrogatories in good faith, by filing objections across the board, or by being dilatory in identifying critical witnesses.

The most obvious way to counteract delaying tactics is the motion to compel discovery, but judges in the federal courts where Mr. Hourihan practices have sometimes confronted him with a "Catch-22" situation by asserting that, since trial was at least two to three years distant, another 60 days for the answering of interrogatories could hardly cause problems. Delay, said Mr. Hourihan, is one cause of the public's poor perception of lawyers, judges, and the whole judicial system.

Mr. C. Stephen Howard

Mr. Howard, who also represents defendants, commented that his clients have an obvious interest in delay, and in making use of the "natural free ride" that the system provides. His role as defense counsel therefore is simply to wait, to see if his opponent has the resolve and the financial ability to continue. He usually attempts settlement negotiations as soon as he knows what the case is about, but usually meets with a response so unrealistic that serious discussion is impossible. Fully 75 percent of the discovery he undertakes thereafter serves the purpose, not so much of informing him, as of educating his opponent as to the weakness of his case—a process that can be time-consuming. Most often, settlements come at the last possible moment, when the parties are faced with a costly trial.

When Mr. Howard represents plaintiffs, he knows that he must find ways to be creative in a totally defense-oriented system. His best way of "being irritating" is to find some means of putting his case into a preliminary injunctive mode, forcing the other side to litigate on the merits immediately, with papers, affidavits, and declarations. Frequently, a credible threat of a preliminary injunction is enough to induce settlement. Beyond that, a powerful approach in California is attachment of the defendant's property, which, if available, is likely to force an early hearing on the merits. Occasionally, a defendant might find the filing of a suit politically or financially embarrassing and will be amenable to early settlement for that reason.

In his practice, Mr. Howard remarked, he does see discovery used to inflict cost on the other side, to test their resolve, and to make them
think about the stakes and issues involved; but he very rarely sees lawyers using discovery for sheer delay, if only because the normal wait for trial makes this unnecessary.

Turning to the courts’ role in reducing delay, Mr. Howard particularly recommended federal court procedures that force attorneys to prepare their cases well before trial. Rule 9 in the Central District of California is, he said, a “nightmare” for attorneys, but it has the salutary effect of confronting both sides with the strengths and weaknesses of their cases early enough to make them choose settlement over the expensive “crapshoot” of trial.

Apart from factors that are essentially in the control of the courts, Mr. Howard commented on elements in the psychology of attorneys and their clients that might contribute to delay. In conclusion, he noted the insecurity of lawyers as a group, which makes them take on so much work that eventually they may be able to devote significant energy only to the urgent business of preparing for trial, with resultant incremental delays in processing the rest of their workload.

Professor Charles Halpern

After offering some preliminary description of the nature of public interest or public law litigation, and of the parties likely to be involved, Professor Halpern noted discrepancies in resources typically found between plaintiffs and defendants in such cases, the novelty of the legal questions at issue, and the time-consuming characteristics of cases that frequently have at their center an ongoing injunctive decree to be administered over a period of years by a federal judge. Management problems presented to the court by public interest suits are likely to diminish in future, Professor Halpern said, if only because the subsidies that make this important category of litigation possible are drying up. Because the public interest bar is poorly financed, operates in thinly staffed organizations, and is at a growing disadvantage in terms of such resources as paralegal assistance, computerized research, data retrieval, and word processing, it is unlikely to be able to respond efficiently to aggressive case management. He emphasized that delay typically benefits one party or the other in litigation, and since it operates to shift the balance of advantage, it ought to be evaluated in that context. Not only may the interests of attorney and client diverge over the matter of delay, but also an accelerated pace of litigation may have particular strategic significance in public interest suits; for example, some parties may seek delay to “cool out” a controversial subject, while others may need prompt resolution to synchronize with efforts to achieve legislative action.
Professor Halpern suggested that more research is needed, "beyond counting dispositions," into the effects of anti-delay measures on the quality of justice and the question of whether litigants feel obliged to sell out legitimate claims because of the pressures of the system. Unless delay is addressed in the context of equitable justice, Professor Halpern asserted, a "cartoon" of the judicial process results in which case disposition is seen in terms of assembly-line efficiency.

Discussion

Professor Galanter suggested that the question of delay in the activities of lawyers is closely related to the politics of "people trying to use their time optimally." Mr. Fogel and Mr. Hourihan agreed that, given the current attempts of courts to control time to trial and the insistence of malpractice insurers on strict docket control in law office management, attorneys have fewer options in determining the optimal use of their time than they had 20 years ago. Mr. Fogel stressed that he objected to any deliberate policy of staggering or postponing litigation to ensure future income.

Professor Macaulay said that Mr. Fogel and other panelists were perhaps not representative of the profession as a whole. For the solo practitioner in a medium-size city, the crucial decision is not whether or not to take on a case but what to do with a case once he has it. and, in particular, what to do with a case that was supposed to settle and failed to do so. When a hard-pressed attorney is faced with unexpected legal work necessary for trial preparation, delay in the progress of litigation becomes most likely. Attempts to reduce delay in such circumstances by "cutting a deal" rather than going to trial may fail to vindicate the rights of claimants. Professor Macaulay added that he would like to associate himself with the remarks of Professor Halpern in this connection.

Mr. Phillips returned to the topic of public interest litigation. Because many of his cases are brought "in the shadow of the bulldozer," he generally seeks an injunction or extraordinary writ, and has a clear interest in dispatch rather than delay. Recent rulings awarding attorney fees to the winning side in public interest litigation have diminished his opponents' interest in delaying resolution while they subjected him to ruinous bouts of discovery, since it is now possible that every hour he spends might eventually be chargeable to their own clients. Although he might be able to curtail some of the delay that is obviously advantageous to his opponent, Mr. Phillips commented that he nevertheless sees many abuses of discovery "clearly not designed to elicit information that would help in advancing cases to trial." The practice of making whatever delay occurs as
expensive as possible he traced to the fact that litigation is now the staple of private practice, and lawyers working at an hourly rate have an incentive to exploit the possibilities of discovery to the hilt.

Professor Halpern said that arbitrary discovery deadlines and limits on the number of interrogatories are not effective in controlling abuse, and judges seem uninterested in exercising firm control themselves or imposing sanctions. Judge Kline commented that federal court judges seem to believe discovery problems are something to be dealt with as minor matters by commissionrs or magistrates. He went on to say that he believes there are some fundamentally better reasons for removing certain types of disputes from the courts than simply to reduce delay, adding that there might be some "utility" in this delay and in the current crisis in court congestion, if as a result more attention were paid to extrajudicial informal mechanisms for dispute resolution. The notion of the courtroom as the only place to vindicate rights is, he believed, socially debilitating.

Mr. Fogel responded that he objected to the idea that the current system should be stalemated in the interest of political objectives, and Professor Galanter commented that it was not clear to him whether making the courts more or less accessible—for example, by reducing delay—would necessarily enhance the use of extrajudicial resolution procedures. He questioned how much greater such deterrents to the use of courts could become, without distorting the quality of justice available in alternative dispute resolution mechanisms. Judge Kline drew an analogy between courts and highways, suggesting that where either is smooth and quick, the public might use it exclusively to the detriment of other more appropriate forms of dispute resolution, or transportation.

Judge Schauer and Judge Wallace stressed the lawyer's role in reaching settlement. One effect of the development of an extensive range of settlement procedures in his court, Judge Schauer believed, had been that attorneys had come to rely excessively on court settlement initiatives and on judicial evaluation of their cases, which often had to occur late in the course of difficult litigation because the two sides were not ready to talk until discovery was largely completed. Judge Wallace commented that the 10% of all cases that typically come to trial might be seen as those where the lawyers have failed as counselors to achieve settlement. One effect of the adversary system was that lawyers tended to think of success in terms of courtroom victories rather than in terms of settlement won.

Dr. Peterson observed that the pace of settlement might well have a momentum independent of court procedures, noting that 80% of cases in the Los Angeles courts settled long before the pressures of pretrial conference. Mr. Flanders and Dr. Kritzer concurred, each having
found in his own research that many cases appeared to have been withdrawn or dropped from court dockets long before their merits were explored.

Judge Hill, followed by Professor Galanter and Mr. Nejelski, spoke of the problems of a very small judicial establishment, in terms of the ratio of judges to lawyers, managing an increasingly large legal system in which over half of all practicing attorneys are under 35 years old. Mr. Olson closed the panel proceedings with a comment that problems traceable to the disparate sizes of the judicial establishment and a large and relatively inexperienced bar must be exacerbated if the lawyer population doubles, as predicted, to one million in the next 15 years.
PANEL 3: ARBITRATION AND THE PACE OF LITIGATION

Moderator

William Felstiner, The Institute for Civil Justice

Panelists

Bernard Hines, Board of Governors, Insurance Arbitration Forums, New York City
Herbert Kritzer, Associate Professor of Political Science, University of Wisconsin, Madison
Deborah Hensler, The Institute for Civil Justice

Discussants

Robert Coulson, President, American Arbitration Association, New York City
J. Anthony Kline, Judge of the Superior Court, San Francisco
Arthur Briskman, Legislative Counsel to Senator Howell Heflin, U.S. Senate, Washington, D.C.

Mr. William Felstiner noted that arbitration—one response to the problems of court congestion—had been a recurrent theme throughout the conference. When arbitration is undertaken instead of litigation, Mr. Felstiner commented, it is employed as a matter of contract, although the contract in question might have widespread application involving thousands of transactions.

Mr. Felstiner suggested that the panelists and the discussants, all of whom had been active in the policy debate regarding arbitration of civil suits, might address policy issues related to the effects of arbitration on the pace of litigation, on costs, on outcomes, and on the quality of justice offered by arbitration to litigants.
Mr. Bernard Hines

Mr. Hines first outlined the types of program administered by his organization in providing over 1,000 insurance companies with private arbitration as a means of resolving intercompany disputes. Companies who join Insurance Arbitration Forums sign an agreement binding themselves unconditionally to arbitrate rather than litigate any controversy of a type covered by the Forums' programs. By consent, the Forums could arbitrate for any amount, but given the limits of most policies, some larger claims could be resolved only by litigation. In 1980, the organization arbitrated 214,875 cases at a total cost to members of $15 filing fee per case. Arbitrators, chosen for their areas of experience from the ranks of insurance company personnel, serve as volunteers without compensation. They are often members of the bar, but may also be other individuals with an appropriate blend of experience and a reputation for objectivity.

Panelists are instructed to follow liability law in making their awards, and may require briefs from the parties or adjourn hearings if necessary. Each case is decided without regard to arbitration precedent, and is without the force of res judicata so as to avoid conflict of any kind with the courts.

The Forums do not arbitrate the interests of insured parties, but will not arbitrate between two companies until any claim by an insured had been liquidated without prejudice to the company making payment. As a matter of good public policy, his company recommends that the loser in arbitration pay any deductible that is chargeable to the winner's insured.

Informal procedures are adopted during arbitration, but "no continuance" policies are followed, with companies notified by certified mail that arbitration is pending. The average time is 45 days from filing to disposition in their property subrogation cases, which are usually heard by a single arbitrator with parties representing themselves. For more serious cases, such as those involving bodily injury, the hearing might be before a panel of three arbitrators, with companies represented by counsel, and an average elapsed time of 90 days.

Dr. Herbert Kritzer

Dr. Kritzer introduced the research done by the Civil Litigation Research Project at the University of Wisconsin, which used a variety of noncourt, alternative, third-party adjudicative systems for comparison in studying the broader context of dispute processing in the United States. The most prominent of these alternatives were the public systems of the American Arbitration Association (AAA). The
Civil Litigation Research Project had looked at the commercial tribunals of the Association, and also at those for accident cases, which dealt mostly with uninsured motorists’ claims. The research analysis, which used data from a series of AAA cases terminated in 1978, focused on time from filing to termination, comparing the pace of litigation in these cases with roughly matched samples in the state and federal courts of South Carolina, New Mexico, California, Wisconsin, and Pennsylvania. In each state except the last, arbitration was faster in varying degrees than either state or federal court processes. Dr. Kritzer concluded that pace was usually faster with the AAA and that variations within the system might reflect different administrative practices. He thought it unclear whether the faster pace resulted from the expectations of the participants or from procedural differences between the AAA and the courts.

A crucial problem in comparing arbitration and litigation, said Dr. Kritzer, lay in the motives for a plaintiff’s decision to file. It might be argued that plaintiffs made many court filings for tactical reasons, to draw defendants into negotiation, without a firm expectation of eventually going to trial. Parties taking a case to arbitration appeared much more likely to want a decision, and in fact almost 60% of AAA cases were decided by an award, as compared with the 5% trial rate for cases filed in state and federal court.

Dr. Kritzer noted that the Civil Litigation Research Project had also collected data on ten other dispute resolution institutions involving either arbitration or hearing procedures, and had found wide variations in pace. He concluded that in thinking about the pace of case disposition in such procedures, it might well be that alternative processes, such as those using mediation by judges within the court, were more significant than alternative institutions.

**Dr. Allan Lind**

Dr. Lind commented on his report on the Federal Judicial Center’s study of pilot programs for court-annexed arbitration, as established by local rule in the District of Connecticut, the Eastern District of Pennsylvania, and the Northern District of California. The study examined the first two and a half years of the pilot program since its inception in early 1978. Dr. Lind outlined the procedures followed in these mandatory nonbinding programs, including the jurisdictional limits of $50,000 in Eastern Pennsylvania, as opposed to $100,000 in Northern California and Connecticut, the use of three experienced arbitrators, and the fact that the award of these arbitrators became the judgment of the court unless either party rejected it by filing a demand for trial de novo.
Dr. Lind and his colleague John Shapard monitored some 3,000 cases referred to arbitration during the first two and a half years of the program's operation, and gathered data from questionnaires sent to arbitrators and counsel for the parties involved. Comparison was made with records of cases filed in the courts for a period of two and a half years before the program began; a matched group of contemporaneous cases in Connecticut were removed from the program explicitly for this purpose.

The median time from filing to hearing for cases arbitrated during the study was nine months in Northern California and eight months in Eastern Pennsylvania and Connecticut. Time obviously could be computed only for those cases arbitrated, and more than two-thirds of the cases that remained open for more than a year after filing had not had a hearing during that time, leading researchers to conclude that timetables in the rules were not followed closely.

One unexpected finding was that demands for trial *de novo* were running at about 60% for all awards, a much higher percentage than that claimed for state court arbitration programs, which generally experienced a 15% to 20% rate of demand. During the time-frame of the study, 46% of the cases with *de novo* demands settled, establishing at least a minimum figure for the percentage that would settle before trial.

A principal finding of the study was that, in two of the three pilot districts, there was a substantial increase in the percentage of cases terminating in the first year, relative to the best group of comparison cases that could be found. In Connecticut, where there was a matched group of cases outside the arbitration program, researchers found convincing evidence that arbitration increased the rate of termination from 36% to 50% in the first year.

Dr. Lind commented that substantial rates of *de novo* demands, and difficulty in actually getting cases to arbitration, prompted researchers to conduct additional analyses. They found that the more rapid terminations were attributable to settlement and to withdrawal of cases that had not undergone hearings. Dr. Lind concluded that it was not so much the holding of a hearing as the deadline for its occurrence that encouraged more rapid discovery and an increase in negotiation activity, leading to earlier settlements.

If arbitration had this type of deadline value, Dr. Lind suggested that its effect might have been substantially increased if each court in the study had more closely followed the timetable specified in its own rules. He commented that the increased pace of termination observed in the pilot courts seemed a sufficiently positive result to encourage further testing and experimentation with the arbitration program in the district courts. It was now known that a case in the first year of its
life was more likely to terminate if it was in an arbitration program than if it was not.

Dr. Deborah Hensler

Dr. Hensler reported on the Institute for Civil Justice's recently completed study of the first year of the California arbitration program. She noted that it had features similar to those adopted in other states, but was broader in scope than many, in that it could not only mandate arbitration of all civil suits up to $15,000, but also allowed the plaintiff in such cases to elect arbitration without the defendant's consent, and provided for arbitration of suits of any value by stipulation of both parties.

Dr. Hensler described a critical difference between the California program and the federal program described by Dr. Lind. Because California prohibits the *ad damnum* clause in complaints, which states the plaintiff's monetary demand, the value of the case must be determined in most courts by a judge, who then decides whether or not it is eligible for arbitration.

The California legislature had multiple objectives in mind in adopting the program; court congestion, the size of some trial calendars, and a need to stabilize costs were concerns at least as important as reducing time to disposition. Her report assessed the program's potential for achieving each of these objectives, but for the moment, Dr. Hensler focused exclusively on time to disposition. Assembled data on this measurement were based not on sampling of case records but on courts and arbitration administrators' estimates of average times required to reach arbitration awards for both mandatory and voluntary cases. Although the figures were estimates, they were instructive regarding the effect of the program in six courts that were studied intensively and which, between them, handled more than half of the caseload in the California Superior Court system.

The study found that, during the first year, mandatory arbitration reduced time to disposition in only one of the six courts; in four, litigants may have had to wait slightly longer for adjudication than if they were bound for trial. In every court, however, voluntary resort to the program could substantially reduce time to disposition. Dr. Hensler believed that the elapsed-time rules adopted by statute for implementation by local courts were the cause of an initial period of delay, because the rules set a minimum instead of a maximum period within which assignment to arbitration must occur. It appeared to be the consensus among those interviewed for the study that the statute's purpose had been to prevent courts from ordering cases to arbitration that, if left for at least nine months, were likely to settle by themselves.
A decision was therefore made in some courts to limit use of resources by concentrating on cases that were still in the system three or four years after filing the at-issue memorandum.

Another factor affecting time to disposition was the response of attorneys and litigants to the program. In courts with relatively longer times to trial, there had been both a higher percentage of volunteers for arbitration and lower rates for trial de novo. The average rate for such demands during the first year of the program was 40%, but Dr. Hensler noted that she had had the same time-frame problem as that experienced by Dr. Lind in the federal experiment in trying to estimate actual trial rates. Care was necessary in interpreting the significance of demands for trial de novo, as opposed to numbers actually going to trial. In Santa Clara County, where the demand rates had been highest, of all cases assigned to the program (rather than only those where an award was made), only 2% were estimated to have gone to trial. Interviews with attorneys led Dr. Hensler to conclude that demands for de novo trial were more often an element of strategy than an expression of actual intent. Data on complete settlement rates for cases in the program since it began had not been accumulated, but the proportion of cases settled between assignment to the program and the hearing date was known, and unlike the experience in the federal program, it provided no strong evidence that assignment to the program in itself encouraged settlement. Interviews with attorneys and judges indicated that arbitration appeared as likely to extend as to compress the settlement process; and anecdotal evidence suggested that litigants who might have been prepared to settle in the absence of arbitration now waited for a hearing before beginning negotiations.

In summing up, she commented that the California rules as interpreted by the courts had been ineffective in speeding disposition, although attorneys and litigants clearly had been able to expedite the process of volunteering for arbitration by agreeing to streamline arbitration selection procedures, and ultimately by accepting the award rather than deciding to negotiate or go on to trial.

Discussion

Mr. Robert Coulson remarked that he felt indebted to Professor Halpern for the notion of a “cartoon of a process.” The phrase seemed to him apt in describing mandatory arbitration, which lacked both the voluntary and binding aspects of traditional arbitration, and the judicial authority of court litigation.
As president of the American Arbitration Association, Mr. Coulson commented on its "market orientation," which was made necessary by the competing range of resolution services available to disputants, as opposed to that of the courts. Those who chose voluntary arbitration, he said, generally had reasons other than a desire simply for speed and economy. The process was attractive, for example, to those who sought a degree of expert judgment not available in the courts, and to disputants who regarded the court system, particularly in the areas of collective bargaining and international trade, as inimical to satisfactory resolution. Mr. Coulson also commented on the suitability of private arbitration to the insurance industry, where political and public relations considerations are important.

Judge J. Anthony Kline, picking up on a final observation by Mr. Coulson that it was impossible to understand the courts without considering political forces, undertook some description of the political background to the passage of the California mandatory arbitration statute, noting that similar forces would undoubtedly come into play if similar legislation were introduced in other states.

Judge Kline recalled that when Governor Brown took office in California in 1974, a Democratic legislature had presented him with the opportunity to make between 60 and 70 new judicial appointments. Although many observers saw a pressing need for these judgeships, Governor Brown did not see their creation as any solution to the problems of the courts. Rather, he sought to minimize the need for them by reducing the total volume of litigation.

The original idea behind the plan for mandatory arbitration in California, said Judge Kline, had been "to get lawyers and judges out of the foreground so as to permit disputants a private and informal forum in which to resolve their own disputes before an arbitrator of their own choosing." Because any such proposition was perceived as likely to reduce lay dependence on legal assistance, it was initially regarded as an economic threat by most segments of the bar. The price for passage of the bill, Judge Kline noted, had been a degree of compromise that he regretted but had regarded as inevitable.

Mr. Arthur Briskman, as legislative counsel to Senator Heflin of Alabama, described the bases of the Senator's opposition to a proposed bill to expand the use of mandatory arbitration in the federal courts. Senator Heflin had been concerned, he said, that the process might constitute an abridgement of Seventh Amendment rights to access to the courts, and that possible penalties attendant on requests for trial de novo might amount to a tax on the right to jury trial. Senator Heflin also believed that formal adversarial court procedures, following strict rules of evidence, were the best way to get at the facts in any case.
For himself, Mr. Briskman said that he believed arbitration might provide speedy relief from court congestion, and that the historical solution of appointing more judges might not be as effective, but he stressed that its effects on the court system as a whole must be considered.

Mr. Donald Seagraves observed that the performance of the insurance industry in settling disputes perhaps qualified it for inclusion in the system, as one massive alternative to trial by jury. He offered a statistical summary of the settlement activities of automobile insurers, not only as evidence of the experience of that industry in informal arbitration, but also as a response to assertions made earlier during the conference about the interest of insurers in delaying payment of claims through litigation because of the investment value of withheld payments.

Mr. Edward Hamilton, after questioning the utility of court settlement processes in the Los Angeles County courts in arbitration cases only when these were nearing assignment to hearing, observed that during passage of the California mandatory arbitration statute, it was not contemplated that any court would choose to make assignments so late in the process that cases might wait in the system for up to three and a half years. He noted that the California Assembly Judiciary Committee had recently set new limits making such late assignment to arbitration impossible, requiring the selection of an arbitrator within 30 days and raising the jurisdictional limit, in some courts, to $25,000.

Dr. Hensler remarked that her own research, and commentary during the conference, had demonstrated the difficulty of determining from the state capitol how the effects of formal rules might be limited by procedures independently adopted at local court levels. She therefore suggested caution in any statutory changes designed to solve problems in the current operation of the California mandatory arbitration program, and noted that one court in her study had answered judicial resource questions posed by the language of the statute by using an administrator rather than a judge to assign cases to arbitration.

Pre-arbitration rates of settlement had been unaffected by court-instituted settlement programs, she said, perhaps because litigants and their attorneys perceived arbitration as a truly alternative procedure, combining adjudication with settlement negotiations in which litigants were able to participate much more directly than was usual in court litigation.
CONCLUDING REMARKS

Dr. Stephen Carroll, in summing up the conference, said that the Institute's purpose had been to provide a forum for the exchange of ideas, opinions, and information on the pace of litigation, and also to learn what conferees believed to be the salient issues and areas where future research might most usefully be directed. From the viewpoint of the Institute, as a research-oriented organization, the conference had been extraordinarily fruitful.

In touching on some of the numerous themes and topics that had been of particular interest to Institute members during the proceedings, Dr. Carroll commented on the relationship between time to disposition and outcomes, and the supposition that any delay in the making of an award must affect not only its real value but also incentives to reach settlement early in the litigation process. If this were so, he hypothesized, the size, frequency, and acceptability of awards in comparable cases may vary in some discernible relationship to time to trial in different jurisdictions. Incentives in general—to lawyers, courts, legislators, and businessmen—had been a leading concern of the conference. Dr. Carroll observed, and the Institute would hope to explore this subject further in its research.

Speaking of the available data on results in court management techniques, much of which had been generated in cross-sectional rather than longitudinal studies, Dr. Carroll said that he was struck by the fact that reports of improved case-processing in particular courts rarely included specific information on how such improvement had been achieved. He suspected that institutional or individual behavior in these courts may have been modified in some degree simply by the actors' knowledge that their activities were being studied. To the extent that beneficial changes are wrought by "Hawthorne effects," he said, research might focus not only on the means of their achievement but also on longevity of effect.

Mr. Gustave Shubert closed the conference with thanks to all participants and a final admonition on the subject of bureaucracy—a word, he remarked, that had not once been uttered during the proceedings, although the central concern of the conference had been one of the largest of all organizational bureaucracies. The whole question of the bureaucratic incentives of the judiciary, Mr. Shubert said, as they coincided with the economic incentives of the legal profession, might not bode well for the cause of swift and equitable civil justice.
Part II  TRANSCRIPT

PANEL 1:  THE PACE OF COURT ACTIVITY
PANEL 2:  THE PACE OF LAWYER ACTIVITY
PANEL 3:  ARBITRATION AND THE PACE OF LITIGATION
PANEL 1: THE PACE OF COURT ACTIVITY

Introduction

Dr. Deborah Hensler of The Institute for Civil Justice, after welcoming conferees, noted that the topic for discussion at the first session, unlike issues to be addressed later in the conference, had been the subject of considerable research. The conference was fortunate, she said, to have as panelists the Senior Researchers on three of the leading empirical studies of delay in the courts. Mr. Larry Sipes, Director of the Western Regional Office of the National Center for State Courts, was author of *Managing to Reduce Delay*, and director of research reported in *Justice Delayed*. Mr. Steven Flanders, currently Circuit Executive for the U.S. Court of Appeals for the 2nd Circuit, was author and project director of the Federal Judicial Center Study, *Case Management and Court Management in the U.S. District Courts*. Professor Joel Grossman, of the Department of Political Science at the University of Wisconsin, and of the Civil Litigation Project, was author of *The Pace of Litigation in Federal and State Trial Courts*.

Dr. Hensler explained that the purpose of this session was to provide an opportunity for court officials and other practitioners to hear and debate the significance of the results of these studies with the researchers. To present the practitioners' perspective. Dr. Hensler introduced discussants Judge Leo Milonas, Deputy Chief Administrative Judge of the New York City Courts; Mr. Frank Zolin, Executive Officer of the Los Angeles Superior Court; and Mr. Douglas Dodge, Director of Planning and Development of the Administrative Office of the Pennsylvania courts.

Among questions to be addressed by the session, Dr. Hensler suggested, were the extent to which the courts could and should control the pace of litigation, the role of courts in shaping or reflecting local legal culture, and the feasibility of speeding litigation by applying uniform techniques in all jurisdictions rather than a particularistic approach, custom-tailored to each court. Dr. Hensler asked that discussants be prepared to comment on the panelists' presentations in light of their own experience in court management, communicating on the costs of delay, the practical limits of the courts' ability to control the pace of litigation, and effects on the judicial role of efforts to expedite case disposition.
Larry Sipes  
Director of the Western Regional Office  
National Center for State Courts  

I began practicing law in Los Angeles almost 20 years ago in the litigation department of the largest firm in town. There was then no question as to who controlled the pace of litigation in Los Angeles. The preferences of the courts, both state and federal, were simply not a relevant consideration because they did not exist. So we have come a long way to find a group like this convened to talk about the pace of litigation not only in California but also nationally, and it is a pleasure now to outline the work we have been doing over the past four years, at the National Center for State Courts, on trial court delay.  

A group of five of us from the National Center’s San Francisco office began our work with a grant from LEAA in conjunction with the National Conference on Metropolitan Courts, which is composed of the presiding judges of the major urban state trial courts. We began with an overall mandate to determine what could be done to increase the pace of litigation and reduce delay. Clearly we could not address this question without also taking a fairly reliable look at what we perceived to be the causes of delay; so that also was a part of our project.  

After considering a number of trial courts around the country, we decided to study twenty-one courts, for the most part urban, in fourteen different states. The organizational variety was extensive; nine courts had master calendars, eight had individual ones, and four had hybrid systems. Despite the variety of characteristics, terminology, and jurisdiction, both as to subject matter and geography, we set about trying to take a snapshot of comparative case processing times in these twenty-one courts.  

We spent a considerable amount of time and money just trying to get the numbers, discovering very quickly that trial courts simply do not know how long it takes civil cases to move through their processes. I do not think this situation has changed essentially, though there may be some exceptions. Most trial courts cannot age their caseloads, and cannot tell how long the process takes from commencement to disposition. So we developed a statistical system, of reasonably reliable comparability, from which to generalize. We measured time in approxi-
mately 20,000 cases, using 500 cases from both the criminal and civil caseloads in each court we studied. Beginning with the latest year, we took terminations there and worked backwards, as other recent researchers have done. Our numbers now are obviously a bit dated and they do comprise only a snapshot, but it was the broadest snapshot made at that time, and the first that offered some real comparability, as to the pace of litigation within a cross-section of trial courts.

In achieving this comparability, we had to make a number of choices, that will be familiar to those who have done this kind of research. For example, we excluded probate and domestic relations cases because the volume in those areas, particularly in domestic relations, simply skewed any picture we were able to develop. We used tort cases as the common denominator, so when I speak of civil case processing, almost without exception I am referring to the processing of tort cases but not excluding so-called complex tort litigation such as medical malpractice and product liability cases.

Because of time and money constraints we decided we could measure only median times. Among these courts median time from filing to disposition, whether by trial, settlement, or motion, was 288 days on the low end of the scale; on the high side, it was 811 days. That is an almost three-fold increase in elapsed time for a comparable case. For jury trials, the picture was not very different, with a low median time from filing to jury trial in the average tort case of 412 days, and a high median of 1332 days, or almost four years, in the slowest court.

We moved next to an examination of what such case processing phenomena said about some of the more popular notions—many of which originate with judges—as to why courts are delayed. Looking first at court size, the three courts with the shortest processing times had 11, 27, and 31 judges, while the three with the longest processing times had 19, 26, and 33. In between was a complete mixture, so we could find no correlation between court size and processing time. Looking at filings per judge, the court with the fastest track had 391 civil filings per year per judge, while the slowest had 296. We moved on to the theory that a court trying more jury cases will necessarily be slower than a court with less. Of the civil cases proceeding to trial in the fastest court, 2 percent required jury trial. In the two slowest courts, it was also 2 percent. Again, as with court size, there was no reliable correlation between percentage of jury cases tried and the pace of litigation in these courts.

We attempted to measure judicial productivity in relation to slow and fast courts, but came to no conclusive answer. We lacked time, money, and a consensus on an appropriate measure of judicial productivity. But since we did go to the trouble, I will report one very crude number, which at least lends itself to interesting speculation. In the
fastest court, the number of dispositions per year per judge, whether by trial, motion, or settlement, was 275. In the slowest, it was 354, and in between it was 147 per judge. 477, 338, and so on. We were therefore tempted to say in our report *Justice Delayed—The Pace of Litigation in Urban Trial Courts* (National Center for State Courts, 1978), that it was not at all clear that more judges will necessarily expedite the pace of litigation without more being done within the court. Conversely, there are situations where additional resources are the last and only recourse left to a court that has exploited those available to the maximum extent, and that can simply do nothing more in grappling with the volume of its caseload.

Our general conclusion was that the wide variations in processing times and dispositions per judge are not explained by often-suggested factors such as court size, number of filings, percentage of cases going to trial, settlement programs, or available judicial resources.

In addition to gathering numbers, we selected 10 courts which we visited for two-week periods with a team of observers and interviewers, including our own staff members and presiding judges and administrators from the National Conference of Metropolitan Courts. We interviewed members of the bar identified by court and local bar associations as regular litigating attorneys in each jurisdiction. We interviewed every judge, administrative staff members, and, where appropriate, people involved in ancillary arbitration and diversion programs. We observed court proceedings, and examined how cases were set and how continuance policies operated. In short, as outsiders, we spent as much time as we could in trying to get a first-hand grasp on how these courts functioned as institutions, and on local bar attitudes toward them.

I mention these visits and interviews because they made a great contribution to our second and admittedly subjective major conclusion. Processing time, we conclude, rather than being governed by such factors as the size of the court, is usually controlled by the attorneys, with the acquiescence of the court. Cases move at a pace which is compatible with the local bar's determination of what is a reasonable time to trial, and with attorney inventories of cases. We have described this, to the consternation of some of our more academic colleagues, as "the local legal culture," and we have set about grappling with the question of what, if anything, can be done to alter expectations and patterns of behavior.

We do not have a conclusive answer, but for the last two years we have been wrestling with it in this form. We limited ourselves at the beginning to working with techniques which could be instituted unilaterally by the courts. For a variety of reasons, mostly related to resources, we felt we were not in a position to pursue system-wide
solutions to case-processing delay. We initiated our experimental work with eight courts: the Superior Court in Oakland, California; the Court of Common Pleas in Cleveland, Ohio; the Recorder’s Court in Detroit, Michigan; the Supreme Court in Buffalo, New York; the Circuit Court in Palm Beach, Florida; the Superior Court in Phoenix, Arizona; the Superior Court in Cambridge, Massachusetts; and the Circuit Court in Portland, Oregon. We persuaded each of these courts to cooperate with us in undertaking some type of case management in areas where, at the time experiments began, the court had not been involved. Where it was profitable, expeditious, and in some cases critical, members of the bar were brought in, at least in a consulting capacity. Since that time the number of courts involved has increased, but these eight courts formed the basis of our experiments in management to reduce delay. The results are set forth in *Managing to Reduce Delay* (National Center for State Courts, 1980).

Our most ambitious project was with the Phoenix court, where a group of five judges out of the seventeen who were sitting on civil cases undertook to control the pace of litigation from the time a complaint was filed. The court examined measurements we had made of how long it was taking between each critical stage in the processing of a civil case, decided whether that period was acceptable or unacceptable, and set time periods for the completion of pleadings, discovery, expression by attorneys as to when they were ready for trial, and the trial itself. In Cambridge, Massachusetts, by contrast, our goal was simply to deal with the threshold problem of identifying truly ancient cases in the files, as opposed to merely old cases. So we began at very different places with very different objectives in terms of specific techniques in these jurisdictions, the overall purpose being to test the hypothesis that courts, acting unilaterally, though preferably in cooperation with the local bar, can modify the local legal culture so as to improve the pace of local litigation by shortening the processing time.

The results, as I said, were mixed. The more dramatic ones occurred in Phoenix; we took a great deal of encouragement from those, and have seen them sufficiently repeated in other jurisdictions, though in paler form, for us to be prepared to say that the notion of case management is viable.

In Phoenix there was a 36 percent reduction in pending caseloads for the judges who participated in the case management system, compared to caseloads for those judges who did not. The number of settlements in the courts of participating judges increased by 31 percent. The number of trials also increased, by 47 percent, but this proved to be a temporary phenomenon. As the judges implemented the various stages of the case management system, including a firm no-continuance policy, more cases went to trial; we surmise because
lawyers were caught unprepared to settle and had no alternative. That has now dropped off, and trial rates among the participating judges are much closer to those of non-participants. Finally, overall elapsed time for participating judges dropped almost 50 percent compared to the rest of the court. The primary goal was to move cases from filing to disposition within 12 months; disposition, again, by any means. When the official experimental period ended these calendars were down to a maximum of 14 months, compared to 21 months median disposition time for the rest of the court.

As I mentioned, we are continuing to work with a variety of courts around the country in measuring the pace of litigation and developing case management techniques that are sensible and acceptable. The results continue to be mixed, but there are enough versions of the Phoenix experience to convince us that this is a worthwhile avenue to pursue. I would be the last to assert that it is the only avenue, but I think it worth consideration and discussion.”
Steven Flanders
Circuit Executive
U.S. Court of Appeals, Second Circuit

Our project, the District Court Study of the Federal Judicial Center, began here in the Central District of California a little more than six years ago. Since our first report appeared in 1977 and is now more or less in the public domain, I will not recite its findings in any significant detail. Rather, I would like to discuss what I see as the context in which the project's findings have operated, and its outcomes and effects, because I think these are of considerable interest. There is some rather good news in what I have to say, although there is also a discouraging aspect.

The experience of the federal district courts in the last 20 to 30 years shows that delay can, to a very substantial degree, be controlled. There are techniques that can be implemented successfully to mitigate both the evil of court delay and, although this is less demonstrable, that of excessive expense as well. First, there are some rather simple techniques of judicial case management that can be implemented in different jurisdictions, and some rather simple statements that one can make about results. Second, the political and doctrinal obstacles to implementing these techniques can be overcome. I think we have seen a substantial change in the intellectual context within which judicial case management efforts operate. The change has been gradual within the past decade, but it is now only a slight exaggeration to say that the battle is largely won.

In dramatic contrast to the prime obstacle that faced the Court Delay Project of the National Center for State Courts, in our project we started several steps ahead of the game as beneficiaries of a highly imperfect but universal statistical system that told us a great deal about what was going on in U.S. district courts around the country. This system is based upon a very old case management study conducted in the 1930s for the Wickham Commission by Charles Clark, later Chief Judge of the Second Circuit. The Wickham Commission conducted docket surveys of several U.S. district courts and devised survey instruments that bear a very close resemblance, including even some of the same numbers, to present forms used in the
nationwide statistical system employed ever since the creation of the Administrative Office of the U.S. Courts in 1939. So a system was there and, for researchers at the Federal Judicial Center, the first question was what to do with it.

A second, underlying question had to do with the meaning of differences between district courts. What is the difference between a U.S. district court that has a median time, from filing to disposition, of 4 months, and one that has a median time of 33 months? Those were the extremes for civil-case processing. Corresponding figures for criminal cases were shorter, but extremes were as far from one another in percentage terms. We knew of very wide variations, and where the extremes were to be found, but we proceeded as though we knew nothing at all, which eventually proved in substantial degree to be the case. We began by selecting a group of five U.S. courts which we visited in a process of total immersion. We spent a good deal of time in the jurisdictions, talking with each judge, with most members of the support staff, certainly with all magistrates, and with many people in the docket offices. Perhaps more to the point, we talked with a great many lawyers. We did this in a rather unsystematic way, simply taking our opportunities as we saw them. We talked to people we ran into in the courts and those that we met through observing pretrial conferences. We also set up some more formal meetings with interested bar organizations that worked with the courts in some specific fashion.

This experience of total immersion took place in very large courts in the Central District of California, the District of Maryland, the Eastern District of Pennsylvania, which is Philadelphia primarily, the Eastern District of Louisiana, which is New Orleans, and the Southern District of Florida, which is Miami. We expanded the process to include the District of Massachusetts and four smaller courts to round out the data base, and collected a great deal of data from the civil dockets of each of these jurisdictions.

Our key finding was that the distinguishing feature of the fast courts is the presence of an automatic, or nearly automatic, system that puts each case on a relatively fast track soon after it is filed. This assures that the pleadings are completed quickly, that discovery begins early and comes to a halt rapidly, and that trial follows shortly thereafter if that is where the case is headed.

There are variations in the devices that courts use to implement this approach. The local rule used in California's Central District is breathtakingly simple. It specifies that a final pretrial conference, by which time all discovery must be completed, will take place 60 days after the answer is received. This 60-day time limit clearly is honored more in the breach than the observance, but it has the great virtue of
assuring that some kind of a schedule is being observed, no matter what doctrines or procedures are followed by the judge or judge’s staff involved. Other jurisdictions approach timing rather differently. In the Southern District of Florida, for example, at the time of our study the judge sent out a scheduling order very soon after filing, sometimes even anticipating the receipt of the answer if he knew who was to respond, but normally following such receipt. Then the burden was on the lawyers to show why this schedule, nearly always a very tight one, was not realistic.

Turning to the more data-based findings, we were surprised to discover that approximately the same amount of lawyers’ work was completed, even in the very fast jurisdictions, as was accomplished in the extremely slow ones. This led us to the policy-relevant conclusion that as far as we were able to tell from interviews, in the fast jurisdictions the same amount of work was compressed into a smaller amount of time. Despite the forebodings of critics of judicial case management, there was apparently little or no detrimental effect on the quality of the resulting proceedings. Indeed, we were very surprised to find that the greatest lawyer resistance to court case management efforts occurred in the relatively slow courts. In the faster courts there were plenty of other complaints, but these did not focus on any supposed excessive judicial urgency in bringing cases to a conclusion.

We explored the hypothesis that the fast jurisdictions might be characterized by the use of defensive discovery. This, of course, would have been quite counter-productive. It is certainly a sensible hypothesis that when a court puts pressure on lawyers to prepare their cases extremely quickly, they will do everything as rapidly as possible and spend a lot of money in the short period of time available to them, because they know that they have only one shot at winning. But that did not emerge at all in our discussions. We did find that fast jurisdictions had somewhat more discovery activity than the slower ones, with the most discovery activity per case taking place in the Southern District of Florida, which was our fastest test court. It was not by much, and it was within a narrow range that could easily have been accounted for by the very wide, if not measurable, differences that occur in how much of discovery actually finds its way onto docket sheets and thence into our records. When this figure emerged about the extent of discovery in fast courts, it was a matter of great concern to us, and it has continued to be of concern to many other people. It was raised, for example, during deliberations of the Advisory Committee on Civil Rules when that body considered changes in the discovery rules a few years ago.

I want to turn now, very briefly, to a methodological point, because our original research design failed in a way that is both instructive
and interesting. One of our ideas had been to explore possible differences between the amount of "dead time" in one court and in another, time when nothing was pending, nobody was waiting for somebody else to do something. It was the search for this "dead time," and for a means of operationalizing the concept, that was at the heart of our data-gathering instruments. We wanted to find a start date and a finish date for every motion, for every discovery initiative, for everything of that kind, and then add up the time between these kinds of initiatives and responses. In effect, we told our researchers they were to go out to each jurisdiction, find 500 cases, and bring them back dead or alive. This did not work, because they brought most of them back comatose. We could not operationalize the notion of dead time because we found that for almost all of these periods there was, at least in a nominal sense, something pending. In a hypothetical sequence, you might have a civil suit filed, and then an early motion filed to transfer it to another jurisdiction. Then there might be 8, 12, or 16 months of desultory discovery activity and, finally, a settlement. There would be no "dead time," as we have defined the notion, because the motion for transfer was never resolved, at least on paper. One may guess, in looking at such a docket sheet and file, that the motion to transfer somehow got resolved in everybody's minds at a rather early stage. Hence, to define or measure dead time on some basis that made sense would have required an enormous investment of labor and some very tricky definitions. So we abandoned this, and began counting initiating events instead.

Where has all this taken us? Where did the doctrine and the device of judicial case management come from, and where is it going? In looking at the differences among jurisdictions, and the different results of their case management practices or lack thereof, what we found ourselves doing, broadly speaking, was tracking the degree of acceptance of a remarkable grassroots movement which began in the early 1950s and continued through the Pre-Trial Committee of the Judicial Conference of the United States. Like all grassroots movements it had many sources, but I will identify Judge Alfred P. Murrah as its prime mover for our present purposes. He was director of the Judicial Center when I was there, and previously had been Chief Judge of the Tenth Circuit.

The Pre-Trial Committee "invented" and diffused what Art Miller recently referred to as "the religion of case management," and it did so, interestingly enough, with little or no legal sanction or recognition. As the Federal Rules of Civil Procedure now read—although they are about to change in this respect—there are a few references in Rules 16, and 83 which judges may use as bases and justifications for judicial case management, but nowhere do the rules explicitly say that there is
a judicial responsibility to control the expenditure of time and money in a civil case. What has happened is that the whole judiciary has gotten religion in this sense. The vanquished minority is no longer very vocal and appears somewhat embarrassed. And strikingly enough, every authoritative body that has looked at problems of excessive delay and expense in recent years has recommended increments in traditional judicial management as the prime solution.

A recent article in the *Legal Times*, concerning the management by Judge Edward Becker of the Eastern District of Pennsylvania of a Japanese electronics case, began by quoting the Antitrust Commission of two or three years back, and went on to demonstrate that the kind of judicial activism recommended by that commission was at work in this case. My own Second Circuit Committee on Planning for the District Courts has recently promulgated a very strong statement by Arthur Liman, a distinguished trial lawyer, imploring judicial case management and describing it as a demand made by the bar of the bench. This is an extraordinary change of position with regard to a doctrine that, as far as I have been able to determine, was originally a judicial initiative, and which has always been regarded as something imposed by the federal courts upon a reluctant bar. The Advisory Committee on Civil Rules is about to propose a large number of amendments in the Federal Rules, of which the most significant is that Rule 16, the rule on pretrial, will be substantially rewritten to impose a specific and explicit judicial obligation to manage the conduct of each case.

I believe that our project has been part of a process that has brought judicial case management out of Judge Murrah's closet and made it part of the public domain. Judge Murrah, who was no shrinking violet, did a remarkable job of spreading the word in the judiciary, but I think it is only very recently that the word has gotten outside the judiciary. Suspect practices of district judges in the case management area are no longer so suspect, but rather recognized as the core of almost any approach to the ill of delay, and perhaps also of expense. I think the changes in Rule 16 will help to establish case management as an obligation.

A crucial problem for administrators is the almost complete absence of incentives for the courts, in any conventional sense, to support administrative initiatives. But I think we have seen, as the diffusion of case management religion has taken place in the federal courts, the effective operation of a peculiar kind of incentive. Obviously, for federal judges, as Article III officers whose inadequate pay is universal, conventional incentives of the kind that economists recognize are nonexistent. But what Judge Will, of the Northern District of Illinois, refers to as the profit-and-loss statement (the
report on cases filed, disposed of, and pending before each judge, prepared each month) has proved a remarkably effective alternative. Each U.S. district court is a kind of ongoing experiment in the efficacy of case management techniques used by each of its judges. The experiment is, of course, subject to all sorts of intervening variables of which the individual judges and their staffs are acutely aware. Nevertheless, this experimental approach compels a kind of continuous re-examination of management techniques in the district courts, and is a remarkable and surprisingly effective device.
Joel B. Grossman
Professor of Political Science
University of Wisconsin

The data I am about to refer to come from the Civil Litigation Research Project, centered at the University of Wisconsin with branches in California and at Amherst. This is a large-scale, federally funded project designed to investigate the cost of civil litigation. Although our research was not conducted primarily for the purpose of studying the problem of delay in the courts, some of our results do bear on this question.

One of the things we did was to study a sample of middle-range disputes litigated in state and federal trial courts of general jurisdiction. We wound up with a sample of about 1,650 cases, all of which were terminated in calendar 1978. The sample was drawn directly from the case records in twelve courts: five federal district courts in Milwaukee, Central California, Eastern Pennsylvania, New Mexico, and South Carolina, five state trial courts in the same locations, and two small samples taken in rural areas of Wisconsin and Pennsylvania. For the purpose of studying the cost of litigation rather than delay, we decided to exclude from the sample about 30 very large cases which we felt were probably atypical and were in any case beyond our capacity. We also excluded cases that were essentially non-adversarial, principally collection cases and non-adversarial probate cases, and we placed an arbitrary limit of 20 percent on domestic relations cases in the state courts, on the practical grounds that if we had allowed all domestic relations cases into the sample we would have had almost nothing else. Obviously, this may have some effect on how our data bears on the problem of delay, because domestic relations cases may or may not be significant in that respect. The nature of our effort to speak about delay is derivative since it was not our major or initial intent to do so. When we found that we had data that bore on the question we decided to pursue it.

As those who have studied the subject know very well, and as most who have dealt at all with case records perhaps suspect, these records are extremely opaque and somewhat inaccurate. We found out a lot about cases from sources other than the records by conducting, or
attempting to conduct interviews with the litigants and lawyers in the cases. The case records themselves often do not tell much; for example, they certainly tell very little about the total range of discovery incidents. All we could do, for example, in dealing with discovery was to note those events mentioned in the logs or the case files which seemed to relate to discovery events. We are certain, of course, that many such events took place which were not recorded in the case files, but there was no way, other than in interviews, that we could ascertain the exact number.

In terms of measures of delay, I will talk primarily about elapsed time from filing to termination, but we looked also at elapsed time from the first discovery event to the filing of the last discovery event, and from the filing of the case, or the pre-trial motion, to the trial. There are other “time periods” in the data that we have yet to extract. The common technique is to use the median as a measure of the elapsed time of cases. We used a slightly different technique known as survival analysis, an approach which was first used in medical research designed to study the survival time of patients with severe illnesses. Perhaps there is an analogy there to some of the cases we are talking about. In any event, it gives us an opportunity to graphically present the way in which cases seem to be moving through the courts. The graphs in Figs. 1-5 show a horizontal axis measuring the elapsed time in each case, while the vertical axis measures the proportion of cases surviving at each interval. The slope of the line essentially measures the pace of termination; the steeper the slope, the faster the termination.

I now want to raise a couple of questions which I hope to answer later. For example, why is delay a problem? A few people have raised this question in the literature, but it is almost never answered. Tom Church argues that delay self-evidently is problematic, and of course it is so, for some people under certain circumstances. But I do not think that it is necessarily true that delay is a problem for all litigants, and it is certainly not a problem for litigants in the same way that it is for court managers. This question must be addressed because it bears on policy recommendations. What do you do about delay? What kinds of resources do you put into this problem? Is there a marginal utility in trying to reduce delay by one increment, however measured? Tom Church says, “Delay cannot be eliminated unless cases move at a faster rate.” I think that suggests the nature of the problem that we are dealing with. Delay is a very subjective phenomenon, and what might be fast and efficient for a court, or for one party, might be a disservice to the other side. So I think that we ought not merely to assume that delay is bad and to be reduced by all available means. I do not think social science theory can resolve this, but I do think we ought to seriously address the question.
Fig. 1 — State and federal survival rates: Wisconsin

Fig. 2 — State and federal survival rates: California
Fig. 3 — State and federal survival rates: Pennsylvania

Fig. 4 — State and federal survival rates: South Carolina
We have used the term "pace of litigation" as the title of our paper, a term that is also used in the Church study and elsewhere in the literature. I think that we use it in a slightly different way, and not necessarily as a synonym for delay, again because that is obviously a subjective term. What we are trying to suggest is that cases are disposed of in a variety of patterns and at different paces. We are not suggesting that there is one particular objective, that of reducing the elapsed time, but seek rather to understand why cases proceed at different paces, why they are disposed of at different rates, and how this may affect, for example, the way in which they are terminated. Is the outcome of the case affected by whether or not you speed it up, or allow it to linger for some period of time? We know, for example, that disputes tend to be transformed over time; they are not synonymous with litigation. Cases change, and changing the tempo of processing them will obviously have something to do with the transformation of the underlying dispute.

The numbers on the graphs in Figs. 1-5 give an idea of the kind of results that we have reported. Table 1 is merely a summary in conventional tabular form of the pace of disposition of these cases. The month on the left tells the percentage of cases in that particular jurisdiction, in both federal and state courts, that were unresolved at the end of that time interval.
Table 1

SURVIVAL LIFE TABLE (SELECTED INTERVALS) FOR TOTAL DISPOSITION TIMES, BY COURT

<table>
<thead>
<tr>
<th>Interval Start Time (Months)</th>
<th>Cumulative Proportion Surviving to End of Interval (%)</th>
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<tbody>
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<td></td>
<td>Milwaukee</td>
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**Federal Courts**

| 6   | 63.4% | 55.1% | 60.1% | 71.6% | 60.7% |
| 12  | 49.1% | 31.8% | 39.2% | 39.4% | 24.4% |
| 18  | 32.7% | 17.9% | 19.6% | 16.8% | 3.6%  |
| 24  | 23.1% | 11.3% | 11.5% | 7.7%  | 1.2%  |
| 30  | 11.6% | 8.1%  | 6.1%  | 5.2%  | 0.6%  |

10% remaining (in months) | 32 | 25 | 26 | 23 | 16 |
Last case terminated (month) | 69 | 51 | 56 | 57 | 30 |
Median survival time (in months) | 13.14 | 8.56 | 9.24 | 11.32 | 8.54 |
N | 147 | 151 | 148 | 155 | 168 |

**State Courts**

| 6   | 81.1% | 74.4% | 81.4% | 57.8% | 42.4% |
| 12  | 35.9% | 46.4% | 60.7% | 45.8% | 15.0% |
| 18  | 18.3% | 29.6% | 44.1% | 19.7% | 6.5%  |
| 24  | 10.7% | 20.8% | 37.9% | 6.3%  | 1.3%  |
| 30  | 6.1%  | 11.2% | 30.3% | 4.9%  | 0%    |

10% remaining (in months) | 25 | 32 | 54 | 22 | 17 |
Last case terminated (month) | 62 | 48 | 69 | 70 | 29 |
Median survival time (in months) | 10.21 | 12.25 | 16.83 | 10.20 | 6.15 |
N | 131 | 125 | 145 | 142 | 153 |

In all the courts except the state trial court in Philadelphia, which is a special case and where procedures have recently changed, we find that more than half the cases are terminated within the first year, and a very substantial number, much more than half, within the first two years. In all but a couple of courts, no more than about 10 percent of the cases remain after a 24-month interval. In all the courts there is not only a period of rapid termination of many cases, but also a period where a few cases (at the other end of the scale) seem to linger interminably. In Table 1, where it shows the month of termination for these cases.
lingering cases, the longest remained for 70 months for the state court in South Carolina, and 69 months for the state court in Wisconsin. Obviously there is a very substantial period of time between the filing of this group of cases and the termination of the last one. But the number of cases that linger on beyond a couple of years is very small. We have not pulled these cases out to study them separately, but it is something we might well do in the future, given additional resources, and it would be very interesting to learn something about their characteristics.

In each of these graphs the slope of the curve becomes fairly gradual during the middle years. That means that the rate of termination activity is moving at a fairly gradual pace. The bulk of cases are already terminated, the lingerers are going to be there for a long time, and the other cases will tend to terminate gradually. This is least true, for reasons that I simply cannot explain, in New Mexico.

There are a number of interesting comparisons that we can make just on the basis of very simple data. For example, if we compare the federal and state courts in each district, we find that in four of the districts—Los Angeles, Philadelphia, Milwaukee, and New Mexico—there are significant differences. In Los Angeles and Philadelphia the federal courts are faster, but in Milwaukee and New Mexico quite the reverse is true. In South Carolina, as Figure 4 shows, there is virtually no difference, with state and federal courts moving at very close to the same pace. Why is this true? We cannot answer that, but can make the observation that the key to whether a court is fast or slow seems to lie in the number of cases terminated in the first few months after the case is filed. After that there seem to be fairly comparable gradual slopes, but the fast courts are the ones that dispose of the most cases early on. It is also worth observing that in the three most urban districts there is the least convergence between state and federal courts in the rate at which they dispose of cases.

In Figures 6 and 7, we have taken the same data and plotted it differently. In other words, we now ask whether state courts differ significantly from federal courts, and whether state courts differ from each other. For the federal courts, we see a fairly strong indication of a common pattern, in that they are much closer to each other in the rate at which they dispose of cases than are the state courts. In terms of statistical difference, the differences among the five state courts are much more significant than the commonality of the federal courts. It is clear that federal courts, with reasonably comparable rules, yield more similar rate patterns; there are, of course, local rules which make a difference.

Like the Federal Judicial Center's study of the federal courts, which was done a couple of years earlier than ours, our data produced no
Fig. 6 — Cumulative survival distribution for five state courts

Fig. 7 — Federal comparison of overall survival
observable linkage between the overall disposition rates of different courts and the mix of case types in these courts. We have not yet fully analyzed disposition patterns by type of case on an individual basis. But what we have found in Figure 8 suggests that, regardless of whether a court is high in tort cases or low in tort cases, the mix of cases does not affect the overall disposition pattern. This is not to say that tort cases are or are not faster than contract cases, but merely that we did not find that the courts with more tort cases and fewer contract cases were faster than courts that had the reverse pattern.

![Graph showing survival patterns for different types of cases](image)

*Fig. 8 — Federal survival patterns controlling for area of law*

One of our co-authors is about to publish a paper on the current and seemingly perennial debate as to whether diversity cases should be removed from, or restricted, in the federal courts.¹ Our findings about diversity cases are weak but suggestive. Having identified diversity cases in the federal courts, we then generated a sample in the state courts by taking those cases which met the $10,000 diversity minimum. Given our data, we could not determine whether or not the residency requirement was met in these state cases, but for statistical

purposes the question was not crucial. We simply took those state cases which otherwise appeared comparable to diversity cases filed in federal courts. We found, contrary to public assumption, striking similarities in the disposition pace of the cases that went to federal court and their lookalikes in the state courts. They were disposed of in very similar time periods, but a point we have not fully developed is whether these were fast courts or slow courts. So the argument favoring diversity of citizenship jurisdiction in the federal courts, on grounds that disposition is quicker there, is not supported by our data. We certainly do not disprove the argument, but we are not able to support it.

In measuring time to trial from time of filing as shown in Figure 9, we found surprisingly little difference between the federal and the state courts, although there are some differences in the third-year time period in which federal cases seem to linger more before trial. But certainly for almost all of the first two years there were very great similarities between them. The probability of a case going to trial in both the state and federal courts is clearly highest in 8- to 20-month period, and one of our very tentative conclusions is that a large number of cases, at least in our sample, reach trial without enduring
an overly long case life. This is not a conclusive finding, but if it is true that there is not as long a delay as has been thought between the filing of a case and when it goes to trial, that is obviously grist for the mill, something to be pursued. Of course, what constitutes too long a delay is subjective, and we have no response there.

What would we conclude simply on the basis of these kinds of figures? It seems to me that they are consistent with the theory advanced by Tom Church and others, that the pace of litigation is less determined by “court factors” than by “individual factors,” such as the particular goals and stakes of participants, or of various idiosyncratic local factors which have been dubbed “the local legal culture.” We are certainly not suggesting that court management techniques are unimportant, but only that our findings are not inconsistent with the conclusions of Church and other researchers. Nonetheless, I think our data should invite skepticism about the local legal culture hypothesis. We do not suggest that it is wrong, or that it does not apply, but simply that our data raises questions about it. For example, in the tables comparing the federal and state courts in each district, we found that the differences between these courts were greater than those between all federal and state courts, suggesting that there was no substantial evidence of a local pattern. Rather the federal courts were closer to each other than they were to their neighboring state courts, at least in three of the five instances. What is interesting here, is that where federal and state courts in the same location were most divergent was in the three largest districts. We suggest, just speculatively, that this may have something to do with the diversity of the bar. We might assume that in Los Angeles or Philadelphia, or to a somewhat lesser extent Milwaukee, those attorneys who practice primarily in the federal courts are likely to be different from those who practice primarily in the state courts. On the other hand, the two states in which federal and state court patterns were closest were our two smaller states, where it is simply more likely, on a numerical basis, than attorneys who practice in those areas did so in both federal and state courts. In other words, there was less likelihood of an exclusive federal bar in each of the smaller states.
Discussion

Following the panelists' presentations, the three discussants outlined their experiences in attempting to control pace of litigation in their large metropolitan jurisdictions, each of which had endemic problems of backlog and delay. Judge Milonas first described the administrative style of the New York City courts, where each borough independently controlled its own operations and court structure. Since he believed that litigation pace in New York had historically been set by attorneys in response to judicial attitudes, his goal had been to modify such attitudes and to require more active caseload management by the bench.

In 1979, with time to trial ranging from 64 months in the Bronx to 58 months in Manhattan and 48 months in Brooklyn, he had met with administrative judges and representatives of the bar to formulate a plan to increase judicial productivity and resources. Twenty-two judges from rural courts with current calendars were transferred to the city on a temporary, rotating basis. Judge vacation time was reduced from seven to five weeks, and the courts' working hours were increased by 30 minutes per day. Compulsory arbitration of civil cases with claims under $6,000, which had been well accepted elsewhere in the state, was expanded to the entire city of New York.

Pending caseloads had been reduced from 26,000 in 1979 to 15,000 but more importantly, in Judge Milonas' view, time to trial was being markedly reduced to meet goals and standards established for the state courts in 1974, which set an optimum time to trial of 12 to 15 months. Judge Milonas reported that city courts were now studying the effects of early judicial intervention in an experimental project in Brooklyn, where judges were holding scheduling conferences, designed to decrease discovery motions, soon after joinder of issues and well before the certificate of readiness.

Judge Milonas commented that the specifics of any action taken to expedite litigation were much less important than the simple fact, well publicized, that action was being taken. The symbolic effect of transferring judges to the city, for example, had resulted in much greater judicial productivity than might be attributed to the hours of additional judge time actually available. The making of "a great fuss"
at the judicial level had been effective, he concluded, in getting attorneys to move their cases more expeditiously to settlement or trial.

Mr. Zolin said that the Los Angeles Superior Court civil case backlogs had increased since 1969 from 35,000 cases with 27 months to trial to the present level of 73,000 with a 41-month wait for trial. With such a volume, the pace of litigation was controlled entirely by the capacity of the court to utilize productive judge time. Management techniques could increase this capacity only so far, and only slowly. To see delay in the processing of civil cases in Los Angeles County in perspective, said Mr. Zolin, it should be noted that, by statute, criminal and juvenile cases must be disposed of first, and that further, the management decision had been to give family and probate cases the next priority. Although the family law caseload was as large as that on the civil side, it was actually processed very quickly. As matters stood, with the pace of civil litigation always dependent upon the pace and volume of cases in these other areas, an ever-increasing backlog had developed over the past decade.

Mr. Zolin commented that since the panelists' research had focused on the experience of various exemplary courts for brief periods, no information could be given as to the durability of the reforms and management techniques instituted. Where the goal was long-term control, longitudinal studies of total caseloads over time were necessary to gain some understanding of what could or should be done to achieve lasting results. Even if it were possible to substantially reduce court-induced delay through management devices, or by adding to judge capacity, he said, the problem of litigant- or attorney-induced delay would remain. In this last connection, he had been interested in the idea of experimental over-staffing of a few courts. In processing all cases to trial as soon as they were ready, the extent of delay attributable to litigants would become clear. He understood from discussion with the Los Angeles bar that a desirable time to trial for civil cases would be from 14-18 months. But as yet no official target had been set. If some sort of goal were established, Mr. Zolin said that he believed the capacity of the courts, in terms of their judges and their supportive staffs, would be looked at in a different light.

In the Los Angeles courts, said Mr. Zolin, 10 percent of the caseload actually went to trial, using the major part of available judicial resources. Forty percent were disposed of with varying degrees of court intervention, while the remaining 50 percent were either settled or dropped. Unless one planned to manage 100 percent of the caseload, an obvious problem in developing techniques to route cases more efficiently was that of identifying in advance the 50 percent of all cases which would be resolved in some fashion without court intervention.

Mr. Dodge discussed the misuse of judicial resources which fre-
quently occurs when courts address difficulties in managing their caseloads by adding new procedures rather than by eliminating unnecessary steps. Referring to the multiplying effect of large caseloads on internal court practices, Mr. Dodge suggested that the problem courts create for themselves with their own procedures are quite as contributory to delay as the behavior of attorneys and litigants. Many judicial appearances, he said, serve no purpose other than the setting of another date for the parties to appear in court. As an example of the time frequently spent by judges on essentially non-judicial matters, he cited the average number of court appearances before a judge in misdemeanor cases going to trial in Rochester, New York. This was nine: arraignment and trial itself, plus seven appearances for motions, continuances, exchanges of documents and the like. Such wasteful consumption of judge time can be reduced in most jurisdictions, as it was in Rochester, New York, by minimizing the number of appearances and requiring the attorneys to be ready to proceed when they did appear.

Mr. Dodge commented that in Pennsylvania the courts take no cognizance of a case until the certificate of readiness is filed. One result of this absence of early management had been the existence in the Philadelphia Court of Common Pleas of 630,000 undisposed cases, some dated as long ago as ten years. In a housecleaning move to determine the size of active caseloads and to move active cases to trial readiness, said Mr. Dodge, the Pennsylvania Supreme Court had ruled in November 1979, against strong bar objections, that effective August 30th, 1980, a Certificate of Readiness must be filed for all cases within 240 days of initiation of suit. To date, Mr. Dodge reported, only a small percentage of the pending cases had complied; the others had been resolved or dismissed. In Philadelphia, for example, only some 14,000 of the nominal 630,000 pending cases had been moved to the trial calendar. He expected that the number going to trial would increase somewhat at first, but that by early 1982 time to trial in Philadelphia would be one year, as compared to the eight-year wait confronting litigants five years ago.¹

Mr. Ryan opened a brief period of general discussion with a reference to Mr. Zolin’s comment about the need for longitudinal studies of the effectiveness of court management techniques. He asked panelists how the overall significance of research findings might be affected by the “snapshot” approach of short-term studies. Mr. Sipes and Mr. Flanders agreed on the importance of more longitudinal work, both with respect to the establishment of data bases and to the study of

¹The Pennsylvania Supreme Court has since rescinded the 240-day rule, which had resulted in an extraordinary influx of filed Certificates of Readiness during the deadline month of August, 1980. However, most local courts have retained the rule.
longevity in the results of various types of court management reform. Mr. Flanders commented that given the inadequate resources available to most courts, changes in management systems could not be extensive. He went on to describe the current situation in the Southern Florida District Court, which during the period of his study had been exceptionally fast and efficient. A recent massive increase in its caseload had so overwhelmed previously effective management systems that it could no longer reach cases ready for trial. As a result, attorneys were now free to use delay as a litigation tactic.

Mr. Galanter commented that the topic under discussion seemed to have become not so much “pace” as delay, and delay seen as an evil. He suggested that if this was the underlying concern of the conference, rather than productivity and efficiency in pacing litigation, a different approach to the measurement of outcomes might be appropriate. Mr. Flanders responded that speed was a concern in the context of other values, and that he had frequently been asked if there was a trade-off between speed and the quality of justice in the faster courts in his study. In his experience, the quality of justice tended to be better in these courts. The performance of witnesses and attorneys in the faster courts, for example, speaking extemporaneously from memory, was generally superior to that of those speaking from notes in cases prepared over prolonged periods in the slower courts.

Judge Wallace and Judge Hill agreed on the responsibility of judges to manage their caseloads and move cases expeditiously, asserting that when litigants chose to use the courts their disputes became, in effect, public business. Judge Hill remarked that he thought it pessimistic to assume that 10 percent of the caseload was inevitably bound for trial. In his experience, the setting of deadlines for case processing and strong emphasis on settlement would dramatically reduce the number of trials. Where the courts created an environment for negotiation and compromise, those cases which were not going to settle become apparent earlier.

Judge Wallace asked the panelists to comment on the research findings pertaining to the relative efficiency of master and individual calendaring. Mr. Sipes said that all seven of the fastest courts in his study had used individual calendaring, while six of the seven slowest had master systems. Mr. Flanders observed that there were few master calendars remaining in use in the federal system, and that longitudinal studies had shown the pace to increase significantly after changeovers from master to individual systems.

Dr. Hensler spoke, in this connection, of the need for more sophisticated analyses of variables in studying litigation pace, with attention paid not simply to isolated factors such as size of caseload, or management techniques or calendar type, but to the effects of differing
combinations of factors in the circumstances of individual courts. Mr. Sipes agreed on the need for more ambitious research undertakings of that type.

Mr. Rosenberg questioned the extent of court responsibility for the management of three essentially different categories of cases: those where both sides want prompt disposition, those where only one side wants such disposition, and those where neither side is interested in speed. Mr. Flanders observed that cases where neither party, as opposed to the parties' attorneys, has any interest in speed are extremely rare. He mentioned a judge he had encountered who required that any lawyer seeking a continuance produce a client's letter stating that the party agreed to delay in resolution of his case although he understood that the court was ready to hear it on a specific date. This judge hardly ever sees such letters.

In response to a comment from Mr. Flanders that courts could invoke overall administrative supervision of their caseloads without adding to the burden on judges, Mr. Zolin reiterated his question about the most appropriate point in case processing for court intervention, arguing that because of the 50 percent drop-out rate, it appeared counterproductive to intervene early. Mr. Sipes suggested that extremely modest management techniques such as deadlines are often effective, offering as an example the practice of the Phoenix Superior Court, where cases are routinely dismissed if at least one party does not file a request for trial within eight months of bringing suit. Mr. Zolin commented that such methods could remove chaff from the backlog but would not affect judges' workloads.

Mr. Olson, after stating that he would like to see increased judicial use of sophisticated settlement programs such as those employed by Judge Hill, mentioned the often conflicting interests of courts, attorneys, and clients in delay and backlog. In any analysis of cases, he said, one party generally has an economic interest in not going to trial. In jurisdictions which have experienced delay, both plaintiffs' and defendants' lawyers have built up backlogs of cases from which they work. Before significant changes can be made, attorneys will have to be reconditioned to work only from a current caseload, without the economic security of a substantial backlog.

Mr. Olson said that he hoped the conference would consider the impact of extensive discovery on the pace of both case preparation and trial itself. Mr. Rosenberg said that a question relative to the advisability of time limits that needs research is the hypothesis that such limits on discovery may encourage its greater use. The theory in such circumstances may be, "if in doubt, discover before the time runs out." Mr. Grossman said that in his research into the federal courts, he had found no time differential between cases with no discovery at all and
those with small amounts. A few discovery events apparently have no perceptible effect on the pace of litigation, but with higher frequencies the impact is fairly substantial. Looking at state data, he said, it was interesting to note that the lines of demarcation were quite different, with increases in time most strongly apparent between low and medium discovery states.

Mr. Flanders said that his research had produced some data on the relationship between time available and discovery activity. Since the fastest courts were also those in which the total volume of discovery was relatively high, there appeared to be grounds for optimism about the effects of time limitation on quality of case preparation. Attorneys were able to accomplish substantial amounts of discovery despite time constraints. Mr. Flanders said that since, in his view, all of the economic and professional imperatives of lawyers tend to encourage increments in discovery, the interjection of a judicially imposed deadline was critical. It obliged the attorneys to make choices about potential areas for discovery, to attach probabilities and relative values. The discovery deadline was one of the few devices available to court managers which was likely to introduce cost-effective calculations into the decisions lawyers made as they prepared their cases.
Robert S. Banks  
Vice President and General Counsel, Xerox  

Luncheon Address  
Controlling Corporate Legal Cost

I think it is without a doubt true that top management of major corporations today is seriously concerned, perhaps to the point of frustration, with the seemingly unmanageable burden of legal expense. This concern is based first on the fact that cost is a key limitation on the right of access to the courts. We generally talk about access problems in terms of the poor, but it is not to be assumed for a moment that corporations have an unlimited fund available to finance litigation. Business executives get very frustrated when they believe they have a right that should be prosecuted or defended in court, and then they take a look at the costs and realize that they must swallow hard, be pragmatic, and get out of the lawsuit.

A larger concern is the increasingly substantial drain on profits. Legal expenses ultimately must be passed on to the consumer as a cost of doing business, but in the short term this may not be possible. American industry today, and coincidentally Xerox Corporation, is experiencing considerable competition from the Japanese, who do not have in their cost base the kind of legal expenses that American companies face. With the present focus on Japan, corporate management is looking at the reduction of legal expenses as a profit opportunity that ought to be explored.

This interest of chief executive officers is reflected in a rapidly increasing concern for cost control expressed by general counsels of various companies. When I made a presentation at the Center for Public Resources on this subject, I found myself inundated with requests for our forms and for information on our procedures. I have even made a few presentations at some of the larger corporations so that their lawyers could consider the issue. If this is a trend, it is clearly going to have an impact on the pace of litigation. Several law schools, and some notable nonprofit institutions, are spending a lot of time on the subject of methods of controlling the costs of controversy.
and on alternative approaches to dispute resolution. These schools and institutions are not concerned with corporate profits, of course, but I believe their interest is one that has broad importance throughout the country.

Ralph Nader held a conference in Washington on the subject of control and reduction of legal expenses. He was taking direct aim at private practitioners, feeling very sorry for the corporate executives, complaining that they were being taken advantage of, and offering to teach them how to take care of the problem. I must say that I am not of the Nader school, and emphasize the fact that I speak not as a businessman, but as an attorney engaged in the full-time practice of law for a single client, approaching the problem from a professional perspective. I think Mr. Nader has yet to be fully heard from, but I believe his purpose is to cut costs and drive fees down to some more reasonable level.

Be that as it may, whether or not you are a private practitioner, a corporate practitioner, or any other kind of practitioner, the reasonableness of legal fees to the client has to be a principal concern. We have a professional obligation in any event; the more so in this particular economy with its greater pressures on productivity and efficiency. As professionals we cannot ignore the problem of costs, and if we do not come up with some solutions ourselves, Mr. Nader and his associates may. The results may be neither palatable to the bar, nor very good for the public in general.

When I became general counsel for Xerox in 1976, we were in the throes of some major antitrust suits. In addition, we had and still have hundreds of other law suits, and were spending in excess of $26 million a year in outside legal fees. On top of that, we were maintaining a staff of 150 attorneys in-house; you do not have to be a financial wizard to realize that a lot of money was going out in the legal area. Part of the problem, as we looked at it, was that we were following a “spare no expense” philosophy in trying our lawsuits. The consideration was winning and nothing else, spending anything you had to spend in order to win.

That doesn’t seem too bad, I’m sure, to a lot of lawyers who feel the professional obligation to win. But I don’t believe it is an approach that is feasible today. We looked at changes in priorities, and agreed that once we were in court, in the adversarial system, our top priority had to be winning. On the other hand, it could not be the only priority. We decided that we would put cost in as one of our priorities for consideration in the management of cases. I believe that it would be foolish for us to continue on any other path in a business environment where the emphasis is on productivity, efficiency, and risk-taking. Any system of cost control in litigation becomes, I believe, also a system for risk-
taking, and this aspect had been completely absent in our previous approach.

The house counsel in most major corporations has a responsibility for all legal affairs, but in the case of litigation, for a lot of good reasons, we share that responsibility with outside counsel, with whom we work very closely. In the management of a case, choices arise every day that bear upon expense. I think an obvious example is discovery, its extent and its direction. Should you use depositions, or interrogatories, or requests to admit, or other procedures? Most litigators will pursue discovery through depositions, given client permission. We all know that depositions are expensive. We also know that they are not always productive and may in fact be counterproductive. The need for backup and support also affects cost. In my experience, lawyers are like nuns, they like to travel in pairs. We found that with some firms, a cadre of partners, associates, and paralegals were attending every meeting, deposition, and hearing. The justification was always that you had to be assured that every base was covered, all questions asked and answered, and the necessary backup expertise maintained in case a partner got sick. So you had to have more than one or two lawyers involved. We saw that as a bit of a problem.

Our approach now is that we try to measure every action or decision in terms of its benefit versus its cost. As a matter of policy we do not permit searching for needles in haystacks. We do not permit redundancy. We tell the outside law firm not only how many lawyers we want, but of what type. We go to paralegals without any hesitation if we think they are capable of performing the task. We also have a policy that we do not file motions for the purpose of delay. We do not file motions if we think we have only a long-shot chance of prevailing. On a cost-benefit basis, these judgments must be made, and this is the policy we follow. We have had experiences where the trial lawyer may have wanted to call four or five witnesses on a point, and we decided against it where we felt that one witness would be enough. We have gone into considerable detail.

In the final analysis, it is really a question of what risks you want to take. It is certainly our objective to win a lawsuit if we go to trial. But we would rather risk losing than follow the prohibitively expensive approach of failsafe, which I believe is the approach our outside law firms would take without direction. From their point of view, they have nothing to gain by reducing costs, and so they do indeed need our direction. Our system is not really innovative, but involves simply taking the kind of budgeting and financial planning done by businessmen and applying this to litigation. We have a form of retainer that we ask our outside counsel to accept. First, it specifies that we do not provide and will not pay contingencies or bonuses. The theory is
that we've paid for legal services at the going rate in terms of what they're worth, and we expect that we are paying for the best service, win or lose. Therefore, we insist on a "no bonuses" clause. Second, we require that the firm submit to us at least quarterly or, if it is a big case, monthly, a statement which lists in brief the amount of work done, the type of work, by whom, and at what rates. Finally, we ask that no significant expenses be incurred without approval of house counsel. We do not want to be too restrictive about it, but we also do not want a deposition to be taken without our agreement.

We deal with a great many lawyers around the country, and we have had virtually no complaints about our system or our procedures. I recognize that this may be because we are in a position to make demands, but we really don't try to force them on anyone. Our view on the role of outside counsel has won respect and recognition as a contribution to cost control and case management.

One of our war stories concerns a dispute with outside counsel, whom we still use, on what actions we should take in a particular case. He felt very strongly as a professional that it might border on malpractice not to undertake a particular procedure. We discussed it thoroughly, but ended up in disagreement. His position was not unreasonable, and he was very nervous about the risk. We agreed that since the corporation rather than either one of us was the risk-taker, it would be appropriate for us to discuss the matter with the chief executive officer. Since the chief executive officer is a bigger risk-taker than I am, he was not nervous about the risk and we did not take the particular procedure advised by outside counsel. But I do want to emphasize that we respect and understand the professional obligations of the outside lawyer to the client corporation. That is a crucial aspect of the whole system.

When a case comes in, it is assigned to one of our corporate counsel who has responsibility for that area. If he does not have familiarity with the allegations or the facts, which is most often the case, he will first meet with the businessmen, review the allegations, and get a feel for the situation. At a very early date, he will meet with our chosen outside counsel to scope out the case, not only from the substantive but also from the cost viewpoint. He will have a worksheet that we have developed which lists quarter by quarter what expenses are anticipated. The left-hand side of the sheet will list some very specific items: discovery, motions, preparation for preliminary hearings, the type of manpower necessary. Costs are assigned for these and necessary disbursements are estimated if they are going to be unusual, but otherwise we apply a given factor. When all this has been done, with the agreement of outside counsel, and on the basis of stated assumptions, the budget is submitted to management of the law department at Xerox.
It is true that some items are easier than others to estimate. If you consider the preparation and filing of an answer, you arrive at a pretty good number as to what it’s going to cost. If you are talking about motions that we feel are necessary, or a briefing that may be required, you can also get a pretty reliable estimate. But for depositions that we might want, or for other kinds of discovery, costs are less predictable. Finally, I suppose, you look at the other side. It is difficult to estimate exactly what the adversary is going to do, but it is possible. The estimates are always made, and they are based on assumptions. Those assumptions, which give the lawyers a lot of comfort, are very important to the whole system. The assumption might be, for example, that a particular plaintiff’s lawyer is not very aggressive, that he will let the case sit for a year or so, and that we, therefore, can estimate low expenditures on that case during the year. But the reverse may be true. We may assume that he is going to press very hard for a preliminary injunction. In any case, the inside and outside lawyers will sit down, figure out what they think is going to happen, and assign costs based on their assumptions.

If the budget is reasonable on its face, it is automatically submitted to our finance department, and a budgetary supplement is created if necessary. We don’t try to budget for large cases. We do have a certain minimum budget for lawsuits that we know absolutely will come up in a given year, but this is not a very large number. With a big case, there will have to be a budgetary supplement; to that extent legal expenses are unlimited, in that management cannot do much about our estimates except accept them. Even so, they now have something they didn’t have before, and that is a pretty good estimate of what’s going to be spent in this area for the year.

There was, frankly, considerable resistance to this at the beginning. I don’t think that that’s too surprising—lawyers don’t like to deal with this kind of business. The basic complaints were first that it was impossible, that it couldn’t be done; and second that whatever you did, it wouldn’t be worth the effort and the manpower. Well, the fact is that the system didn’t require an increment in manpower to handle any additional workload. As to the supposed impossibility, the fact of the matter is that the estimates are not bad at all. I don’t say they are precise, but they are generally accurate when you get to the bottom line. They may be too small in one case, or too large in another, but when you get down to the bottom they are accurate enough for the company’s purposes. Besides that, whatever the system’s failings, it is certainly better than no system at all. So we are quite pleased with it.

On the question of estimating, the businessman calculates what his expenses are and tries to plan, but he can’t be terribly precise either, whether he’s estimating sales or the production of machines in a given
year. What is necessary is, in effect, professional judgment. Who are better than trial lawyers to consider such things as the practice in a particular jurisdiction, the temperament of a judge, or his inclination to push a case or to subject the parties to some arm wrestling on settlement? What is our attitude about the case? Is it complex? Do we have a taste for it? Do we want to get out? Is there a principle involved that we really have to defend? All these questions relate to cost, although we generally don't look at them in that light. If you go through the procedure of asking such questions, it is surprising how accurately you can estimate costs.

I guess the key to the success of the system is the fact that the budget isn't cast in concrete. Every quarter we review all the case budgets with the appropriate lawyers. We look at the plan, the actual expenditures in the current quarter, the outlook for the rest of the year, and at a comparison of that outlook with the original plan. If there are material variances—using 15 percent as a number pulled out of the air for a material variance—we will take a look at our original assumptions and find out what went wrong, or how events differed from our expectations. This is an important practice because it gives us a handle on the progression of the case. It tells us how good our judgments are and whether we're going in the right direction, and provides information on the budget for the rest of the year. For example, if an assumption was made that this plaintiff would not take much discovery, and we found to our chagrin that he was all over us, obviously we have an increase in expenses that will be real and continuing. We may even have to increase our overall budget for the case and the department. On the other hand, it might be that we anticipate discovery in one quarter, but because the plaintiff's lawyer got sick it will not take place until the next quarter. We just slide the expense over, making no increase in the total budget but changing the timing. Cash flow is a very important commodity apart from total actual expenditures, and we are able to give the company not only a reasonably good estimate of what we're going to spend, but of when we're going to spend it. Where there are very large expenditures, timing is a most relevant item.

We do the same thing every year, as a continuing experience. There is no chastisement for mistaken estimates or assumptions because we are asking people to use their professional judgment. Each year we put together a total litigation budget on which management can, absent some really major litigation that we had not anticipated, reliably base its financial plans for the following year. I think our size now is such that we simply have to do this. I can't quantify our actual dollar savings, of course, since the caseload will vary dramatically from year
to year, but I am confident that we have saved the company significant
money by making cost/benefit tradeoffs. So far we haven’t lost any
lawsuits, and I feel pretty good about that, too.

In sum, these are the benefits of the system as we see it. First, it
creates an awareness in counsel, inside and out, that financial expen-
ditures are important. If you can do that and nothing else, I believe you
will reduce your expenses. We have to stay involved since we are in a
better position to assume risks because we are in more constant con-
tact with the client than is the outside lawyer. Inside or out, if the
lawyers know they are going to be questioned about costs, even if it is
not a chastisement, it effectively gets attention.

Second, while it was not originally our intention in adopting this
system, we have found that it is a very valuable tool for case manage-
ment. I think our prior experience with lawyers was that they tended
to be more or less reactive to a lawsuit. They didn’t sit down, unless
forced to, and think about what to do next. Our system makes them sit
down and look at their quarterly benchmark to see where they have
been and where they are going.

There is one other benefit which really shouldn’t be overlooked, and
is of practical importance. The system gives us a much better assess-
ment of cases in terms of settlement time. You can sit down and make a
guess that a particular case is going to cost you $50,000, but you will
simply have pulled that number out of the air. If you have a case where
there is no principle involved, where there is a bonafide disputed
claim, where no one is trying to hold you up, and you want to take a
hard look at what it’s going to cost to defend as opposed to settling it,
then our system provides you with something concrete to look at.
Finally, it does save money and it does permit better cash flow man-
agement. I think a lot more companies will start to do this.
DISCUSSION
Luncheon Address

Following Mr. Banks' speech, Dr. Hensler opened a brief question period by asking him to comment on the relationship between cost reduction and the pace of litigation. Mr. Banks replied that delays cost money because lawyers, given more time, would inevitably do more work with more hours billed to the client, and would probably develop more evidence, resulting in an extended and therefore more expensive trial. The key, he said, to preventing legal work from expanding to fill the time available when delay occurs is to rely on the capacity of the lawyer to judge what preparation is essential, and to do no more. Mr. Banks added that he thought delay is in no one's interest, except possibly that of insurance companies. For the sake of his company's image, and as a reflection of the personality of the chairman of Xerox, he pointed out that delay was not deliberately used as part of their litigation strategy.

Mr. Seagraves challenged the suggestion that insurance companies have a greater interest in delay than has any other litigant faced with the possible payment of a claim, noting that the investment value of a delayed award is the same for all litigants. Mr. Banks replied that he did not mean to accuse insurance companies of fostering delay. His thought was only that an insurance company is in the business of either paying or not paying claims. A manufacturing company is not, and neither is it in the business of litigation. His company, if it believed it owed money, would rather sit down and resolve the matter and get on with its regular business.

Judge Kline asked if Xerox had any experience in the development of private dispute resolution systems. Mr. Banks said his company was interested in all methods of lowering legal costs, and would therefore pursue any alternatives to litigation that might present themselves. In a recent major lawsuit, he and his opposite number in the opposing corporation had cooperated in getting the chief executive officers of their two companies to sit down, listen to the issues presented by the two law departments, and settle the dispute between them. The procedure had not been very "scientific"—each executive had written his assessment of the value of the case on a piece of paper, and eventu-
ally settled at an amount splitting the difference. Mr. Banks noted that where there is any willingness to settle, generally a way is found to do so, whether or not a structured procedure is followed.

To questions from Judge Hill and Dr. Rabinovitz on the uses of his cost-budgeting system in assessing the settlement value of a case, Mr. Banks said that he did not attempt, in any systemized way, to include overhead in making such evaluations. He noted that the cost of executive and employee time spent in assisting with litigation, and foregone business opportunities due to the constraints of the lawsuit, would be substantial, and considerably more than the out-of-pocket costs for legal fees.

Settlements generally were handled in-house, he said, with outside counsel concentrating on their role as trial lawyers. Sometimes he continued to conduct settlement negotiations while the trial itself was in progress, keeping the trial lawyers continuously informed on developments. In reaching settlements, for which ultimate authority lay with the chief executive officer, careful attention was given to precedents that might be set. Strike suits in particular had always to be litigated, because the real cost of settling one was likely to become much greater down the line.
PANEL 2: THE PACE OF LAWYER ACTIVITY

Introduction

Panel moderator Dr. Mark Peterson, of the Institute for Civil Justice, opened the proceedings by outlining two sets of suggested issues for discussion. The first focused on the potentially conflicting interests in the pace of litigation of lawyers, their clients, and the general public; the second concern the role of lawyers themselves as pacemakers.

Dr. Peterson then introduced the four litigators who would serve as panelists for the session. These were Daniel Fogel, a plaintiff's lawyer in personal injury litigation, with Fogel, Juliber, Rothschild and Feldman in Los Angeles; James Hourihan, a trial lawyer in general business litigation and a defense lawyer in personal injury cases, with Hogan and Harston in Washington; Stephen Howard, practicing primarily in business litigation but also as a defense lawyer in personal injury cases, with Tuttle and Taylor in Los Angeles, and Professor Charles Halpern of Georgetown University Law School, formerly with the Center for Law and Social Policy in Washington.

Noting the lack of empirically based information on the nature and timing of lawyer activity in litigation, Dr. Peterson invited each panelist to draw on his own experience in describing the advancement of cases through discovery and negotiation to settlement or trial, the timing of various phases in this process, and the reasons for such timing.

As discussants Dr. Peterson welcomed Professor Marc Galanter of the University of Wisconsin Law School, author of studies on settlement and litigation practices; Professor Stewart Macaulay, also of the University of Wisconsin Law School, who has studied the professional activities of lawyers; and John Phillips, a public interest lawyer with the Center for Law in the Public Interest in Los Angeles.

In preparation for the afternoon’s discussion, Dr. Peterson had suggested that speakers address the following issues in terms of their own perspectives: optimal periods required for the preparation of different types of cases, and lawyers’ ability to achieve such timing; effects of delay on the interests of plaintiffs and defendants, and on lawyer work habits and income; tactics used by lawyers to delay or speed up litigation; and the effects of court efforts to expedite case disposition.
Daniel Fogel
Fogel, Julber, Rothschild, and Feldman, Los Angeles

Let me say first that, although I go occasionally to Arizona, Oregon, or Washington, D.C., the main focus of my practice is in Los Angeles County and other courts in the State of California. In the courts of any big city in California, I do not believe that the lawyers have that much to do with the pace of litigation. In the Superior Court of Los Angeles County, I don’t even know if there is a pace; you just wait. It really is nobody’s fault, at least that I know of. I think we could do with some more judges, or with some crash settlement programs, but these are like putting a Band-Aid on. The fact is that in the Superior Court you can file a case; you can get to issue in 30 to 60 days, depending on the complexity of the complaint; you can file an at-issue memorandum at that time; and then you sit and wait. If you are lucky, you may get down to the department where cases are assigned in about four or five years. If your case has been waiting for five years, it is mandatory that you go to trial in California, so you will get on, but you may have to wait down in the department, or go “on the beeper.” This means that you go back to your office and wait for the beep like a doctor on call, providing you are able to get back to the court within an hour. You give them that commitment anyway.1

What happens in the [Los Angeles] Federal Court is that you file your suit, and you’re told what to do from then on by the amended court rules, which have all kinds of complicated requirements about early meetings, status conference reports to the court, and notices. You go about doing everything with dispatch because the case is largely controlled by the judge to whom it is assigned. Aside from the intervention of the criminal calendar, which may delay things when you are scheduled to go to trial, the pace of litigation is determined by

1As of April 1982, additional judges and commissioners have been appointed for the Central District of the Los Angeles Superior Court. Additionally, the court has instituted an arbitration status conference that takes place 90 days after the cases are at issue, thus causing a realistic view to be taken by lawyers as to the value of their cases. Cases under $25,000 are referred to arbitration. The initial result of such action has been a decrease by over 50 percent of cases sought to be set on the Superior Court calendar. The foregoing, plus other affirmative measures, should substantially decrease the time it takes to get to trial in downtown Los Angeles.
the availability of the judge, and by the ability of the judge to push his
calendar along consistent with the lawyers' finishing their discovery.
The lawyer does have a bigger role to play in federal court than he has
in state court, because if he does his discovery in a timely manner and
moves with dispatch, there's every chance, subject to the criminal
calendar intervening, that he can get to trial in a reasonable period of
time. I believe, although it varies from judge to judge, that most cases
can get to trial in somewhere between nine months and a year and a
half in Los Angeles Federal District Court in California, which I think
is remarkably good for a court in a jurisdiction of this size.

The first question I have been asked to address concerns the length
of time it takes to get various types of cases to trial, to get them ready
without taking into account what the courts do. If you have a nickel-
and-dime fender-bender, it probably shouldn't go to court at all. A
letter should be written saying, "If you don't settle when we send you
the special damages, we will file a suit." Normally that kind of case
can be adjusted. The threat of the suit there means something because
it imposes an additional cost on the defendant and provides a reason
why he should want to settle. A case like that could take five or six
weeks, maybe two or three months to settle. For attorneys who handle
such cases, I guess they are done in wholesale quantity, because they
are able to settle them very quickly.

If the case has to go to suit, leaving aside the problem of court
schedules, it depends on how complicated liability is and how long it
will take to do discovery. In a complicated medical malpractice, legal
malpractice, accounting malpractice, or product liability case, you
might have to take a lot of depositions. If you are taking on a whole
industry, as in the asbestosis cases, a lot of depositions are going to
have to be taken on the liability factors, and there will also be exten-
sive discovery and production of documents. Or you may have a big
case that has very little liability discovery—where the plaintiff has
been hit in a crosswalk by a truck. The same thing applies with respect
to the damages situation. If it is a wrongful death case the damages are
set at the time of death, and it should not take more than a month or
two to get the evidence together if you are able to go quickly to court. If
a person loses a leg, it also does not take a long time for the medical
situation to become clear. But in a bad back injury, with a succession
of operations, it might take two years before the situation stabilizes. So
time factors vary from case to case.

A second question concerns an assumption that it takes some cases
longer to reach settlement or trial than they have to, and the causes of
this kind of delay. I have already indicated the causes in our state
court, and in many other big state courts that I know of. What can a
lawyer do to make such cases move faster? Very little. He might be
able to convince an understanding judge to assign his lawsuit out as "a case for all purposes," which means the judge takes the case in the beginning and moves the trial on his own schedule. With series of cases, like the DC-10 crash cases that we have in the Superior Court right now, they are at trial within two years of the time the crash occurred in Chicago because one judge was assigned, and he is trying the cases one after another, forcing the attorneys to be ready. Complicated business litigation or complicated personal injury cases at least have a possibility of getting a judge for all purposes. Other than that, I do not know what can be done in the Superior Court. In the Federal Court, again, I think you can move it about as fast as you want to, subject to the criminal calendar intervening and causing a slight delay.

On the question of whether clients gain or lose by delay, the plaintiff gains nothing by delay, unless he needs the time for the injury to become stable and permanent. He might die; we have a very poor survival statute in California, and survival statutes in general are not as good as a live plaintiff. He could have another injury, which would raise the question of a connection between the two injuries. If he is disabled, he has the problem of maintaining himself up to the time of trial. But from the defendant's standpoint, there is nothing better than delay. Nothing can happen to make the defendant want to move the case. As long as he doesn't go to trial, nothing is going to happen to him. He has the money in an unliquidated damage case, and it is certainly not clear that he will have to pay prejudgment interest. We have a case in California in which a jury in its discretion awarded prejudgment interest in a business tort case as part of a verdict against the defendant. But such awards are not made very frequently.

From the defendant's standpoint, he has his money and he is making 20, 25, or 30 percent on it, and meanwhile the dollar is inflating; it is really to his great advantage not to go to trial. It is also most advantageous in California to take an appeal from a personal injury judgment if there is any basis at all to do so, because our statutory judgment rate is 7 percent. The defendant has about the cheapest loan he could ever make. I think this is an area where there has to be some correction, with prejudgment interest a matter of mandatory effect, and penalties for frivolous appeals. The number of times the appellate courts in our state have held that an appeal is frivolous is practically nonexistent.

What are the effects on an attorney's practice when the litigation process is delayed by an opponent? I think most attorneys can deal with this, unless they are not ready themselves. It costs a lot of money to delay a case effectively by taking writs up on jurisdiction issues, and there have to be some issues there to begin with. But the effect of delay
is clear. From a plaintiff's standpoint, it can kill your practice. Most plaintiffs' attorneys practice personal injury law on a contingent fee basis, which means that they are paying overhead in increasing amounts, and advancing costs. When the trial calendar goes from a three-year trial anticipation to a five-year anticipation, until your calendar starts cycling so that you're getting cases to trial on a basis of five years, you must have money up front for overhead in your office. In our office we have a mixture of personal injury and other kinds of work, so we do not feel the effects as much as in some other plaintiffs' offices where all they do is personal injury work. Delay is a real burden on the lawyer, and I think a very severe burden on the client, especially a disabled client who does not have the money to sustain himself while he is waiting to get to trial.

From what I have seen, the courts try very hard to expedite their cases, and the rules, both in the [Los Angeles] Superior and the Federal Courts, work toward that. There have been all sorts of efforts to push crash settlement programs, and arbitration in the minor cases. The new federal-local rules require a status conference or early meeting of attorneys 20 days after the case is at issue, when the attorneys have to tell each other what arguments they are relying on, who their witnesses are, and what the documents are, even though they may not know that at the time themselves. I do not like having to make this report because I do not like to be controlled by the courts. But the fact of the matter is that it does make you talk to the other side, it makes you think about your case in context. When there is an opportunity to get to trial, I think it makes you do so a little faster. Although I find the rule difficult to live with, I believe it has a salutary objective.

The fact that in the superior courts of other counties in California you can go to trial in seven or eight months certainly makes a difference in the attitude of the litigants. In jurisdictions like Oregon the attorneys have a completely different perspective because they know that with both the federal and the state courts, they are going to be in trial within several months after they file a lawsuit. There is none of this passive waiting around for something to happen, waiting for the court to act and attorneys to react. The attorneys know that they can have happier clients, at least from the plaintiffs' standpoint, because they can get to trial faster. And it seems like a much fairer way of doing things. If I had my choice personally I would like to go back to a slower and simpler day. I like the idea of being able to file a suit, and get to trial as fast as I am ready. I think that that is when a lawyer gives the best to his calling, and the best service to his client. But we do not have this, and I do not think the lawyer can do a lot about it.
James A. Hourihan
Hogan and Hartson, Washington, D.C.

The primary focus of our discussion today is what happens once a case gets into litigation; that is, after suit has been filed. However, in order to fully appreciate this subject, you should be aware of what happens in a typical personal injury case before suit is filed. Initially, the insurance company receives notice of the claim. Its adjuster investigates it, has settlement discussions with counsel for the plaintiff, or with the plaintiff, and probably makes an offer based upon the company’s evaluation of what the case is then worth. If the plaintiff’s lawyer feels that that is not a realistic offer, he files suit.

Thus, there may be a period of time after suit is filed when there are no settlement discussions because the positions of the parties have already been polarized. In many cases, it is only after defense counsel has been retained by the insurance company that an evaluation is done of what discovery is necessary to prepare the case for trial and what the defendant’s exposure potential is.

When will a typical case be ready for settlement? In my judgment a typical case will not be ready for settlement until after discovery of the principal witnesses and parties has been completed. In addition, an expert will probably be necessary to help review the testimony or medical reports of plaintiff’s doctors. Only then can the case be evaluated properly.

In discussing the processing of civil cases through the system, we often lose sight of the fact that civil cases are not fungible. They are all different. An intersection collision case usually can be prepared with a minimum of discovery. If the parties do not settle, the case should be ready for trial within a relatively short period of time. But there is a whole range of other types of cases which require extensive discovery before judgment can be made as to their settlement value. If, for example, the case is a “blind accident,” where the first notice the client has had of the claim is when the lawsuit is filed, then no prior investigative work will have been done on the case. Or the magnitude of the exposure will dictate how quickly a case can be investigated without incurring the time and expense of taking depositions and thoroughly investigating the claim. On the other hand, in a DES case or a product
liability case where the plaintiff is challenging the integrity of the manufacturer’s product, the manufacturer will fully litigate the claim if it thinks it is right. These cases require a substantial amount of time for preparation.

Another factor which has a bearing on the timing of a settlement is the personality of counsel. There are lawyers who enjoy litigating and who view their role in the world as that of premier litigators. As a defense counsel, you must deal with this personality in preparing your discovery and making judgments regarding how to settle the case. Generally, this type of personality produces conflict. An offer to settle at an early stage of the litigation is viewed as weakness. Thus, unless the court intervenes, the case will not be settled, if it is going to be settled at all, until you’re at the courthouse steps.

How quickly you are in a posture to evaluate a case frequently depends on the extent of client control. Insurance companies and corporate legal departments are typically understaffed. They are either cutting back or not expanding their staffs. Accordingly, workloads are significantly greater. Normally in a product liability case your client will provide expert testimony or technical assistance. The primary function of that employee is to contribute to the manufacturing function and not to assist in litigation.

Delays are frequently experienced because of this arrangement. For example, it is very difficult to obtain answers to interrogatories from corporations. The period between sending the interrogatories to the corporation, drafting answers, and resubmitting them for execution normally requires at least one if not more motions with the court requesting extensions of time.

The same is true for the production of documents. The requested documents may be spread throughout the corporation. Under the federal rules, you are to produce the documents within 30 days. With a substantial production request, it is almost impossible to meet those requirements.

The level of experience and sophistication of opposing counsel may also be a factor in delay. If he does not know how to evaluate his case, he may put a very high value on it right up to the time of trial. Only after the judge has identified weaknesses in his case will the lawyer consider a more realistic evaluation of his case. Trial counsel also may be inexperienced in the field. If it is a technical case, again using DES as an example, his complaint may be inartfully drawn. He may inject many issues into the case which are not there. As defense counsel, you must decide to either run down each one of those issues or disregard them. The presence of third-party actions, cross-claims, and multiple parties in the litigation all tend to delay the date when the case is ready for evaluation and settlement negotiations.
As to the extent of the court's involvement in the proceedings, I think that judges in anything other than a routine case should be very active in the litigation at an early date. Perhaps after some initial discovery has been taken, the parties should be brought in and schedules established. In more complicated cases, you have the approach provided by the manual for complex litigation. Even in some cases which do not warrant that treatment, you can still develop phase lines to be followed. It is a very orderly process requiring a cutoff of all interrogatories, or production of documents, by a particular date. The dates are very important, particularly dates cutting off discovery. The general population usually plans from the present day forward; lawyers take the future date and work their way back to the present. If you have a trial date a year off, the tendency of most lawyers is not to do any discovery at all for perhaps six months. They will deal with something more pressing, only becoming more active as trial approaches.

Lack of preparation is sometimes a problem. Plaintiffs' lawyers generally practice by themselves or in small offices, whereas defendants' lawyers tend to be with larger firms. If the small practitioner files a case with 15 or 20 plaintiffs, and the defendant wants to schedule their depositions one after another, plaintiff's attorney's schedule will not permit him to do that. So you must spread out the depositions, and sometimes this becomes a very real problem. In the Eastern District of Virginia, where I practice, there is a rule which cuts off discovery 90 days after the case is at issue. Ten days after that you go to a pretrial conference and you are guaranteed a trial four to six weeks later. So you are moving on a very fast track. The plaintiff has an advantage under that kind of system because he can hold back filing a lawsuit until he is ready to proceed quickly to trial.

A question has been raised about why there appears to be more discovery in those jurisdictions with a fast track than in those with a slower track. In my own judgment there are a couple of explanations. One is that a lawyer who is functioning within a very tight time constraint has to sit down at the outset and plan his discovery. He has to identify which parties or witnesses must be deposed. He probably has a middle group that he ought to depose and then another group where it would be nice to depose if time permits. At the same time, he may be talking settlement; although normally he is working so fast that he does not have time to sit down with opposing counsel. So in that compressed time period he is going to take probably the same depositions that he would have taken in the lower jurisdictions. If he settles the case less than two years out, he will probably never get to those depositions in the slower jurisdiction that he would reach on the fast track.
Sometimes delay is used simply as a tactic to wear out an opponent. When there is a large corporation or a well-heeled party on one side—and it is not necessarily always the defendant who has the financial ability to withstand the onslaught of depositions and discovery requests—there are some lawyers and clients who will try to overwhelm their opponent, while so dragging out the case that a time will come when the other side says, "I give up. I can't take it any longer. How much does it cost? Let me get out of this and go on to something more productive." Beyond simply exhausting the other side, there are other types of advantages that stem from delay. Sometimes there may be critical witnesses who have not yet been deposed by an opponent. Those witnesses may go away, they may die, their recollections may dim with the passage of time.

Mention has been made of a client's ability to use money while a case is delayed. As somebody who does represent insurance companies, I have never had a carrier tell me to delay a case in order to have the benefit of the money. Except perhaps with a case of a significant magnitude, the insurance company's approach is that if it can settle within a reasonable range, it wants to do that as soon as possible to avoid attorneys' fees.

Delay may be to a defendant's advantage if there are other potential claims that have yet to be filed. Delay may result in the statute of limitations barring the claims. Or, you may be waiting for new and more favorable law to develop. It may be that a case similar to yours in another jurisdiction has ruled adversely to your theory and you want to see if other jurisdictions will rule more favorably to your position in other pending cases.

Some lawyers, as a tactical move, will try to deprive their opponents of essential information by delay. This usually happens in discovery. The American Bar Association's Litigation Section has spent a lot of time and effort on discovery abuse; but still, most practicing lawyers have all too often seen other lawyers who will not answer interrogatories in the spirit in which they know they have been given. They may file objections across the board knowing that these are not well taken. They may use discovery as a sword by just inundating the opponent with 200 or 300 interrogatories.

The most obvious means of countering delaying tactics is the motion to compel discovery. But there seems to be a Catch 22 situation in many of the federal courts that I practice in. You want your opponent to answer the interrogatories promptly. When your opponent files a motion to delay answering for 60 days, the judge may say, "Well, we will not be getting to this case for two or three years, so what's another 60 days to respond?" Rule 37 is, of course, available for sanctions. Trial lawyers generally abide by the rules, but there is a large
enough segment who do not, and Rule 37 is adequate to control them. The protective orders of Rule 26 can also give some assistance. Last year, I believe, Rule 26(f) went into effect making a discovery conference available and specifying a number of things that lawyers have to do prior to the time they file a motion for this conference, including setting up discovery schedules, trying to agree on dates for depositions, and things of that nature. Then you go to the court and get some help finalizing these details and getting agreement on schedules and issues.

It has been my experience in fast-track cases that the amount of time that I spend preparing for depositions is reduced because I may be taking them day after day. I do not have to go back over my abstracts and records to reacquaint myself with the particular case. I have seen the witnesses over the last several days, and I am moving forward so I do not have to go back and develop the case again.

Delay is one cause of the public's poor perception of lawyers, judges, and the whole judicial system. Society has a great interest in getting plaintiffs back to work, and some of these react quite differently after their cases have been litigated. I received a letter recently from a gastroenterologist who told me that I ought to settle a case because he thought his patient's ulcers would clear up if we did that! This fellow was board certified. He has hit upon a very real problem.
C. Stephen Howard  
Tuttle and Taylor, Los Angeles

The defendant, quite frankly, is almost always interested in delay. I represent defendants most of the time, and if I told you anything different, I would be less than candid. If delay can be achieved without significant cost, what fool would go ahead and pay the plaintiff now? I am assuming for the moment that you have some good faith dispute, either with the liability or with the amount of damages. If that is the case, first of all, human nature is involved. I do not know anybody who willingly steps forward to pay a disputed amount of money which they may not have to pay for three or four years. You wait and see if the plaintiff is really serious, if he has the resolve. Of the cases I have handled, 10 percent of them simply dissipate. Somebody files the case, and maybe there is some skirmishing in the beginning, but people either lose interest or they lose the financial ability to carry through with the lawsuit.

In business litigation, you have changes in management. For example, I had a lawsuit filed against a business manager on behalf of an entertainer by another business manager. The entertainer had gone on to a new manager and then sued the old business manager for doing all kinds of terrible things. I let the case drift for three years, and then the entertainer changed managers again. The new business manager has no interest in going after the guy who is being sued. But he certainly wants to make his immediate predecessor look bad, so he says to the entertainer, who had been advised to bring suit by his predecessor, "Gee, that was a frivolous lawsuit which should never have been filed."

Time is on the side of the defendant even in the most sophisticated cases. I am sitting on a case right now where the plaintiff is a New York stock exchange company and we are banking on a change in management. If that change occurs, I think the lawsuit will go away. Beyond these kinds of psychological factors, it is naive to think that pre-judgment interest rules in California do not have some effect. There is no pre-judgment interest in many cases, and even when there is, it is 7 percent simple interest. From my perspective at least, if he can do it without cost, the defendant is never going to want to resolve a
matter any sooner than he has to. Unfortunately the defendant can usually have his way, especially in our crowded state courts. I do not have to be a genius to delay. I can go back to my office, put my feet on my desk, and read comic books if I am in the spirit. The plaintiff cannot make me go to trial in less than three years, and probably it will be four or five years. You file a piece of paper once the answers are in, and that is it. You cannot do anything until the court sends you another piece of paper two or three years later saying, “Okay, we are beginning to notice your case now. Start taking it seriously.” There is no cost to the delay in that kind of case.

I suppose it is possible, and it does sometimes happen, that a defendant’s lawyer is motivated to settle a case even though the trial is not upon him, but that is relatively unusual. I would say that in my experience most of the settlements come when the day of judgment is at hand and you must either settle or spend all that money to go to trial. You are also more educated at that time about the case, and that is when you get around to settling. Sometimes you can settle a case early because there is a good lawyer on the other side who will evaluate his or her case in a reasonably intelligent fashion, and sometimes you have had prior experience with that lawyer so you know something about him or her. I have settled more than one case without its ever being filed, just because I knew the lawyer on the other side and had respect for that lawyer’s judgment, and the lawyer was willing to make a reasonable evaluation of the case. But my much more common experience is that the plaintiff’s lawyer files a case after having been told a nice story by his client, and before he has come to grips with the strengths and weaknesses of his case. I usually try to have a settlement negotiation as soon as I know what the case is about, but if I engage the plaintiff’s lawyer in a settlement discussion at that time, nine times out of ten the response I get is so hopelessly unrealistic that I cannot negotiate seriously. So I engage in discovery to educate myself and also, for about 75 percent of the time, in an attempt to educate the other lawyer. I am trying to make the plaintiff’s lawyer come to grips with the weaknesses of his or her case so that we can make a deal. But that takes a lot of time.

If I am the plaintiff’s lawyer, I must find some way to be persistent. The system is totally defense-oriented, and that means I must be irritating in some way. The best way of all is somehow to put my case into a preliminary injunctive mode. If I can credibly seek a preliminary injunction, that is terrific for two reasons. Obviously if I can get it, the case is going to settle very fast. Beyond that, it forces the other side to try to litigate the merits with you right away, not with full witnesses in our courts, but with papers and declarations and affidavits, and that frequently can produce a settlement. You may never
have a hearing on the preliminary injunction if your threat to get one
is reasonably credible.

Similarly, in certain cases in California you can get into attachment.
If you can attach a defendant's property that he needs to use, you will
settle the case and you will settle it fast. The attachment hearing in our
courts also has the advantage of forcing an early hearing on the
merits, obliging both sides to come to grips with the strengths and
weaknesses of their cases.

One way or another, you must find some way to prevent the defend-
ant from taking the natural free ride that the system gives him. If you
cannot get your case into one of these procedural modes, another
possibility is to use discovery. You do your discovery concentrated all
at the beginning, and if you are lucky, the defendant will say, "This
isn't worth it, let's try to settle this case." Suits are sometimes politi-
cally embarrassing for the defendant. For example, he's in the busi-
ness of selling houses, and you are raising questions about whether his
product is any good. Sometimes those cases will settle just for that
reason. Occasionally you create a financial statement problem for the
client; they have to settle in order to resolve some uncertainty in their
financial statements. In the average lawsuit, if you want to get a
prompt result for your client, you must come up with something other
than complaining and waiting to see what happens.

Other than trying to be creative, I think there are some things that
can be done. I do not know about the administrative problems that
might be created, but it seems to me that we must tell litigants, "This
is your trial date, and this is it." It seems to me the trial does not have to
be five years after the filing of the complaint. Most business cases, and
not all since there are obviously some truly large cases, could be ready
for trial in a year if the parties really had to have them ready. One of
the judges in the Federal Court of Los Angeles gets most of his cases to
trial in less than a year. I have tried some pretty complicated cases
myself in his court, and I may have been panicked. I may have asked
myself why I should have to live with this, but I do not think that the
outcome was affected at all. It can be done. Just tell the lawyers this is
the deadline and they will make it. The other thing that I think helps,
and this is done very nicely in our federal courts, is to implement
procedures that force the lawyers to do some work they would not
otherwise do. Dealing with local Rule 9 in the Central District of
California is a nightmare because it makes the lawyers fully prepare
their cases before trial. Both sides have to deal with the strengths and
weaknesses of their cases, then look at the expense of the trial, the fact
that it is always a crapshoot anyway, and realize that it makes a lot
more sense to try to come to some common agreement about what the
case is worth.
In my practice, I very rarely see lawyers intentionally trying to delay a case by using excessive discovery. They may be trying to inflict some cost on the other side, to make the other side think about the issues, or to test the other side’s resolve, but they are not, in my experience, trying to slow up the ultimate day of reckoning, largely because this is not necessary.

I do not know how to talk about this systematically, but the pace of cases is clearly affected by the psychology of the client and the psychology of the lawyers. There is a macho contest that develops between the two lawyers that is very real. Sometimes the lawyers are polite, very cordial to each other, and sometimes very aggressive and very hostile. Quite frankly, I have had both relationships myself with different lawyers. I am never quite sure why one case runs at one pace and one at another. But in either case, there is no doubt in my mind that I am testing the lawyer on the other side, and the lawyer on the other side is testing me. Quite apart from what the case is worth in an objective sense, it is very hard to eliminate from the process the desire of each side to do better than some other lawyer would do with this case, and to best one’s adversary.

Frequently there is a strong client who becomes very identified with the litigation and has a lot of personal psychology caught up in it. Those kinds of psychological interactions delay the ultimate resolution and impede the ability of lawyers and clients to think rationally about what a case is really worth, and about the advantages of settlement. One other thing I think affects delay: Most lawyers are insecure, and one of our insecurities is that we are never sure whether we’re going to have another case or not. While we are preparing one case, another comes along, and so we put the first case a little bit to the side and take on the new case, and the next, and the next, until we are so spread out we cannot possibly devote significant energy to anything except a trial. And this I think slows down the process of resolving individual cases.
Charles Halpern
Professor of Law
Georgetown University Law School, Washington, D.C.

In one of the first trials I was involved in when I was a business lawyer, a large equipment manufacturer in the midwest purchased another corporation and the Justice Department challenged the merger. I will not say that our client wanted to delay the case, but they did recognize they would be benefiting from the merger as long as the case was unresolved. It is not an overstatement to say that they were not in a hurry to get a final determination. I think much of my pretrial work was traceable to the fact that our clients were not anxious to see that case tried. We had good reasons for doing all the discovery we did, and it took a very long time. Indeed, it took so long that it was ultimately the reason why I got out of private practice: I got tired of interviewing dealers and manufacturers in the middle of winter in southern Indiana.

My other first-hand experience with delay in the courts was a lawsuit I started in 1971 to protect the rights of mentally ill and retarded residents of state institutions. That case is still pending in the Middle District of Alabama. It is a case that would make case management experts very upset. And it is also the most important case which I have ever handled.

As I think about delay, I would like to focus on public interest litigation. It tends to be time-consuming, and there are so few cases that they do not even show up in the research data. We are talking about a small percentage of the docket in any court in the country. "Public interest litigation" is a term of vague definitional outlines. The term is usually used to cover cases that involve large public policy questions with a broad impact going beyond the interests of the parties in the courtroom. Often constitutional or statutory rights are involved. Examples arise in the areas of civil rights, environmental protection, consumer rights, and the like. My ten-year-old case in Alabama involving the rights of mentally ill and mentally retarded people is in this category. It could conceivably go on for another ten years.
Typically, the plaintiffs in these cases are too poor or unorganized to hire attorneys of their own. They are represented in these cases by lawyers, frequently organized into public interest law firms, who are subsidized either by the federal government, by a local bar, or by foundation grants. The defendants are usually government agencies or corporations. Typically there are disparities in the resources that are brought to bear by plaintiffs and defendants. These cases are virtually never stereotyped or routine. Frequently they present novel legal questions, complex factual issues, and complex party structures.

This class of cases is in a special category, and one that is likely to shrink in future years because the sources of subsidy are drying up. Instead of these cases presenting management problems for the courts, they will become grievances for which people will be unable to find any legal redress at all. This category of cases overlaps that identified as “public law litigation” by Abe Chayes in his well-known article in The Harvard Law Review. Chayes argues in that article that this kind of litigation is extremely important in the federal courts’ caseload, notwithstanding its relative insignificance in terms of the number of cases handled. He also argues that at the center of these kinds of cases is an ongoing injunctive decree that a federal judge enters and then has to administer over a period of years. The injunctive decrees, in many instances, are intended to affect and alter the behavior of large public and private bureaucracies. The judges’ time is frequently tied up for years in administering ongoing decrees, so these cases are not particularly popular with the judiciary. From the statistical case disposition point of view, no judge wants to have them on his or her docket.

I want to make some observations about court delay and the public interest lawyers who most often bring these kinds of cases. First, these lawyers are typically poorly financed and operate in thinly staffed organizations. Thus, where there are tight time deadlines on discovery, they will have considerable problems in meeting them. A friend of mine is one of two or three plaintiff’s civil rights lawyers in the entire state of Arkansas, and he would not, I suspect, be a model of efficient response to any efforts to reduce delay in the Arkansas court system. He is terribly stretched. Second, the gap in resources between public interest lawyers and lawyers representing corporations is growing. This gap exists in the availability of paralegals, the availability of computerized research assistance, the capacity for indexing large sets of documents, data retrieval, and word processing. And there is a growing gap in access to non-legal expertise in other relevant disci-

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plines. Often the public interest lawyer has to scour the country for technical experts who will volunteer their time on nights and weekends. In short, public interest lawyers tend to be “inefficient,” and are likely to be unable to respond to really aggressive case management imposing tight limits on discovery, or no-continuance policies. A corporate law firm with 100 lawyers will obviously find it easier to respond to a no-continuance policy than a public interest firm which has three or five lawyers.

I want to underline the point that delay typically operates to the benefit of one party or the other. What one litigant calls intolerable delay, another litigant might call a comfortable, measured pace. And what is true of delay is also true of speed-up tactics. It is not in everyone’s interest to have the pace of litigation accelerated. It is a way of shifting the balance of advantage in litigation, and it ought to be evaluated in those terms. It is not self-evident that resources ought to be devoted single-mindedly to bringing all cases to trial as expeditiously as possible. There are a set of subsidiary questions that should be addressed.

One issue which has been touched on and ought to be explored further is the extent to which lawyers’ and clients’ interests diverge. Particularly with less sophisticated clients, delay in litigation often reflects the needs of the lawyer, not the interests of the client.

The general question of what clients gain and lose by delay has been addressed. But this has a special dimension in public interest litigation, where some parties may want to see a matter delayed in the interest of “cooling out” a hot or controversial subject. Others, who want to use public interest litigation in combination with other strategies, such as legislative action, consider prompt case resolution important.

Court efforts to get rid of delay can have a differing impact on the actors in the litigation drama. Some efforts to reduce delay can have the effect of degrading the quality of justice, a subject that I think has received too little attention in the research that has been done in this area. While some questions have been asked about the impact of anti-delay measures on the fairness of dispositions and litigants’ perceptions of the adequacy of justice, this has been a rather peripheral line of inquiry. It has not been pursued with the same rigor with which questions about the economic consequences of delay are pursued. The difficulty in researching that issue has quite understandably deterred investigation. It is very difficult to go beyond counting dispositions. It is harder to learn about the adequacy of those dispositions, about how many are made on the merits, about how satisfied the lawyers and litigants are with the justice and impartiality of the proceedings, and about whether or not litigants feel that they have to sell out legitimate
claims because of the pressures of the system. It seems to me that this is an important direction for more research.

It is troubling to me that this dimension is not fully developed. You end up with a cartoon of the judicial process in which you talk about case disposition as you might talk of assembly line efficiency. The subject of delay must be addressed in a larger context, where the adequacy of the justice done in the courts is an integral part of the inquiry.
Discussion

The discussion began with Mr. Galanter introducing the topic of the pressures which influence lawyers in allocating scarce time to one task or client rather than another.

Speaking of his own decisions about time allocation, Mr. Galanter commented that, as an academic, he might choose to divide his attention among a variety of promising activities, such as participation in a particular conference, rather than concentrate on the completion of a series of tasks on hand. Judged by some abstract standard of productivity, he said, this might not appear an optimal use of his time. But by choosing to tradeoff some degree of present efficiency for future possibilities, he was able to provide for a continuing float or “backlog” of work. Mr. Galanter suggested, on the basis of his own experience, that the whole question of delay was closely related to “the politics of people trying to use their time optimally.” In this context, he asked the panelists to comment on how clients likely to provide continuing business, or in the field of public law cases with fund raising potential, may influence lawyer decisions as to priority of service. He also commented on the effects of differing fee arrangements on lawyer incentives to invest continuing time in case preparation, the incentives presumably being stronger where there was an hourly arrangement than a contingency fee, where the inclination might be to postpone preparation until a need for trial became certain.

In replying, both Mr. Fogel and Mr. Hourihan agreed that, with many courts currently attempting to control time to trial, and unwilling to grant continuances, lawyers have fewer options in picking and choosing where to devote their energies than they had 20 years ago, when it was possible to take on more work than could be handled immediately because both early trial dates and continuances were more readily available. Both panelists mentioned the emergence of legal malpractice as a distinct specialty, and the requirements of malpractice insurance carriers for docket control as a central concern in law office management. Mr. Hourihan spoke of the changing attitudes of attorneys to work flow, with practitioners in the Depression era unwilling to turn away a single case, while younger lawyers today have more confidence that business will continue as usual.
Dr. Peterson suggested that for both defendants' and plaintiffs' lawyers, backlogs of cases were economically advantageous as a kind of inventory representing future income. Mr. Hourihan noted that plaintiffs' lawyers whose entire practice is devoted to a single series of tort cases—as with the DC-10 crash victims—may emerge at the end of a decade with no backlog of work whatever, and have to begin practice again from ground zero. Mr. Fogel, objecting that there was a difference between backlog and the habit of deliberately putting cases on ice, said he thought it inappropriate to stagger or postpone processing cases to ensure future income.

In responding to a question from Mr. Macaulay about how his law firm decided which cases to take on, Mr. Fogel said that in a plaintiff's firm, "the most important judgment call is over turning down a case," and that such decisions were made "partly scientifically, partly by the seat of the pants, and partly by greed." Mr. Macaulay remarked that the lawyers on the panel were perhaps not representative of the legal profession as a whole, saying that in his research his interviewees included both practitioners with offices "upstairs over a vacant lot," and those whom "we would want to put forward on 'Law Day—USA.'" For a solo practitioner in a medium-sized city, the crucial decision is not whether to take on a case, said Mr. Macaulay. The lawyer needs all the work he can get, anything that will generate income. The decision is what to do with the case once he has it; the problem comes when a case that was supposed to settle at virtually the first offer fails to do so, and the hard-pressed lawyer is faced with the legal work necessary to prepare for trial. There, said Mr. Macaulay, "you might get a delay factor." He added that the legal system for the past 20 years has promised to vindicate the rights of claimants, but performance has been by settlements, by cutting a deal, rather than by trial. He would like to associate himself with the remarks of Professor Halpern that we must bear in mind the consequences, in terms of equity, of whatever we do to reduce delay.

Mr. Phillips moved the discussion first to a clarification of the relationship between public interest litigation and congestion in the courts, noting that while the public perception may be that such large cases inevitably clog the courts, a part of the purpose of the litigation his firm brings is to deal with problems of judicial resources, for example by removing from the justice system cases such as those of the Los Angeles skid row alcoholics, who until last year were repeatedly processed in and out of the Los Angeles municipal court at an annual cost of $8 million.

Mr. Phillips noted that because many of the cases he litigates are brought "in the shadow of the bulldozer," and because he generally seeks some sort of injunction or extraordinary writ, he is able to move
his cases to fairly quick resolution. In moving with dispatch, his firm has been helped by recent rulings awarding attorney fees to the winning side in some forms of public interest litigation. Defendants now appear less interested in subjecting his firm to ruinous bouts of discovery because they fear that, when the day of reckoning comes, they may have to pay for every hour of work that his firm puts in. Mr. Phillips noted that he sees many clear abuses of the discovery process, and related this to the fact that litigation, once a loss leader for major law firms, is now the bread and butter of private practice. Defense lawyers litigating increasingly complex cases at an hourly rate have an incentive to do as exhaustive a job as possible, including exploiting the possibilities of discovery to the hilt. Mr. Phillips' firm is frequently served hundreds of pages of interrogatories "clearly not designed to elicit information that would help in advancing cases to trial or to better represent clients."

Picking up on a question from Mr. Phillips about the extent of law firm consultation with clients about cost effectiveness in discovery and trial preparation, Mr. Howard commented that since he worries about clients' reaction to his bills, he always consults with them at specific stages in the case to avoid "raised eyebrows" later. He went on to describe the particular educational values of delay in representing clients determined to pursue ill-considered cases to the limit. In such instances, he found that he might need six months to a year of inaction to "slowly, gradually, repetitively, educate the client that the dispute in question should be disposed of by settlement."

Mr. Phillips at one point had asserted that judges should be more aggressive in controlling discovery and imposing sanctions for frivolous motions. Mr. Halpern, commenting on this idea, remarked that limits on the number of interrogatories and arbitrary discovery deadlines were not effective in controlling abuse, and that in his experience judges could not be relied upon to exercise firm control because, as he put it, "they have not gotten that kind of religion." Judge Kline agreed, noting that when he practiced in federal court, he had the impression that the judges believed the whole discovery process was beneath them, something to be dealt with by commissioners or magistrates. Judge Kline went on to speak of what he termed the "utility," not only of delay itself but also of the current crisis in court congestion. He would like to see a shift of attention from the problems of courts to extra-judicial procedures, and private and informal mechanisms to resolve disputes, commenting that the notion of the courtroom as the only place to vindicate rights was a socially debilitating one. There were, he believed, some fundamentally better reasons for removing certain types of disputes from the courts than simply to settle problems of delay. Judge Kline noted that the judicial process is not only
time-consuming and expensive, even under the best of circumstances, but far more impersonal and adversarial than other forms of dispute resolution. The courts are therefore not as conducive to settlement as other forums.

Replying to Judge Kline’s comments about the utility of the current crisis in court congestion, Mr. Fogel remarked that he had some objection to the idea that the current system should be stalemated, to the disadvantage of litigants, because of political objectives. Mr. Galanter said that the most prevalent means of moving disputes from the courts had always been by means of bilateral settlement, with or without the use of judge as a mediator or broker, but that it was not clear to him whether making the court more or less accessible—for example, by reducing delay—necessarily enhanced the use of the kinds of extra-judicial resolution procedures advocated by Judge Kline. The courts, he believed, functioned as a kind of “doomsday machine”; one question therefore was how much greater their deterrent qualities could become without distorting the quality of justice obtained by means of alternative procedures chosen by disputants wishing to avoid the courts. Judge Kline drew an analogy between courts and highways—where you made either one smooth and quick, the public would use it, perhaps exclusively, and thus to the detriment of other forms of transportation or dispute resolution that were in fact more appropriate. Mr. Macaulay suggested, and Judge Kline agreed, that a court is the best forum for certain types of disputes, where a constitutional right must be vindicated or where there can be only one winner, with no room for mediation.

Mr. Howard spoke of the need to educate lawyers to alternative methods of dealing with disputes outside the courts, and also of the almost complete lack of incentive, for defendants at least, to resort to any means of settlement while the statutory interest rates remain so unreasonably low. Mr. Fogel agreed that little could be done to encourage early settlement while defendants had a positive incentive, in the form of interest rates, to settle late. He suggested that large cases are nonetheless settled early when the lawyers involved know and respect one another professionally. “They assume that you’re going to try it right, and you assume that they’re going to try it right, so the only question is, can you figure out the dollars in advance.” Mr. Howard noted that one obvious incentive to early settlement could be an attorney’s wish to be paid early for his services. Mr. Banks mentioned the negative impact of litigation on ongoing operations for many business defendants, particularly in antitrust cases, and the lost opportunity costs of delay which might induce early settlement. Without delay, he said, his company would litigate more and presumably settle less.
Judge Schauer said that since settlement, rather than any kind of arbitration or mediation, was the most efficient way of removing disputes from the court system, his court had developed an extensive range of settlement procedures. As a result, the local legal culture had come to rely on mandatory conferences and attorneys waited to hear how a judge evaluated their case before initiating negotiations themselves. Judge Schauer’s concern was that court-run settlement conferences necessarily took place late in the progress of litigation because lawyers in the difficult cases, which did not settle early, were not ready to talk until their discovery was largely completed.

Judge Wallace commented that the focus of much of the discussion had been on what judges can do for lawyers, on how the courts can function better for lawyers. He recalled Dean Griswold’s observation that 90 percent of justice is administered in lawyers’ offices. The 10 percent that trial lawyers bring to court are, so to speak, the law office failures. But the effect of the adversary system is such, he said, that lawyers when they reminisce talk of courtroom victories rather than gratifying settlements. As a former trial lawyer himself, Judge Wallace confessed that he had always had a sense that there was something “chicken” about settling a case on the brink of trial.

Dr. Peterson remarked that despite all that had been said about delay, the pace of settlement might have an independent momentum of its own, unaffected by court procedures. In Los Angeles, for example, 50 percent of all cases settled within a year, and 80 percent within two years, long before the pressures of pretrial conference and evaluation by a judge. Mr. Flanders and Dr. Kritzer, each referring to his own research, noted that the court dockets they had studied had all included many cases identifiable as pure chaff, which had been withdrawn or dropped for one reason or another before any exploration of their merits. Dr. Kritzer commented that among the lawyers sampled for the Wisconsin project, virtually none could be found who would admit to simply dropping a case rather than settling it in some way.

Judge Hill, followed by Mr. Galanter, invited conferees to confront realistically the problems of a very small judicial establishment—much smaller in the ratio of judges to lawyers than anywhere else in the world—managing a large and ever increasing legal system. Whatever the volume of civil cases, the judges who must try them were usually committed first to deal with a geometrically expanding criminal case load. Mr. Nijelsky added that something like half the lawyers litigating in the courts in a recent two-state survey were under 35 years old. Many of these younger litigators emerged from law school unequipped for practice, and had to acquire their experience haphazardly, sometimes using the courts for on-the-job training at the expense of litigants. Dr. Peterson contributed a note from his own
research on jury verdicts in Cook County, Illinois, which revealed that something like a third of cases going to jury won a verdict hardly large enough to pay attorney fees. An explanation offered by local lawyers for this curiously uneconomic behavior was that young lawyers brought their cases simply to get some trial experience. Mr. Olson closed the proceedings with a comment that the problems of the system traceable to the disparate sizes of the judicial establishment, and of the large and relatively inexperienced bar, must inevitably be exacerbated if, as predicted, the population of lawyers doubles to one million in the next 15 years.
PANEL 3: ARBITRATION AND THE PACE OF LITIGATION

Introduction

Panel moderator Mr. William Felstiner of the Institute for Civil Justice opened the proceedings by noting that arbitration was one response to problems of court congestion that had been a recurrent theme throughout the conference. Although arbitration had other values, he said, the session’s focus would be on its effects in that context, and on its uses either as a substitute for court trial or as a step, frequently terminal, in litigation.

When arbitration was resorted to instead of litigation, Mr. Felstiner commented, it was engaged in as a matter of contract, although the contract in question might be of widespread application involving thousands of transactions. Mr. Felstiner introduced panelist Mr. Bernard Hines, a member of the board of governors of the Insurance Arbitration Forum, who was to describe contractual arbitration as used in the insurance industry’s program of inter-company arbitration, and Dr. Herbert Kritzer, Professor of Political Science at the University of Wisconsin, who would report on research conducted by the Civil Litigation Research Project into the use of the American Arbitration Association in five states.

Court-annexed arbitration, said Mr. Felstiner, is always a prerequisite to trial. Nevertheless, the objective was not so much that arbitration be a step on the way to trial as that the hearing itself would result in an accepted award or provide an occasion for settlement. Mr. Felstiner then introduced panelists Dr. Allan Lind, of the Federal Judicial Center, who was to discuss his recently completed study of a pilot program in judicial arbitration in three federal district courts, and Dr. Deborah Hensler, of the Institute for Civil Justice, who would describe her research into the first year of court-annexed arbitration in California.

Mr. Felstiner suggested that panelists, after presenting synopses of the results of their research, and indicating the scope and character of the process under discussion, might address policy issues related to the effects of arbitration on the pace of litigation, on costs, and on outcomes.

In welcoming the discussants, he noted that all had been active in the policy debates regarding arbitration of civil suits. Mr. Robert Coulson, as President of the American Arbitration Association, actively promoted the use of private contractual arbitration for dis-
pute resolution. Judge Anthony Kline, of the San Francisco Superior Court, had been an early supporter of judicial arbitration in California during his tenure as legal advisor to Governor Brown. Mr. Arthur Briskman, as legislative counsel to Senator Howell Heflin of Alabama, had participated in arguments before the Senate Judiciary Committee about the expansion of compulsory arbitration in the federal courts. In preparation for the session, Mr. Felstiner had asked the discussants to describe their perspectives on the quality of justice offered by arbitration to the average litigant, and to comment on these views in the light of the findings presented by the panelists.
Bernard Hines
Member of the Board of Governors
of the Insurance Arbitration Forums

Through the Insurance Arbitration Forums we provide the insurance industry with ten private compulsory arbitration systems designed for different areas of intercompany controversy. We have, for example, a program for bodily injury claims, where there are codefendant disputes between insurers or coverage overlaps. Then there is a medical malpractice arbitration program, where the insurers of doctors or hospitals as codefendants bring their disputes to resolution before a panel of our experts. With such malpractice cases, we can become involved with related product liability disputes. Another program arbitrates coverage disclaimers between insurers under automobile lines. We are also very active in no-fault arbitration between insurers in 18 jurisdictions. These are all compulsory systems where the arbitrators are selected on the basis of their expertise from the ranks of insurance company personnel, and serve without compensation as volunteers. The programs are economical for companies in that there is no membership fee, no subscription charge, and no assessments. It is a pay-as-you-go system, where our average charge is a $15 filing fee. We operate entirely through these fees because the insurance industry has enthusiastically embraced the arbitration programs. Last year we closed 214,875 cases through our forums, at $15 per case.

We also have a program that is not compulsory where we call on the services of experts from any area of insurance. This is customized for carriers who are involved in some unusual situation which they wish to resolve through arbitration. We provide from our files resumes on experts available for such service. The arbitragible parties select their panelists and agree to pay them a minimum per diem rate of $200.

We have over 1000 insurance companies in our programs. They may belong to one, several, or all of our programs. When they sign the agreement they bind themselves unconditionally to arbitrate rather than litigate any controversy of the type covered by that program. If a company files litigation and it appears the defendant is represented by another signatory company, they are required as part of their
contract to forthwith withdraw litigation and submit their differences to arbitration.

We operate through 357 different forums in all 50 states as well as in the Commonwealth of Puerto Rico. We have 9000 arbitrators with various degrees of expertise on our panels.

We emphasize that our procedures are informal in the sense that they do not follow formal rules of evidence. All that is necessary is for a company to file an application form with one of our committees. Within a certain time, the respondent company—in effect the defendant—has to file its answer. A failure to answer does not delay the arbitration process. With or without that answer, at the end of 30 days we set the case for hearing. To be certain the silent company is on notice of the pendency of arbitration, we send its notice by certified mail, return receipt. The company must be there on the hearing date because on that date we proceed. Once we decide a case the decision is final and binding. There is no right of rehearing or appeal, even if our arbitrators are guilty of an error of fact or law. I can assure you this discipline works well.

We do get complaints occasionally from people who feel there was an error of fact or law and we are very sympathetic with them. We explore the complaint because we do not want any of our panels to operate under any misapprehension as to the correct procedures. But of the 214,000 cases last year, of the complaints I received only 5 actually revealed a panel error of fact or law. Otherwise, the complaints usually stemmed from a mistake on the part of the arbitrating companies. Perhaps they did not understand the case, or did not submit all their evidence, or else waived some right they did not fully appreciate.

Under our property subrogation programs we encourage the use of one-person panels. For our more serious cases, where there is bodily injury, the hearing is by three persons. The panelists are selected by us exclusively, from the home office in New York. No one can appoint a panel member locally under our compulsory system. We feel the success of arbitration is built on the confidence of the insurance industry in the quality of the awards. Consequently, we are most conscientious in selecting qualified personnel for our panels. Every panelist we have has a personal data sheet in our files listing the individual's formal education and experience in the industry, as well as the particular expertise in the area where the panelist will be appointed under the compulsory arbitration system. For example, for the medical malpractice program we require that one of the panelists be a medical malpractice claims expert. In our workers' compensation arbitration system, which is compulsory in California and Michigan, the panelists must have experience in workers' compensation hearings, or expe-
rience for a certain minimum time in handling workers' compensation cases.

When a case is filed with us, the average time taken from filing to conclusion under our property subrogation program is 45 days from the date of filing to hearing and conclusion. In more serious cases, such as those involving bodily injury, the average time for hearing from date of filing is 90 days. For these cases, companies are usually represented by counsel, either house or outside. For property damage cases, the bulk of our hearings are based on files alone, with parties simply submitting the evidence they consider appropriate to prove or support their case. We have no default awards, but require at a minimum that for an applicant to recover in arbitration it must establish a *prima facie* case on the issues.
Discussion

In response to questions from Judge Hill and Judge Schauer, Mr. Hines commented that insurance companies might occasionally appear as litigants in court either because they were not signatories to insurance arbitration forums agreements, or because they were unaware of the existence of such forums, or because a local insurance company was ignorant of its obligation, signed on its behalf by a parent company, to submit its disputes to arbitration. Mr. Hines noted that his company's task of educating insurance personnel by means of constant seminars about its existence and functions never ceased.

His company was able to arbitrate disputes between two nonsignatory companies so long as both executed an agreement to be bound by the decision. By consent, the forums could arbitrate for any amount, but given the limits on most policies—as for example $50,000 in medical malpractice cases—some of the largest claims between insurance companies might be resolved only through litigation.

The forums did not arbitrate the interests of insured parties, but recommended as a matter of good public policy that the loser in arbitration pay, for example, any deductible chargeable to the winner's insured. Mr. Hines said also that his company would not arbitrate between two companies until any claim by an insured had been liquidated. Either party could settle the claim without prejudice to itself, and he observed that the party which felt the most confident that it would prevail in arbitration was most likely to settle with the third party to get that issue out of the way. Then they came to the forum's experts for a resolution by arbitration of the coverage question, rather than take the time of the court.

Replying to questions from Mr. Shubert, Mr. Rosenberg, and Mr. Galanter, Mr. Hines said that in selecting arbitrators in each state his company's first choice would be a member of the bar, but if an attorney with experience in the area in question was not available, they would consider anyone with the right blend of experience, formal education, and reputation for objectivity. All insurance companies belonging to the plans recommended qualified personnel, so the forums had no difficulties in recruiting suitable arbitrators.

Panelists were instructed that they must follow the law in deciding questions of liability, said Mr. Hines. Each case was decided individu-
ally without regard to arbitration precedent. Where the law was uncertain, the arbitrators might require briefs from the parties, and adjourn the hearing if necessary. To avoid conflict of any kind with the courts where a single issue was to be both arbitrated and litigated by different parties to a claim, the forums had a rule in all programs that its decisions were without the force of res judicata.
Herbert Kritzer
Associate Professor of Political Science
University of Wisconsin

Mr. Hines spoke of a private arbitration system outside the courts. I am going to describe the public arbitration systems outside the courts conducted by the American Arbitration Association. The research I will describe is part of the Civil Litigation Research Project at the University of Wisconsin. In one aspect of that project we sought to look at the broader context of dispute processing in the United States, selecting a series of non-court, third-party adjudicative alternatives to courts to use as a comparison base. The most prominent of these alternatives is the American Arbitration Association.

The American Arbitration Association cases cover a variety of areas of law under a series of “tribunals.” We selected two specific tribunals to look at: the commercial tribunal, which deals primarily with contract cases, and the accident claims tribunal, which deals primarily with uninsured motorist claims. Both of these types of cases typically come to the AAA as the result of a pre-existing agreement to arbitrate. (When you take out an insurance policy or sign a contract to remodel your kitchen, the contract will contain a clause stating that if a dispute should arise in the execution of the contract, it is to be taken to arbitration, often specifying the American Arbitration Association.) A number of cases in the commercial area, where there is no pre-existing binding agreement to arbitrate, do come to the AAA under a process of “submission.” Before turning to our data, there is one last point about AAA arbitration that should be noted: Generally the outcome of arbitration is an award that will be final and binding unless there is some specific appealable error on the part of the arbitrator.

Our data consisted of a series of cases terminated in 1978 selected from the files of the American Arbitration Association in the federal judicial Districts of Eastern Wisconsin, Eastern Pennsylvania, Central California, New Mexico, and South Carolina. From these files we coded a variety of data about the case: filing date, termination date, subject, claim, award, etc. Our analysis is focused on pace—the time from filing to termination.
Figure 1 is a survival graph. In Figures 1-8, the broken curves represent contract cases, and the solid curves represent accident claim cases.

Let me try to describe the many variations that are present. The rapid broken line in Fig. 1 that goes virtually straight down is South Carolina commercial contract cases. (Because of South Carolina law, there were virtually no accident cases.) In South Carolina, arbitration is very fast, so all of the cases in our sample, which are not many, were terminated within five months. Pairs of curves for other states tend to be very close together, suggesting that there is not a lot of variation within the sites by the area of the law. The one exception to the rule that patterns are the same for the two types of cases is Wisconsin. It appears that contract cases in Wisconsin move substantially faster than do the accident claims cases. I do not have any specific explanation for this. It just appears to be a pattern that has developed there.

If we are going to try to understand arbitration as an alternative to the courts, we really need to compare the two. This presents some interesting problems. We certainly cannot compare arbitration cases to all cases in the courts, because the American Arbitration Association is looking only at particular subsets of cases. We tried to develop a matched sample by identifying the area-of-law codes that were used by our field staff in coding the American Arbitration Association cases and selecting from our court samples the cases in which these
same codes appear. The mixes are not necessarily the same, but this approach does provide a base for comparison, albeit still somewhat crude.

Before turning to the pace comparisons, let us consider some other dimensions of comparisons. First, the level of states in the various groups of cases tends to be quite different. Figure 2 shows the lawyers’ views of the value of their cases; this information is taken from a survey of the lawyers. Not surprisingly, since the bulk of these cases are going to be diversity cases, the federal cases involved substantially greater sums of money than did either the American Arbitration Association cases, or certainly the state cases. American Arbitration Association cases in some locales appeared to be very much like the federal cases, in some locales very much like state cases, and in some locales somewhere in between.

![Fig. 2 — Fees and stakes by source, type, and district](image)

Incidentally, the bottom-most segments of the bars in Figure 2 represent the median lawyer fees in these same cases. It doesn’t necessarily appear that lawyers’ fees in American Arbitration Association cases are substantially less, proportionate to what is at stake, than is true for the other forums. American Arbitration Association cases fall somewhere between the federal and state courts in terms of magnitude of stakes, and so do the median lawyer fees in these cases. It is interesting to note that median stakes in all cases in our sample, both state and federal, as reported by the lawyers, are about $8000. Keep in
mind that the vast majority of cases are state cases, and the median state case is for something under $5000.

To return to the American Arbitration Association cases, the really crucial problem in comparing litigation and arbitration lies in the decision to file. There is an argument to be made that many filings in court do not represent a desire to have the case adjudicated: such filings are simply part of a standard process in getting the other side to talk; perhaps negotiations have broken down, so a case is filed to attract the opponent's attention, with no realistic expectation that it is ever actually going to be adjudicated. When a party takes a case to the American Arbitration Association, he is more likely to be thinking, "I really want a decision on this." He has none of the usual tactical reasons for filing the case in court, nor is he simply covering himself by getting in line for a distant trial date.

Figure 3 compares the way cases are terminated in the different forums. Almost 60 percent of American Arbitration Association cases are decided by arbitrator's award. In the state and federal courts, cases can be decided either by trial or some other process, such as summary judgment or involuntary dismissal of one sort or another. Only 5 percent of the cases in our state and federal courts sample were in fact tried, though a somewhat larger proportion were decided in other ways.

Fig. 3 - Mode of termination by source
Keeping these differences in mind, let us turn to the comparative analysis of pace. We will look at each geographic area separately. In South Carolina (Figure 4), we found that arbitration moves very fast, much faster certainly than court processing, either state or federal. In New Mexico (Figure 5), arbitration is also substantially faster than court processing but not to the same degree. Here it is not so much that arbitration is slower, but that the court processing is faster. We cannot explain the anomaly of New Mexico and why it seems to move much faster in its courts, but this does appear to be the case. In Los Angeles (Figure 6), American Arbitration cases are slower than they were in the other areas, but they are still faster than the courts (note that for the Los Angeles state court we are talking about time from date of filing rather than from the date at-issue). In Pennsylvania (Figure 7), we see a different pattern. Here we have only the federal courts as a comparison. (The state court’s information on termination, as it existed when we were collecting this data from court files, was more or less meaningless because there was no norm of notification of settlement of any sort that we could find. The court clerk would periodically clean house and publish a list of cases saying, “If we don’t hear from you, we’re assuming that these cases are dead, that you’ve settled them, and they are blotted from the record.” That was the date entered as termination, so we could not use state cases as a good comparison.) It is striking that the American Arbitration Association in Philadelphia is no faster than the federal court. Lastly, in Wisconsin

![Fig. 4 — Termination pattern for District of South Carolina](image-url)
Fig. 5 – Termination pattern for District of New Mexico

Fig. 6 – Termination pattern for Central District of California
Fig. 7 – Termination pattern for Eastern District of Pennsylvania

Fig. 8 – Termination pattern for Eastern District of Wisconsin
(Figure 8). An interesting pattern emerges. Contract cases are faster in the AAA than in court, while accident claim cases move at about the same pace.

The conclusion I would draw from this is fairly simple and straightforward. The American Arbitration Association is usually faster, particularly if you really want a decision; there are some noteworthy exceptions. Variations with the AAA probably reflect administrative practices. Whether the faster pace in the AAA is due to the procedural differences between the AAA and the courts, or to different expectations of the participants, is unclear.

We also collected data on pace in ten other "alternative" institutions, some involving arbitration and others involving various kinds of hearing procedures. Patterns for these institutions are shown in Figure 9. What we see in that figure is a lot of variation. The fastest procedure was that of an unemployment tribunal in New Mexico, which one would expect to be fast because if it is not it does not do anybody much good. Otherwise a couple of arbitration programs and a zoning board were the fastest procedures. The three slowest were those of the Wisconsin Equal Rights Division, the California Contractors' Licensing Board, and the Pennsylvania Board of Review, which resolves questions of value in land condemnation cases. All of these were really quite slow, particularly the Board of Review in Philadelphia. So alternative institutions may or may not be faster.

![Graph showing termination times for alternative institutions](image)

**Fig. 9** — Termination times for alternative institutions
What these alternative forms of adjudication suggest is that if one is going to think about alternatives, particularly alternatives as related to the pace of case disposition, it probably makes sense to distinguish between alternative institutions and alternative processes. In fact there is an alternative within the court: mediation using judges. It may well be that what is of more significance in understanding pace and speeding things up is an alternative process rather than an alternative institution.\footnote{Figures 10 and 11 provide some additional comparisons between the courts and alternative institutions, with controls for areas of law. What these figures tend to show is that alternatives tend to fall somewhere between state and federal courts, both with regard to what is at stake and with regards to the cost of case processing as indicated by legal fees.}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{fig10}
\caption{Fig. 10 – Median stakes by area of law}
\end{figure}
Fig. 11 -- Median lawyer fees by area of law
I will report briefly on the Federal Judicial Center study of pilot programs for court-annexed arbitration in three federal courts. The study examined mandatory but nonbinding arbitration programs established by local rule in the District of Connecticut, the Eastern District of Pennsylvania, and the Northern District of California. These rules took effect in early 1978, and all are still operating. The study, conducted by John Shapard and myself for the Federal Judicial Center, examined the first two and a half years of the operation of the pilot program. Each of the three courts has slightly different rules for determining which classes of civil cases are to be referred routinely to arbitration, and for the procedures to be followed. The great majority of cases in these programs are tort and contract actions brought in the federal courts on the basis of diversity jurisdiction. The arbitration rules exclude cases seeking substantial nonmonetary relief, and those where the amounts in controversy are over $50,000 in the Eastern District of Pennsylvania, or over $100,000 in the District of Connecticut and the Northern District of California.

The case is referred to arbitration by the office of the Clerk of the Court and can be removed from the program only by order of a judge or magistrate, or on certification that it does not meet the rule’s specifications. Upon filing of an answer in an arbitration-eligible case, counsel are notified that the case is in the program and a timetable begins to run. In general, about seven months are allowed for case preparation prior to an arbitration hearing, with a more specific timetable followed in Connecticut and Eastern Pennsylvania than in Northern California. If a case is still open after seven months, an arbitration hearing is to be held before a panel of three experienced attorneys. The hearing is relatively brief and informal, with the federal rules of evidence serving as a guide but not necessarily followed in every detail. The hearings are, however, adversary in nature, and not in any sense mediation sessions. Upon completion of the hearing the arbitrators supply the court with their judgment, and their award becomes the judgment of the court unless either party rejects it by
filing a demand for a trial *de novo*. Penalties for rejecting the award and failing to improve upon it at trial are small or nonexistent. If a demand for a trial *de novo* is made, the case is treated as though it had never undergone arbitration, except that testimony at the hearing may be used for impeachment purposes at trial.

Our evaluation was based on a monitoring of records from approximately 3,000 cases referred to arbitration during the first two and a half years of the program's operation. We also gathered data from questionnaires sent to arbitrators and counsel involved in cases in the program. For comparison purposes, we relied on records of the administrative office of the court for cases filed during the two and a half years prior to the institution of the programs. In the District of Connecticut there was a matched group of contemporaneous cases removed from the program explicitly for purposes of comparison. We also conducted interviews with arbitrators, counsel, and personnel of the Clerks' offices, and observed a number of arbitration hearings.

We found that hearings were held as soon as two months and as late as 18 months after the filing of the case. The median time from filing to hearing for cases arbitrated during the study was nine months in Northern California, and eight months in Eastern Pennsylvania and Connecticut. It was, of course, possible to compute the time from filing to hearing only for those cases actually arbitrated. Our data suggest that, had the study period been longer, the median time from filing to hearing would also have been considerably longer. We found that more than two-thirds of the cases that remained open for more than 12 months after filing had not had an arbitration hearing during that time, so the theoretical timetables in the rules are not followed strictly.

Our observation of some of the hearings and our questionnaires to arbitrators showed that the hearings were, as envisioned, relatively brief and informal, consuming an average time of from three hours in Eastern Pennsylvania to six hours in Northern California. There were some hearings that lasted more than a day, but that was uncommon. Although we have no firm data on how long the arbitrated cases would have taken at trial, we did ask the arbitrators to estimate the length of time for trial of the cases they had heard and got a general estimate that this would have taken about three times as long. The hearings were generally pursued expeditiously, but there were occasional confusions about procedures; these decreased over the period of the study as people became more familiar with them.

We found that about 60 percent of the arbitration awards were voided by demands for trial *de novo*. This percentage is considerably higher than was expected prior to the institution of the programs, and it is considerably higher than what had been claimed for earlier state court arbitration programs, which generally have only about 15 to 20
percent \textit{de novo} demands reported. Because of our study's limited time frame, we could make no definite statements about how many of the \textit{de novo} demands actually result in trials. But we do know that during the study, 46 percent of the cases with \textit{de novo} demands settled, thus establishing a minimum for the percentage that will settle prior to trial.

The distribution of arbitration award outcomes, where the award was sufficiently simple to make a determination as to whom it favored, was approximately 70 percent for plaintiff and 30 percent for defendant. For plaintiffs the median arbitration award was around $12,000. Our questionnaire to counsel asked about the fairness of the outcome of the case, however terminated, and we found that in cases terminated by arbitration awards counsel viewed the disposition as being as fair as did attorneys in cases terminated by settlement or by trial. In general, across all termination situations, the disposition was seen as being moderately fair.

The results presented to this point do not reveal the full consequences of arbitration programs for the pace of litigation. In two of the three pilot districts, we found substantial increases in the percentage of cases terminating in the first year after filing, relative to the best group of comparison cases we could find. In Connecticut, where the removal of a matched group of cases provides the basis for very strong inferences about the effects of the program, we found convincing evidence that the program increased the rate of terminations. By the end of 12 months after filing, 50 percent of arbitration eligible cases had been terminated while only 36 percent of the matched cases had done so. In the Eastern District of Pennsylvania, where our comparison was to a sample of past cases selected to resemble those placed in arbitration, we found a similar pattern of effects. More arbitrated cases terminated in the first year after filing than did earlier cases that had not been arbitrated. In the Northern District of California there were no significant differences in termination rates attributable to the arbitration program.

In Connecticut and Eastern Pennsylvania the major effects on the rate of termination were particularly evident in the seventh to the twelfth month after filing. This is also the time when most arbitration hearings are scheduled. The substantial rates of \textit{de novo} demands and the difficulty in actually getting cases into an arbitration hearing make it questionable that the more rapid terminations were the result of arbitration awards. When we conducted additional analyses, we found that these terminations were attributable to settlement and withdrawal of cases that had not yet undergone arbitration hearings. Comparison of rates of termination to rates of attempts to schedule hearings suggests that it is probably the scheduling of a hearing,
rather than the holding of a hearing itself, that produces the fastest termination. It appears to us that the firm scheduling of an arbitration hearing encourages an increase in negotiation activity and provides a deadline for negotiation; and this in turn leads to more rapid termination, often on the eve of arbitration. The deadline value of the arbitration rules as a possible reason for the more rapid terminations is suggested also by the responses of counsel to our questionnaire. A substantial number of attorneys in cases terminated before arbitration hearings believed that the timetable encouraged more rapid discovery and earlier settlement than would have otherwise occurred.

The absence of faster terminations in the Northern District of California relative to those in past cases may be explained in two ways. First, Northern California had, both before and after the institution of the program, very rapid case disposition relative to the other two courts. So it might be that there was simply not much room for improvement. Alternatively, it might be that more rapid terminations did not result because the rules in Northern California do not specify as tight a timetable as do those in the other two districts. In Northern California there is more room for arbitrators to delay the hearings on their own initiative or at the suggestion of the parties. If, as suggested, the more rapid terminations are the result of the deadline value of the rule, it is reasonable to conclude that an arbitration program that allows delay in scheduling hearings would not realize that effect. Indeed the delay in scheduling hearings in all three districts suggests that the deadline effect might be increased substantially if each court followed closely the timetable specified by its own rules.

In general we believe that the prospect of an arbitration hearing encourages settlement since firm scheduling raises the threat of considerable investment of time, effort, and expense for both counsel and litigant. The increased pace of termination observed in two of the three pilot courts seems a sufficiently positive result to encourage further testing and experimentation with arbitration programs. Such testing might involve expanding programs to include other types of civil cases that are known to show substantial rates of negotiated settlement achieved after some delay, or in the initiation of similar programs in other district courts.

The limited time frame of our study leaves unanswered some questions about arbitration that are quite important to the court. For example, we do not know whether arbitration programs decrease the incidence of trial in subject cases because the study did not go on long enough for us to track a sufficient number of cases to trial. What we do know is that in the first year of the case’s life, the case is more likely to terminate if it is in an arbitration program than if it is not.
Discussion

In response to questions from the audience, Dr. Lind noted that the numbers in the study were too small for any statement to be made about the relationship between arbitration awards and the results of trial *de novo*. The 60 percent who had demanded such trial comprised 72 cases, of which 46 percent settled, 36 percent were pending trial, and 18 percent had been to trial, either bench or jury. Of this 18 percent he understood that some settled during trial. As to the cost of arbitration, the project had been unsuccessful in its attempts to get cost information from litigants, but did establish that the administrative costs to the courts were the salaries of two deputy clerks per 1,000 cases per year. Arbitrators' fees amounted to between $75 and $100 per day in two districts; these officers served without compensation in the third.

Judge Milonas commented that in the city of New York, where mandatory arbitration had been extended to cases where the demand was for more than $6,000, the trial *de novo* rates ran at about five percent. The New York rules require that the party requesting a trial *de novo* pay the fees of the arbitrators, and Judge Milonas asked if the possibility of discouraging *de novo* requests in the federal courts by such means had been considered. Dr. Lind replied that the program had initially been developed by the Department of Justice, and that they maintained some interest in it. He noted that there had been constitutional challenges to the program, on the ground that it limited access to jury trial even in its present form without substantial penalties for demand for *de novo* trial.
Deborah Hensler
The Institute for Civil Justice

The results of our recently completed study of the California arbitration program offer some additional data on the questions that have just been asked. California's statutory program is one of nine court-annexed programs that have been adopted by the state court systems. It is experimental in nature, and will terminate after five years unless the California legislature decides to extend it. The features of the California program that are shown in Figure 1 are quite similar to features of programs that have been adopted in other states, although they are broader in scope than many. Not only can all civil money suits up to $15,000 be ordered to arbitration by the court, but plaintiffs can also take such suits to arbitration without the defendant's consent. There is also a provision for arbitration of suits of any value by stipulation of both parties.

There are a number of differences between this program and the federal program described by Dr. Lind. One such, that may be critical in determining the effects of the program on the workload of the court, is that the California program requires that a case be valued by the court before it is ordered to arbitration, since there is no ad damnum clause stating plaintiff's monetary demand in the complaint in California. In most courts this means that a judge, in conference with attorneys, must determine the value of the case before deciding whether or not to send it to arbitration. Another difference is that the California program requires only one randomly selected arbitrator rather than a three-member panel. Testimony at the arbitration hearing cannot be entered as evidence in a trial de novo and, unlike the New York program which Judge Milonas has described, penalties associated with trial de novo are imposed only where the party requesting trial does not better his position. The monetary penalty is relatively small, including the arbitrator’s fee plus certain specified court costs, but not including attorneys’ fees.

In adopting this program, the California legislature had multiple objectives, of which reducing time to disposition was not necessarily the most important. There was considerable concern about congestion in the California court, about the size of trial calendars in some coun-
- Effective July 1, 1979 — 1984

- Mandatory arbitration of all civil suits ≤ $15,000
  - Required in 13 largest Superior Courts
  - Optional for other Superior & Municipal Courts

- Voluntary arbitration in any court
  - By plaintiff election, if ≤ $15,000
  - By stipulation of both parties

- 1 randomly selected arbitrator, paid $150 per day

- Informal hearing; relaxed rules of evidence

- Assures right to trial de novo, with conditional monetary penalty

Fig. 1 — Background

ties, and about the need to reduce or at least stabilize costs. Our report assesses the program's potential for achieving each of these objectives, but for the moment we will focus exclusively on time to disposition, with later discussion perhaps of its effects on costs and congestion. Our report is on the first year of the program, and thus provides a kind of early warning system on progress in California.

Figure 2 summarizes the findings regarding the effect of arbitration on time to disposition in the first year. These data are not based on samples of case records but rather on court administrators' and arbitration administrators' estimates of the average time that would be required to reach arbitration awards for mandatory and voluntary cases. For comparison purposes, we have also shown administrators' estimates of the average time to reach jury trial in each of these courts at the time we conducted the interviews (toward the end of the first year of the program), in the six courts that we studied intensively. These courts represent more than half of the civil litigation caseload of the California Superior Court system. Although the figures provided are estimates, they are instructive regarding the effects of the program on time to disposition.

As is clear in the second column of Figure 2, the mandatory component of the program appeared in the first year to be successful in significantly reducing time to disposition in only one court, that of Orange County. In four of the courts, in fact, litigants may have to wait slightly longer for adjudication on the mandatory arbitration track
<table>
<thead>
<tr>
<th>Court</th>
<th>Average time to jury trial</th>
<th>Average time to arbitration award*</th>
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</thead>
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<tr>
<td></td>
<td></td>
<td>Mandatory</td>
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<tr>
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<td>14½ mos.</td>
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<tr>
<td>Orange</td>
<td>30 mos.</td>
<td>12 - 27 mos.</td>
</tr>
<tr>
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<td>30 mos.</td>
<td>30+ mos.</td>
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<tr>
<td>San Francisco</td>
<td>16 - 17 mos.</td>
<td>17 - 18 mos.</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>6½ mos.</td>
<td>9½ mos.</td>
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Court administrator estimates

Fig. 2 — Effect of arbitration on time to disposition (first year)

than if they were bound for trial. However, in every court, as indicated in the final column, voluntary arbitration can substantially decrease time to disposition. In both voluntary and mandatory arbitration, cases may actually take somewhat longer than the time shown on these charts. If litigants choose to exercise their right to trial de novo, if they file a request, engage in negotiations, and either go on to trial or settle, the time to final disposition would be longer than shown here.

We believe the first factor explaining this effect, or lack of effect, on time to disposition is the elapsed time rules which were adopted by statute and by the Judicial Council for implementation by the local courts (Figure 3). The program first takes notice of a case when a memorandum is filed by the plaintiff stating that the issues are joined. According to the statute, a case is to be assigned to the program no sooner than nine months after at-issue, and no later than 90 days before trial, “whichever comes first.” There was great debate in the legislature about the time of assignment. Among those we interviewed there was consensus that, whatever the tag line may imply, the actual intent of the statute was to prevent courts from ordering cases to arbitration earlier than nine months after the at-issue memorandum was filed. Valuing cases earlier than that would require courts to deal with many cases which the parties would otherwise be likely to settle on their own. Rather, they decided to limit the use of these resources to cases that were still in the system three or four years after the at-issue memo had been filed. Apart from Los Angeles and San Bernardino, the other courts are quite close to the nine-month interval specified by the rules.
MANDATORY CASES

At assignment to program Appointment of arbitrator Hearing Award Trial de novo request Total elapsed time

△ "No sooner than 9 mos. and no later than 90 days before trial, whichever is first"

Mandatory Cases *Note*

Voluntary Cases

Looking across Figure 4 at the interval between appointment of the arbitrator and the award, it is clear that a second period of delay is encountered after the arbitrator is appointed. From this point the case is in the arbitrator’s hands and it is for him to determine when the hearing is to be held. Of course the rules specify that the hearing is to be held within 60 days, but they also explicitly permit continuances. The courts have followed different kinds of policies in trying to exer-

MANDATORY CASES

<table>
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<tr>
<th>Stages: &quot;At issue&quot;</th>
<th>Assignment to arbitration</th>
<th>Appointment of arbitrator</th>
<th>Award</th>
<th>Total</th>
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<td>2 - 12 mos.</td>
<td>12 - 27 mos.</td>
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<td>30+ mos.</td>
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<td>13 mos.</td>
<td>½ - 1½ mos.</td>
<td>3½ mos.</td>
<td>17 - 18 mos.</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>4 mos.</td>
<td>2 mos.</td>
<td>3½ mos.</td>
<td>9½ mos.</td>
</tr>
</tbody>
</table>

Fig. 4 — Elapsed time for critical stages of the arbitration process
exercise control over arbitrators' granting of continuances. In Orange County, where there is a range of from 2 to 12 months from appointment to hearing date, the courts take the position that the purpose of the program is to get the cases out of the court. Orange County has a backlog that it is trying to deal with, so once the cases are in the arbitrator's hands, the court pays no further attention to them. Arbitrators are quite generous with granting continuances. This should not surprise us since arbitrators are attorneys being asked to grant continuances to colleagues who may subsequently serve as arbitrators in their own cases.

San Francisco and Alameda courts have taken a different approach in setting limits on continuances that go beyond the state rules, and require that any continuance beyond the first can only be granted by permission of the court. We have been told that this was working quite effectively in San Francisco. In the smaller court of Santa Clara there is informal program-monitoring by the arbitration office with telephone calls to arbitrators to determine the status of assigned cases. Where arbitrators are observed to be slow in holding hearings, they find that no further cases are assigned to them.

Figure 5 shows elapsed time in the same critical stages of voluntary cases, and indicates that even these cases can encounter delay or be expedited as the result of different policies. Although the rules specify a three- to four-month period of elapsed time for the voluntary cases, there is considerable variation in the actual time these cases spend in the program, particularly in the period between assignment to arbitration and the appointment of the arbitrator. In Los Angeles, which has the largest arbitration caseload in the state, there is a backlog in the arbitration program office. That office has had to decide whether to assign mandatory or voluntary cases first. Since the mandatory cases have already been in the court system for many years, they are given priority. At the time we did the study, the interval for the voluntary cases was about 10 1/2 months. Since then the office has increased its clerical staff and this time has decreased, but it is substantially longer than for the mandatory cases. In Orange County, where we've shown a range of from 0 to 4 months, a different kind of court policy is apparent. The Orange County judge in charge of the program has encouraged litigants to waive their rights both to a randomly selected arbitrator and to strike an arbitrator's name from the list. The statute provides an elaborate and detailed process to ensure that litigants will be satisfied with their single arbitrators. However, litigants in Orange County who accept an arbitrator appointed by the judge can speed the process by a month or more, depending on the state of the backlog in the arbitration office.
Another factor affecting time to disposition is the response of attorneys and litigants to the program. Figure 6 shows that the time it takes to get to arbitration as compared to the time it takes to get to trial does appear to influence this response. Courts with a relatively longer time to trial, such as Orange, Los Angeles, and San Bernardino Counties, have the highest rate of volunteering for arbitration. Los Angeles is the most dramatic example of this response, with two-thirds of the cases going into the program in the first year by plaintiff's election. On the other hand, courts with a relatively short wait for trial, such as Alameda, San Francisco, and Santa Clara Counties—Santa Clara is the most dramatic example—have a much higher rate of mandatory arbitration, with voluntary cases accounting for only 10 percent of the volume. In addition, it appears that courts that have a short time to trial have the highest rate of request for trial de novo.

In the California program, for all eligible courts during the first year, the average rate of request for trial de novo was about 40 percent. Santa Clara led the list, and one possible explanation is that litigants can get to trial there within 6 1/2 months. But it is also possible that the Santa Clara rate was higher because that county had experience with a local rule arbitration program that was in existence before the state statute came into effect. The California Judicial Council believes that there is some evidence that the de novo rates are increasing as attorneys get more experience with the program.

We believe, on the basis of our interviews with attorneys, that arbitration awards are being used as a basis for negotiating settlement, and that de novo requests are therefore an element of strategy rather than an expression of actual intent to go to trial. Given this
California state arbitration program de novo request rate of 40 percent, the federal program rate of 60 percent appears less surprising, considering the much higher dollar limit for eligible cases.

We have the same time-frame problem in trying to estimate trial rates as that experienced by Dr. Lind in the federal study. But in Santa Clara, where there has been enough experience to attempt estimates, we think that the percentage of cases going to trial, of all cases assigned to the program rather than only those where an award was made, is about two percent. So care is necessary in interpreting the significance of requests for trial de novo.

Figure 7 gives some data on settlements, but this is not extensive because we do not know what the settlement rates for these cases would have been before mandatory arbitration, nor do we have complete settlement rates for cases in the program since it began. However, we do know the proportion of cases that settled after assignment to the program but before a hearing was held. Here the experience seems to be somewhat different from the federal program, and provides no strong evidence that once cases are assigned to the program, they settle before hearing. In fact, the majority do not settle. These are final figures only for cases that have been disposed of, and therefore they do not suffer from the problems of running data. From our interviews with attorneys and judges, it appears as likely that arbitration extends the settlement process as that it compresses it. There is at least some anecdotal evidence that suggests that litigants who might have been prepared to settle, wait to go to arbitration before they begin settlement negotiations. This is clearly an area for further
research, since one of the most important issues about arbitration is its effect on settlement. To sum up: the factors we think determine arbitration's effect on time to disposition include all three shown on Figure 8. Elapsed time rules clearly affect time to disposition, and we conclude that California rules have tended to extend rather than reduce this period by setting minimum elapsed times and at the same time allowing almost complete discretion as to maximum elapsed time limits. Hence the rules as interpreted have been ineffective in speeding the process.

Particularly in congested courts, local court policies have been able to expedite the process by assigning cases early to arbitration and by establishing various procedures for speeding the appointment of the arbitrator, by monitoring the arbitration process, and by setting limits on continuances. But these policies do require increased resources to administer the programs, so courts are faced with a difficult trade-off if they want speedy disposition of arbitration cases.

Finally, attorneys and litigants clearly have been able to expedite the process by volunteering for arbitration. They can also agree to a streamlined arbitrator selection procedure if they are really interested in speed and of course they can agree to accept the arbitration award rather than deciding to negotiate or go on to trial. Our view, based on this study, is that arbitration is clearly not magical in its effects, nor is it a panacea. Under certain conditions, with certain implementation practices and certain behaviors by attorneys and litigants, it appears such programs can speed cases. Its other effects, both on outcomes and on litigant satisfaction, remain to be investigated in California.
• Elapsed time rules tend to extend process

• Local court policies can expedite process by:
  - Early assignment
  - Speedy appointment of arbitrator
  - Monitoring arbitration process
  - Limits on continuances

• Attorneys and litigants can expedite process by:
  - Volunteering for arbitration
  - Agreeing to streamlined arbitrator-selection procedure
  - Accepting arbitration award

Fig. 8 -- Factors determining arbitration's effect on time to disposition (first year findings)
Discussion

After the presentations of the panelists, two of the discussants also spoke at some length. Mr. Coulson began by commenting that in thinking about the quality of justice in relation to problems posed by the pace of litigation, he found himself indebted to Charles Halpern for the notion of a "cartoon of a process." Mandatory court-annexed arbitration seemed to him to be a cartoon of the processes of both litigation and arbitration. He noted that the voluntary and binding features of traditional arbitration are central to its processes. Although some litigants might submit to mandatory arbitration rather than endure court delay, he concluded that "in most cases you have to force parties to use it." As a cartoon of litigation, mandatory arbitration reflected a legislative judgment, he believed, that where the courts can no longer give prompt judicial attention to cases, arbitrators will provide something approximating that attention and arrive at decisions "good enough for the parties to live with." Where the system was properly designed, it could encourage earlier settlements and deal effectively with the rising volume of litigation, while the public remains unwilling to provide for more judgeships.

As president of the American Arbitration Association, Mr. Coulson moved to a description of the work of the Association in providing commercial and industrial disputants with suitable arbitrators and various types of traditional arbitration systems. He noted the courts were peripherally involved with the process in enforcing state and federal laws as these relate to arbitration contracts and awards.

Mr. Coulson pointed out that those who opt for voluntary arbitration rarely do so for reasons of speed or economy. Most frequently the desire is for a degree of expert judgment in the relevant field which cannot be provided by the courts. In collective bargaining negotiations, and in international relations, the parties may perceive the courts as a hostile environment and prefer arbitration as a system where they retain control by writing their own rules, and by either selecting their own arbitrators or working with bipartisan negotiating committees. Historically, there had been a sense that certain courts were anti-union. Arbitration clauses are common in international trade contracts because neither party wishes to be sued in the national court system of its contractual partner.
Other motivations for the use of arbitration, found principally in the insurance industry, have to do with public relations and legislative considerations. Mr. Coulson noted in this context the arbitration of claims against uninsured motorists. Coverage in case of accidents involving such parties was offered to automobile policyholders by commercial carriers when it appeared likely that the states would get into the insurance business themselves, if necessary to ensure such protection. Public relations become a consideration when insurance companies decide to defend against their policyholders, an activity they prefer to undertake in the privacy of the arbitration room rather than in the courts.

Mr. Coulson described the role of the American Arbitration Association in administering private arbitration tribunals as essentially precarious because the parties who use its services have a variety of alternatives available to them, ranging from regular court processing to the use of independent or court-appointed arbitrators. Once an arbitration set up by the American Arbitration Association is in progress, there is little that can be done to encourage expedition if this is not desired by the parties themselves. The attorneys control the pace, but Mr. Coulson commented that he was pleased to find that this pace was generally in accordance with the expectations of parties who chose arbitration. His concern for the satisfaction of those who opted for the American Arbitration Association system was, he said, a part of the general "market orientation" of arbitration agencies, as opposed to the approach of the courts.

The mission of the American Arbitration Association was aggressively to seek opportunities for the use of arbitration, and to design new and better vehicles for dispute settlement. However, innovators were faced always with the problem of trying "to unhook lawyers from traditional concepts of litigation." Mr. Coulson commented that he thought it fair to say that lawyers were creatures of habits formed in law school and reinforced in practice, and that it was exceptionally difficult to motivate them to change.

After observing that he wished to ally himself with Judge Kline's remark that mediation and arbitration are often better methods for the resolution of certain types of dispute than are the processes of litigation, Mr. Coulson offered some general comments on the presentations of conference panelists. He believed that aggregate statistics that do not distinguish between different types of disputes are likely to be misleading, and similarly, that generalizations about the local legal culture that do not take account of the variety of motives and interests of individual lawyers in particular cases are inadequate. Finally, he asserted that it was impossible to understand the courts without consideration of political forces. He personally believed
neither in the religion of court management, nor in the existence of a new wave toward court reform. But he welcomed the Institute’s initiative in investigation of court problems.

Picking up on Mr. Coulson’s remark that it was impossible to understand the courts without examining the political forces that may shape their operation, Judge Kline undertook a description of the political history of the passage of the California mandatory arbitration statute, suggesting that if similar legislation were to be implemented in other states, similar political forces would undoubtedly come into play. Part of the problem, he thought, was that the legal culture in general had a “fundamental antipathy to enhancement of the ability of people to solve disputes outside the courts; that is, without the intervention of lawyers.”

Judge Kline said that although he knew that many perceived him to be an architect of the California mandatory arbitration program, the bill that was eventually passed was so far from what he had wanted at the outset that he now saw it as a very pale shadow of what was originally intended. In defense of the program, however, he noted that there was room for experimentation within the parameters of the statute, and that this had allowed the courts to devise a variety of procedures to increase its viability. In his own county of San Francisco, for example, well over half the cases sent to arbitration are settled at a mandatory pre-arbitration conference.

In outlining the political background of the California statute, Judge Kline noted that when Governor Brown took office in 1974 a Democratic legislature, which had avoided creating new judgeships for the previous Republican governor to fill, presented him with the opportunity to make between 60 and 70 judicial appointments. Since the need for new judges had been building up for some time, Judge Kline, who was then Governor Brown’s advisor for legal affairs, expected that his chief would move with dispatch. Governor Brown, however, appeared to see the creation of more judges as no panacea for the problems of the court. California, said Judge Kline, has more judges absolutely than any other state in the Union, and more per capita than all but two or three very small states. Los Angeles County alone has more judges than the whole of England, with one-fifth of that nation’s population. Undertaking some research, Judge Kline discovered that during the decade when court congestion first became serious in California—1965 to 1975—the size of the judiciary expanded by 50 percent while the population rose by only 14 percent.

Governor Brown, according to Judge Kline, understood that he must bow to the extraordinary pressure on him to endorse bills creating more judges, but determined that he would require a quid pro quo from the legislature in the form of action on various court reform bills.
The purpose of these bills, which included proposals to remove certain business from the courts altogether, to simplify unnecessarily complex procedures, and to encourage alternative methods of dispute resolution, was to minimize the need for more judges by reducing or at least stabilizing the total volume of litigation. The original idea behind the mandatory arbitration program had been, said Judge Kline, "to get lawyers and judges out of the foreground so as to permit disputants a private and informal forum in which to resolve their own disputes before an arbitrator of their own choosing." Judge Kline remarked that such a goal was seen by lawyers, and to a lesser extent by judges, as "an extremely threatening proposition."

In describing the opposition to a bill proposing experimental removal of traffic cases from some courts, he remarked that the Trial Lawyers Association reacted "as though it was the repeal of the First Amendment that was being proposed." A comparable response came from family lawyers faced with the institution of summary dissolution of certain types of marriages. Judge Kline attributed the ferocity of the battle over these and similar proposals to "a vested interest in disputatiousness" of the legal profession, and also to the economics of the legal practice in California, where overproduction of lawyers has resulted in some unemployment and underemployment. Any proposal of a treatment that might possibly reduce the need for legal assistance was therefore seen as an economic threat. Thus, when the time came to debate the mandatory arbitration plan, it was initially opposed by most segments of the bar, from the Judicial Council to poverty lawyers. The price for passage of the bill was a degree of compromise which Judge Kline had regretted but regarded as inevitable.

He concluded his remarks by urging the American Arbitration Association and other interested persons to educate the public and to explain that the pressures the legal system is under now result from the breakdown of other institutions that were once used to resolve disputes, and which have not been replaced. Meanwhile, he commented, the legal profession would not easily relinquish any part of its interest in servicing and in some instances furthering the already extraordinary litigiousness of American society. That was part of the problem, he said, of implementing "in the real world" the kind of ideas they had been discussing.

Following Judge Kline, Mr. Briskman, legislative counsel to Senator Heflin of Alabama, said that his chief had opposed federal court-ordered arbitration legislation during the 1979 Congress because the Senator believed that formal court procedures, following the rules of evidence, were the best way to get at the facts of any case. Mr. Briskman said Senator Heflin's opposition to the federal bill focused in part on the lack of uniformity or consistency in its requirements, which
would allow wide procedural variations from state to state. Beyond that the Senator was also concerned that mandatory arbitration might at least qualify Seventh Amendment rights of access to the courts, and that the various possible costs and penalties attendant on a request for trial *de novo* could amount to a tax on the right to jury trial. For himself, Mr. Briskman said that he had determined from the panel presentations that arbitration has a tendency to work when parties voluntarily submit to it, but that its effects in other circumstances are questionable. He conceded that the historical solution of more judges might not be the answer, and that arbitration may provide some speedier relief for court congestion, but he suggested that it is the system as a whole that must be looked at, and that careful attention should be given to possible constitutional problems.

Mr. Seagraves concurred with Mr. Briskman's remark about looking at the entire system, and noted that the performance of the insurance industry in settling disputes may be seen as a massive alternative to trial by jury, and therefore, effectively, as part of the system. There are approximately 100 million insured automobiles in the United States, which generate more than one million bodily injury liability claims per year. Lawsuits are filed in about 21% of the injury claims, but only 1.5 percent ever get to trial, and fewer than 1 percent are tried to verdict. Among the bodily injury cases that go to verdict, about half result in a defense verdict, and only one in five of the remainder result in an award equal to or greater than the plaintiff's last demand. Mr. Seagraves offered these statistics not only as evidence that the insurance industry is experienced in the practice of informal arbitration, but also to disprove assertions made during previous panel discussions that insurers have an interest in delaying payment of claims through litigation because of the investment value of withheld awards. Those few cases that were litigated, said Mr. Seagraves, were the tough ones, where agreement absolutely could not be reached. He thought that the high proportion of verdicts in favor of the insurance companies indicated that there were excellent grounds for rejecting plaintiffs' claims.

Mr. Coulson commented that the high rate of settlement in uninsured motorist cases might be attributable in part to the significant filing fee for arbitration in the public systems administered by the American Arbitration Association. Where there is no initial charge in filing a lawsuit, as in New York, this particular pressure on parties to settle is obviously absent. He suggested that courts might think of using increased fees as a deterrent to unnecessary lawsuits, but supposed that there probably would be constitutional problems. He also urged, to the same end, that law schools should give some formal mainstream training to students in those well-recognized negotiating skills which make settlements more easily obtainable.
Mr. Hamilton suggested that there was a researchable question as to how much difference the settlement implementation processes of the court make, particularly in Los Angeles County where judges believe it is not cost effective to direct settlement attention to arbitration cases until they are nearing assignment to hearing, by which time they have been in the system typically for from three to three and one half years. It was not contemplated, he said, when the mandatory arbitration program was debated, that any court would decide to make assignment to arbitration so late in the process. Had it been thought of, he believed the rule would have been written differently so that courts would have had less leeway in implementing the statute. Mr. Hamilton noted that the California Assembly Judiciary Committee had just approved three bills amending the statute by raising the jurisdictional limit to $25,000 from $15,000 in some courts, setting new limits making it impossible for the courts to assign cases to arbitration as late as was now the practice in Los Angeles, and requiring the selection of an arbitrator within 30 days of assignment. Mr. Hamilton concluded with the observation that for purposes of “interesting and operational debate” it was not possible to separate issues of costliness, timeliness, and the quality of justice, since the quality of justice is often a function of time, and time itself in litigation may be a function of money.

Dr. Hensler, responding to Mr. Hamilton’s comments about the implementation of the California mandatory arbitration statute, noted that the language of the bill strongly suggests that a judge be involved in assignment. Clearly this presents a resource question, but one that has been avoided by at least one court in her study, where cases are assigned to arbitration by an administrator, with appeals only left to a judge, and with no problems reported. Dr. Hensler added that pre-arbitration rates of settlement appear to be unaffected, one way or the other, by court-instituted settlement conferences. It might be, she suggested, that the litigants and their attorneys perceive the arbitration hearing as a truly alternative procedure, combining both settlement negotiations and adjudication, and see some advantages in litigant participation in contrast to the usual off-stage role of the parties in settlement negotiations.

Dr. Hensler concluded by suggesting a very cautious approach in any legislative move to change the rules of the California statute in an attempt to solve problems in its current operations. She believed both that her own research, and commentary during the conference, demonstrated the difficulty of determining from the state capitol what will happen at the court level, where the effect of formal rules may be limited by procedures independently adopted by judges and attorneys.
CONCLUDING REMARKS

Dr. Carroll, in summing up the conference, said that the Institute's purpose had been not only to encourage dissemination of ideas, opinions, and information on the pace of litigation, and to further effective thought and action in addressing the problem, but also to learn what the conferees perceived as the salient issues, and areas where future research might most usefully be directed. This was the Institute's underlying agenda, and from its viewpoint as a research-oriented organization, the conference had been extraordinarily fruitful.

Dr. Carroll seconded Mr. Macaulay's comment that so many good ideas had been expressed that it became difficult to decide which first to pursue and consider. Nevertheless, he said, several themes and topics emerging during the conference appeared to Institute members particularly worth development. He mentioned first the relationship between time to disposition and outcomes, and the effects of time on the quality of justice, where the latter is reflected in the delivery of compensation. Any change in the date at which compensation might or might not be forthcoming must affect not only the real value of the award, but also must change incentives to settlement early in the litigation process, and possibly even before a lawsuit is filed. Dr. Carroll hypothesized that the size of settlement offers as well as their frequency and acceptability in comparable cases may vary from jurisdiction to jurisdiction in some discernible relationship to time to trial in the jurisdiction in question. If this were true virtually any discussion of time to trial must translate into a consideration of outcomes.

Dr. Carroll noted the prevalence of incentives as a topic of the conference—incentives to lawyers and courts, to corporations, insurance companies, businesses in general, and legislators. The Institute would hope to explore in its work the range, relative importance, and interactive effect of such incentives among participants in the litigation process.

Since much of the data available on the results of various court management techniques, for example, had been generated in cross-sectional research rather than longitudinal studies, it might be, Dr. Carroll said, that Institute researchers, among others, lacked information of a critical kind about isolated instances in which specific procedural changes are reported to have had extraordinarily beneficial results in a particular jurisdiction. Dr. Carroll suspected the presence of a "Hawthorne effect" in these instances, where individual or institutional behavior is modified in some way simply by the knowl-
edge of the actors that their activities are being studied. Dr. Carroll was struck by the fact that reports of improved performances, in case processing for example, are rarely accompanied by an identification of the precise causes of such improvement. In this context he had been interested in Judge Milonas’ observation that in tackling court problems it mattered less what was actually proposed than that some action was perceived to have been taken. To the extent that beneficial changes are wrought by Hawthorne effects, he noted, their duration is likely to be limited. Thus research in these scattered instances of improvement might focus not only on the means of their achievement but also on the longevity of effect.

Dr. Carroll commented on the “missing chair” at the conference, that of the shadowy figure of the client, to whom they seemed not to ascribe much of a role in the pace of litigation beyond paying the costs and enduring the consequences of that process, conducted at whatever pace the civil justice system ordained. Dr. Carroll noted that Judge Kline had nevertheless directed the attention of conferees to the interests of the client, and also that Mr. Banks had pointed to the example of his own company as that of a party determined to play a larger role in the conduct of its own litigation.

Noting that he had mentioned only a few of the topics that had been of particular interest to Institute members during the conference, Dr. Carroll said that he was sure that many more would present themselves during subsequent discussions of the proceedings. In conclusion, he hoped that all conferees would be willing in the future to share with the Institute their best ideas for crucial problem-solving research.

Mr. Shubert closed the conference proceedings first with thanks to panel chairmen, panelists, and all participants, and then with a final admonition on the subject of bureaucracy. That word, he noted, had not been uttered once despite the fact that the center of their concerns had been one of the largest of all organizational bureaucracies. “As we all know,” he said, “bureaucratic organizations tend to develop certain behavior patterns and certain special substantive centers which are concerned primarily with their own interests and development and not always with the more general public interest. That, too, is a fruitful area for the attention of the Institute. The whole question of the bureaucratic incentives of the judiciary and the economic and market incentives of the legal profession coming together may be a coincidence that does not bode well for the cause of the delivery of swift and equitable justice in the civil area.”
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