Court Efforts To Reduce Pretrial Delay

A National Inventory

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with the assistance of Jane Wilson-Adler,
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Foreword

Although courts in every part of the country are plagued with lengthy pretrial delays that interfere at a fundamental level with the execution of justice, very little communication has taken place among jurisdictions to share vital experience in experiments to reduce congestion and delay. As a result, loud and long-standing arguments about why the average civil case now takes 4 to 5 years to reach trial in many jurisdictions consist of more rhetoric than fact, and the remedies offered in judicial councils and legislatures are debated without knowledge of how similar strategies have worked elsewhere.

This Report represents one attempt to fill this void. It lists and describes techniques employed by the courts to combat pretrial delay in all 50 state court systems, as reported by court administrators at both the state and the metropolitan levels. The Report includes observations by court officials on how much the measures adopted have really changed the prior situation, and what problems, if any, have arisen. It also raises implementation issues for consideration by courts planning to adopt such techniques.

The results of this study may be likened to a map of efforts to reduce pretrial delay. It tells us which jurisdictions nationwide have introduced a given type of measure, the key features of the procedure, and how well it is working in the estimation of court officials. While this type of research may be unexciting, it is critical to any sensible consideration of the current state of our pretrial procedures, and of the many proposals advanced to change it.

We hope that this Report will facilitate communication among court administrators and judges in different jurisdictions. There appears to be a general desire on the part of court officials to learn about the experience gained by other jurisdictions in dealing with what all see as a very serious complex of problems. Parochialism remains, of course, and some of it is justified by the real differences in substantive law and administrative tradition that characterize different states. Nevertheless, there is evidence of considerable openness to an approach
to reform that employs measures that have been analyzed and adjusted in the light of lessons learned from the mistakes made elsewhere.

This Report is in no-way an analysis of the problem of, or the possible solutions to, pretrial delay in civil courts. Rather, it is the first nationwide survey of state trial court efforts to reduce pretrial delay in processing civil cases. As such, it provides a broad database, a reference guide, for those seeking solutions to pretrial delay in the civil justice system. While the information here should be of interest to policymakers in all branches of government concerned with court congestion, it should be particularly valuable to court officials dealing directly with the problem.

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

BACKGROUND

Efforts to reduce court delay and congestion have taken many forms across the nation's courts over the past several years. Indeed, throughout their history the courts have been grappling with backlogs resulting from insufficient resources and inefficient procedures for processing their caseloads. Nevertheless, there has been very little evaluation of the effectiveness of procedures intended to expedite the resolution of disputes in the 50 state court systems and hundreds of local courts where they have been undertaken. As a first step toward empirical analyses of the effectiveness of such programs, The Institute for Civil Justice undertook a project to generate a database containing comparative data on the features of various approaches to expediting cases. This Report describes the results of that project—an inventory of state and local trial court procedures to reduce pretrial delay of civil cases.

Our Report presents information on the number of procedures authorized to remedy pretrial delay, and their distribution across the nation. It describes how they operate and discusses the considerations underlying their design and implementation. Available data do not yet permit us to evaluate these procedures; our descriptive research is intended to provide a basis for future evaluations, as well as a reference tool for practitioners interested in what is being done in other jurisdictions.

Data collection consisted of telephone interviews with the state court administrator or his designee in all 50 states and 40 major metropolitan courts. We selected court administrators as our main interview respondents because we wanted to contact officials who were accessible, central to court management, and possessed of an overview of the entire state court system. Because the court administrators' hands-on knowledge of court operations varied considerably, we were often referred to someone else for information about specific procedures.
Consequently, we also interviewed judges, attorneys, and administrators of specific programs.

We asked these court officials about several different types of efforts intended to expedite civil litigation, including procedures to control the pace of discovery, to simplify or liberalize the motions and pleadings rules, to limit continuances, to manage court resources, and to promote settlement. We also inquired about the use of judicial arbitration and medical malpractice screening. In conjunction with our telephone interviews, we collected documents describing specific procedures, including statutes and court rules. To confirm and update the information obtained by telephone and document review, we mailed survey forms to the court officials with whom we had spoken in each of the state and metropolitan courts. We obtained completed verifications from 45 of the state courts and 33 of the 40 metropolitan courts.

OVERVIEW OF COURT EFFORTS

Our interviews with court officials gave us an overview of the scope of court activities around the country and of the types of procedures proposed or implemented to reduce delay. We found widespread interest and activity in efforts to expedite civil litigation; many courts were planning new attacks on the problem and others were continuing longstanding efforts. Procedures currently in use range from informal efforts by individual judges to state laws mandating formal programs, from procedures intended only for a subset of the total caseload to procedures that affect every case.

Scope of Efforts to Reduce Pretrial Delay

Regardless of their perceptions of the extent of the delay and congestion in their courts, most court officials seemed eager to streamline pretrial procedures to achieve better management of the process. All but two states have authorized one or more formal procedures intended, at least in part, to expedite cases. In addition, many states are currently reviewing their pretrial procedures and planning changes to speed up the processing of cases. In 20 states and 7 of the 40 metropolitan courts, officials told us that proposals were planned or awaiting approval; 13 states and 8 metropolitan courts have experimental programs under way.

1Table II.1 in the main text provides detailed information on the nature and extent of court activity to reduce pretrial delay. Tables containing information for metropolitan courts parallel to that provided for state courts in the main text are to be found in Appendix G.
Factors Affecting Court Efforts

Many court officials expressed frustration over constraints on their ability to introduce changes to expedite cases. These constraints arise out of several aspects of the court system, including the attitude of the court toward delay, the relationship among the various participants in the court system, the size of the criminal caseload, and the resources available for remedying delays. The organization of the court—its structure, management, and rule-making authority—is also an important factor in determining the types and scope of efforts to expedite litigation.

Types of Procedures

In considering the wide range of activity and varying approaches to problems of delay, we found it useful to distinguish two categories of effort and to organize our findings and discussion according to them. The categories are:

- Management efforts to streamline or improve management of cases progressing through the system.
- Diversion efforts to reduce the number of cases progressing toward trial by providing alternative forums for their disposition.

MANAGEMENT EFFORTS TO REDUCE PRETRIAL DELAY

Management strategies focus on streamlining the pretrial process and increasing court control over the pace of case preparation. They represent an attempt to respond to critics who attribute pretrial delay to long-standing traditions that have led to inefficient resource management and to attorney control over the pace of litigation.

In all, we identified about 25 procedures that involve court management approaches to reducing pretrial delay. It is important to note that these procedures have not been implemented in all the courts or by all the judges in a system. Moreover, our inventory involves no evaluation of their effectiveness. We have categorized them according to their three main objectives:

- Efficient management of court resources to ensure adequate supply for the caseload demand.
• Expeditious pretrial processing using simplified and streamlined procedures with greater court supervision over the progress of cases.
• Firm trial dates established through strict continuance policies.

The overall objective of these procedures is to assure that the case-flow is controlled and that this control resides with the court rather than the attorneys.

Pattern of Adoption

Forty-seven states have adopted one or more management procedures.² Not surprisingly, the greatest number (43) concentrate on procedures to improve the management of court resources. Twenty-nine states have procedures intended to expedite the pretrial process, and 21 have statewide procedures to establish firm trial dates by enforcing strict continuance policies. Each of the 47 states has adopted procedures in at least one of these categories, but only 12 court systems have statewide procedures in all the management categories. These last figures may indicate that only a relatively small number of states have taken a "total case management" approach at this point.

Efficient Resource Management

Courts have adopted two types of procedures to manage their resources more efficiently: (1) those that attempt to identify the demand for court resources by monitoring the status of the caseload in the system, and (2) those that attempt to ensure that adequate court resources are allocated to handle the caseload. Both types of efforts are necessary for effective management; to schedule judges and courtrooms efficiently the court must know the size and composition of the caseload.

Forty-three states have authorized at least one of the resource management procedures we have defined.³ Procedures intended to identify the demand for resources include:

• Using computerized information systems for monitoring the progress of cases through the pretrial process.

²Table III.1 in the main text provides detailed information on the nature and distribution of various management procedures.
³Table III.2 in the main text provides detailed information on the characteristics and distribution of resource management procedures.
Classifying cases by age, type, complexity, etc. for assignment to special expediting tracks.

- Providing a scheduling office or scheduling personnel for centralized assignment of cases.

- Dismissing inactive cases from the court docket, or "docket cleaning" as it is known in some courts.

- Penalizing the parties for last-minute settlements after courtrooms and juries have been assigned.

The resource management procedures intended to provide an adequate supply of court resources to the caseload include:

- Establishing goals and time standards as guidelines for the court to follow in expediting case disposition.

- Providing technical assistance to individual courts on management and resource problems and planning.

- Reassigning judges as needed across and within jurisdictions to help reduce calendar backlogs.

- Providing for judicial accountability for delay or failure to meet court standards in disposing of cases.

Expeditious Pretrial Processing

In this category we include procedures aimed at expediting the pretrial process by simplifying and limiting motions, pleadings, and discovery. Some of these efforts focus on individual cases, providing custom scheduling or management. Other procedures are applied to the caseload as a whole, limiting time or simplifying steps. Judging from the amount of recent activity in many jurisdictions, and the indications from so many court officials that pretrial motions and control of discovery are serious problems in their courts, it is likely that courts will increasingly adopt procedures to expedite the pretrial process.

Twenty-nine states and 23 of the 40 local courts surveyed have formally authorized adoption of one or more of the following procedures to expedite pretrial processing:4

- Using mail and telephone conferencing to expedite motions processing.

- Requiring counsel to negotiate discovery conflicts themselves before seeking court resolution.

- Assigning parajudicial personnel to hear discovery motions.

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4Table III.3 in the main text provides detailed information on the nature and distribution of measures to expedite pretrial processing.
• Placing a limit on the number of interrogatories that a party can request.
• Limiting or specifying the amount of time in which discovery must be completed.
• Holding conferences for the purpose of scheduling discovery.
• Assigning penalties to attorneys who bring frivolous motions.
• Simplifying the pretrial process, by eliminating or restricting pleadings, discovery, pretrial motions, etc. for certain cases.

Many courts, while lacking formal rules or directives, employ these procedures informally at the discretion of local courts or individual judges. In addition to the procedures listed above, most courts have adopted some time limits for attorneys and judges to adhere to in processing motions, although no one we interviewed reported strict enforcement by the court.

Firm Trial Dates

Advocates of caseflow management believe that setting and maintaining firm trial dates is a critical factor in establishing court control over the caseload. In theory, firm trial dates force case preparation and provide an incentive for attorneys to settle. In addition, they enable courts to allocate resources more efficiently to meet the demand for trials.

But to establish such a system, the court must be sure it can provide judges and courtrooms when cases are scheduled, and must prevent cases from being continued because attorneys are not prepared or have conflicts in their schedules. In short, the court must have a strict continuance policy.

Twenty-one state court systems and 22 of the 40 metropolitan courts surveyed reported at least one special procedure aimed at limiting continuances. Several different procedures may serve this purpose by making continuances harder to obtain. Arbitrarily limiting the number of continuances that can be granted in a single case is one option. Or a court may choose to establish cutoff dates after which no requests will be heard. Requiring a written motion or affidavit with requests, or requiring client signature on requests for continuances may also encourage a more serious attitude toward continuances. Other strategies involve assigning a special judge or office to rule on all requests, monitoring the number of continuances granted by individual judges, and assigning penalties for continuances.

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6Table III.4 in the main text provides detailed information on the nature and distribution of measures designed to limit continuances.
Policy Issues Related to the Design and Implementation of Management Strategies

We noted two types of policy issues in connection with the design and implementation of management strategies to reduce pretrial delay. The way in which management procedures are applied in the courts can affect both the efficiency and the equity outcomes of the procedures. The policy issues related to the efficiency of management strategies designed to reduce pretrial delay come down to a single crucial question: Do these procedures reduce delay to a degree that merits the time, effort, and money required to implement them?

From our interviews we learned that courts have problems in both freeing additional court resources to implement new programs and enforcing new procedures. They also have problems accommodating the variety and complexity of cases to which these uniform measures are supposed to apply. Many court officials and researchers are realizing that the key to achieving a reduction in pretrial delay using management procedures lies in integrating them effectively in an overall management effort.

The second set of policy issues involves the question of how efforts to reduce pretrial delay affect the equity of the case resolutions. Ideally, management procedures should result in reduced delay and congestion in the courts without altering the quality of justice obtained. Although we know of no research that measures the impact of management efforts on the fairness of outcomes, we expect that these procedures could have an effect on litigation that extends beyond their immediate objective. For example, judicial involvement in caseflow management could affect the substantive development of cases as well as their pace. Attorneys may change their behavior in response to new management procedures that they feel change their relationships with the court or with their clients. Indeed, the quality of representation obtained by litigants may be affected by management procedures.

DIVERSION STRATEGIES TO REDUCE PRETRIAL DELAY

Court efforts to divert cases from trial to alternative forums are based on the assumption that in order to reduce court congestion and costs, courts must reduce pretrial caseloads. This is probably a fair assumption because as cases progress through the pretrial process toward trial, they consume increasing amounts of court resources and
time before disposition. Diversion strategies emphasize the value of alternative—faster and less expensive—forums for adjudication.

We have identified three types of pretrial diversion efforts that apply to cases already filed with the courts: judicial arbitration, medical malpractice screening procedures, and settlement programs. Many courts and legislatures have designed other kinds of strategies that, because they divert cases from the court altogether rather than only from trial, are not included in the scope of our study.

The efforts described in this section share several characteristics. First, they are all intended to provide earlier disposition for diverted cases using minimal court resources. Judicial arbitration adjudicates disputes; malpractice programs screen cases; and settlement programs mediate disputes. Each of the diversion procedures by definition places some obstacle in the path of the litigant who seeks jury trial, and so each is vulnerable to criticism that constitutional rights of equal protection and due process are at least threatened, and may be seriously jeopardized.

One common measure of the effectiveness of these diversion programs is whether they dispose of a sufficient percentage of cases at a large enough reduction in cost to be worth the invested court resources. Most programs, however, have not been so evaluated because (1) the courts generally do not monitor the costs of the program, and (2) without a true experimental design it is difficult to determine the number of cases disposed of solely as a result of the diversion.

Judicial Arbitration

One increasingly popular diversion program, judicial arbitration, involves court-administered programs that attempt to reduce the number of cases going to trial by diverting some to an alternative adjudication forum.

In these programs, litigants in certain types of cases present their arguments to an informal hearing held by parajudicial personnel. The hearing results in a disposition that is filed in court. If either party is dissatisfied with the arbitrator’s award, it can appeal the decision and request a trial de novo. Arbitration programs are intended to speed disposition of arbitrated cases, and, by diverting part of the caseload, to expedite those remaining in the pretrial process as well.

Nine states—including heavily populated industrial states of the East and Midwest, as well as Western states with far less density, industrialization, and population—have authorized judicial arbitration
programs. In seven of the nine states, the authorization was by state legislative action. Although Pennsylvania has had a judicial arbitration program for more than 20 years, most states have authorized theirs during the last 10 years. The mandatory program has been adopted most recently in Washington state (1979). The usual pattern of implementation has been to commence the program in the major metropolitan court and to expand it gradually around the state.

The key features characterizing an arbitration program are the following:

- The jurisdictional limit on case eligibility for the program and how it is determined for each case.
- The timing of case assignment to the arbitration program in the course of the pretrial process.
- The arbitration personnel, their qualifications, and their compensation.
- The disincentive to request trial de novo after the arbitration award is filed with the court.

Mandatory Medical Malpractice Screening

The second type of diversion program we investigated is currently used for medical malpractice cases only, but has been suggested as a model for screening other types of tort actions, such as product liability cases, and may foreshadow a trend toward specialized adjudicatory bodies. Medical malpractice screening, which provides the most complete diversion from the court system, is distinguished by the fact that it developed not in response to problems of court congestion but in response to trends in court outcomes. The panels, as well as other medical malpractice legislation, were introduced in response to a perceived “malpractice crisis” involving escalating malpractice liability insurance premiums. The objectives of the panels, established mainly during the mid-seventies, were reportedly to reduce the number of cases going to trial and the amounts of money awarded. They were designed to provide experts instead of juries to determine liability, to weed out frivolous cases, and to promote earlier settlement of meritorious claims. Cases diverted to screening panels were intended to be more

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6Table IV.1 in the main text provides detailed information on the characteristics and distribution of judicial arbitration programs.

7Table IV.2 in the main text describes the features of judicial arbitration programs that have been implemented.
quickly disposed of so that if enough cases were involved, the court's overall workload would be reduced.

A typical panel is composed of one attorney, one physician, and either a judge or a lay person. In most states the panel is authorized to make a decision on tort liability only, after an informally conducted hearing of the claim. The parties to the action have a right to appeal the panel's decision, and the panel findings as to liability are usually admissible at any subsequent trial. Screening programs often include a disincentive to appeal, such as assignment of panel costs to the appellant or admissibility of the panel's findings at the trial.

A total of 23 states have authorized malpractice screening programs. In states where they are operating, some (e.g., in Massachusetts and New Jersey) are reported to be efficiently processing cases and disposing of them at the hearing stage. Other states reported serious backlogs and administrative problems; and a few reported very little demand for the panels because of the small number of malpractice cases filed since the programs began. In some states statutory amendments and changes in procedure have been introduced to address specific problems, and administrators of these programs are optimistic that such changes will improve the efficiency of the panels over time.

- Malpractice screening panels have been extensively challenged on constitutional grounds in 14 of the 23 states where they are mandatory. The challenges have been made on several different grounds, and the responses of the state supreme courts have varied considerably. Panels have been declared unconstitutional in only four states (on different grounds in each state), while other states have found the same grounds insufficient to declare the programs unconstitutional.

The key features of mandatory malpractice screening programs include:

- The scope of the panel's finding and whether it is limited to liability only or also includes damages.
- The timing of case assignment (either precomplaint or post-complaint) to screening.
- The number of panel members and their professional affiliations.
- The formality of the hearing procedure.
- The disincentives to appeal the panel's decision to the court for trial.

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8Table IV.3 in the main text shows the pattern of adoption of mandatory medical malpractice screening panels around the country.
Settlement Programs

About 90 percent of civil cases filed in court are disposed of without trial, usually through private settlement during the pretrial stages of litigation. Heavy caseloads and trial backlogs make early settlement of cases an attractive option for courts seeking to reduce delay. Knowing that many civil cases are candidates for pretrial settlement, and having a tradition of informal involvement with settlement negotiations, some courts have instituted their own formal settlement programs. In this type of dispute resolution, the court provides mediation as the alternative to adjudication of the dispute. We distinguish these formal, court-sponsored programs from the private settlement process that plays a central role in the pretrial stage of most litigation.

In addition to settlement conferences, courts have adopted other settlement mechanisms, including: mediation, which combines features of the pretrial settlement conference and judicial arbitration; mock trials, designed to give the attorneys an opportunity to present their case and obtain an objective evaluation of its probable outcome; court-ordered conferences between opposing counsel (without a judge), for the purpose of good-faith settlement negotiation; court-ordered conferences between opposing counsel before a panel of neutral attorneys who provide objective evaluation and encourage a settlement agreement; and incentives to early good-faith settlement negotiation in the form of fees and penalties if the trial outcome is not more favorable than the pretrial offer/demand.

A typical settlement conference is held between opposing counsel authorized to make agreements for the parties, and a judge assigned to pretrial conferences or to the particular case. It is convened at the discretion of the judge, or at the request of one of the parties. In some courts attorneys are required to submit a pretrial statement of issues before the conference, and a pretrial order regarding the outcome is issued by the court after the conference. The conference may be held early in the pretrial phase of the case or just before trial is scheduled. If an agreement is reached at the conference, the dispute is terminated; if not, it is usually assigned a trial date and proceeds eventually to trial.

At the conference, each side briefly presents its case to the judge. The settlement techniques vary from judge to judge, and with any given judge, from case to case. Sometimes a judge places a value on the case and tries to bring the two parties into agreement over it. In other cases, the judge will only point out to each side the strength of the opposition's case and the weaknesses of its own. But the key feature of the conference is informality and the atmosphere of compromise generated by the judge or other third party.

In many jurisdictions, settlement conferences are used by one or
more judges but are not required by formal policy or rule of the court. In others, settlement is reported as a purpose of the pretrial conference but is not explicitly referred to in the court rule.6 In ten states, court order or court rule either authorizes settlement conferences or specifies settlement as one of the main purposes of the pretrial conference, for some or all cases. Twenty-two of the metropolitan courts in our sample reported use of formally authorized settlement conferences by at least some judges.

The key features of settlement conferences include:

- Eligibility of cases, and whether assignment is mandatory or voluntary.
- Timing of assignment to settlement conference in relation to the assignment of a trial date for the case.
- Selection and negotiating skills of the mediator or conference convener.

Policy Issues Related to the Design and Implementation of Diversion Strategies

As is the case with management efforts, the nature and characteristics of diversion strategies also raise certain policy questions in relation to efficiency and equity outcomes. For diversion as well as management efforts, these questions are related to the net costs and benefits, to the court system and its litigants, of administering the diversion—in terms of the court resources involved in operating and efficiently managing the programs, and the percentage of the caseload affected by the procedures. Moreover, because diversion programs provide an alternative to court adjudication, they may affect the equity of litigants’ outcomes. These and other issues will require careful monitoring, data collection, and analysis to resolve.

CONCLUSIONS

The scope and variety of efforts to solve the problem of court congestion reflect a growing tendency among courts to assume responsibility for setting the pace of litigation, rather than leave this to attorneys and their clients. While the problems addressed by the courts share certain

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6Table IV.5 in the main text provides detailed information on the nature and distribution of formal settlement programs.
features, they also reflect individual differences in court structures, personnel, and caseload characteristics that have resulted in an enormous amount of variety in the specifics of the many procedures in use.

This variety provides an excellent opportunity to learn about why certain procedures fail while others succeed, about the costs of implementing each of them, and about their varying impacts on different types of litigants. Despite several years of experimentation and trial, however, little is known about the conditions under which certain procedures prove effective. For almost every procedure, one can find some court officials who believe that it is a valuable tool for combating congestion and delay, and others who believe it is ineffective. Courts thus have few guidelines to follow in planning and designing new efforts to deal with their own backlogs. In spite of the numerous difficulties associated with conducting research in the courts, court policymakers would clearly profit from systematic empirical research on the costs and benefits of different procedures.

In addition to cost-benefit assessment of specific expediting procedures, there is a growing need to confront other critical issues raised by such court efforts. What is the proper role of the court in dispute settlement? Are there tradeoffs between efficiency in dispute resolution and the equity of dispute outcomes, and if so, what are they? At what point does court intervention to expedite litigation become court management of case development? Basic research on the characteristics of disputes that enter the court, the sources of delay in resolving these disputes, and the costs and benefits of delay for both litigants and the courts would undoubtedly bring a greater measure of clarity to the continuing policy debate on these issues.
Acknowledgments

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I. INTRODUCTION

During the past decade, the workload of many state trial courts has steadily grown. Some courts, struggling with their increase in volume, are taking much longer to dispose of cases. And while the overall cost of civil litigation is also rising, additional resources to relieve backlogs are becoming more difficult to obtain in many state legislatures. As the situation worsens, the courts are roundly criticized for their inefficiency, and reform is repeatedly urged upon them.

Neither concern about delay in the courts nor proposals to reform the system are new. A nineteenth century writer, commenting on the courts in one state, said, "Speedy justice is a thing unknown; and any justice, without delays almost ruinous, is most rare." Complaints about the length, cost, intricacy, and unfamiliarity of judicial proceedings permeate eighteenth century writings on the civil justice system as well (Ellis, 1941; Bloomfield, 1976; Horwitz, 1977).

Structural reforms adopted in the eighteenth century, which altered the number and organization of the courts, as well as their jurisdiction, functions, rule-making, and budgetary authority, shaped the courts of today. During the nineteenth century, courts turned their attention to procedural reforms in the civil dispute resolution process. The codification movement, for example, was a major effort to simplify American common law and thus reduce lengthy and complex court proceedings. David Dudley Field's Code of Procedure, adopted in New York in 1848, set the pattern for procedural reform in thirty states. Many states also granted their supreme court justices the power to make rules regarding procedure in the lower courts to assure uniformity throughout a state. Nineteen states created adjudicatory commissions to dispose of accumulated cases referred from the courts (Pound, 1940, p. 201).

Concern about delay and congestion in the civil justice system and interest in judicial reform have continued throughout the twentieth century. As early as 1906, Roscoe Pound (F.R.D., 1964, pp. 284-289) identified many long-standing structural and procedural problems and led the way in the modern effort toward court unification. (See also,

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1For a more complete historical summary see Selvin (1980).
2David Dudley Field, 1839, quoted in Vanderbilt (1955, p. 81).
3Among the states and territories that rapidly adopted a similar code were Missouri (1849), California (1850), Iowa (1851), Minnesota (1851), Indiana (1852), Ohio (1853), Washington (1854), Nebraska (1855), Wisconsin (1856), Nevada (1861), and Idaho (1864). See Millar (1952, pp. 54-55).
Lowe, 1973, p. 316.) Reform efforts such as court unification have continued through the past several decades (Winters 1964, pp. 2-10; Uppal, 1978-79). Arthur Vanderbilt (1955, p. 81) pointed to the absence of modern management methods and effective leadership as key causes of much of the law's delay. His thinking contributed to the focus on court operations and became the basis for operational reforms.

Increasingly in recent years, the emphasis seems to be on better management of the progress of litigation though the courts. Passage of "speedy trial" legislation in criminal cases and the Law Enforcement Assistance Administration Court Delay Reduction Program are examples of government support for improved management. Attention has also been focused on the managerial role of the judge (King, 1978; Rosenberg, 1965, p. 30; Chayes, 1976).

Although the courts have introduced many procedures over the years in response to concerns about delay and rising costs, there have been only a few attempts to systematically evaluate the effect of these measures. Most evaluations have focused on a small number of procedures adopted by a select group of courts. Neither the number of court efforts nor their nationwide distribution has been the subject of recent research. Comparative data on the features of various approaches to expediting civil case processing have also been lacking. The purpose of the inventory described here is thus to assist in developing a broad and organized database that will permit empirical analyses of the costs and benefits of different approaches, which may in turn lead to improved policymaking on court reform.

SCOPE OF THE STUDY

Court reform efforts consist of a broad spectrum of procedures that are intended to affect different types of cases and are aimed at different levels of the courts. Some procedures involve adding resources to the courts; others involve limiting access to the courts. The range of measures extends from increasing filing fees to establishing judicial selection criteria.

To identify and describe all such efforts under way across the country would be a formidable task that is beyond the scope of this study. We have limited our attention here to procedures that affect the pretrial civil caseloads of state trial courts of general jurisdiction, and have inventoried only those procedures authorized or implemented by the

4Sipes et al. (1980) and Flanders (1977) are examples of these studies. One of the best known evaluations of a procedural reform, by Rosenberg (1964), was limited to the use of a single procedure in one state.
courts themselves. We have focused on state rather than federal courts because less is known about state efforts, and because their number provides an opportunity for identifying a great variety of procedures. We have focused on procedures directed at the pretrial stage of litigation (the period between the filing of a complaint and the beginning of the trial) because it is popularly believed that delay is produced at this stage, and because most cases never proceed past this phase. We have included procedures applicable to the general category of civil cases for money damages (including tort and commercial litigation) because these are the cases generally believed to be contributing to the overload; we have specifically excluded procedures applicable only to a special type of litigation such as to divorce, probate, juvenile, or other special jurisdiction matters. By focusing on cases already in the system, we eliminated from our study efforts to restrict access to the general jurisdiction courts through such means as establishing small claims courts and increasing filing fees. We also excluded efforts involving economic sanctions against the bar or litigants, such as increasing prejudgment interest and awarding attorney fees. And we have not discussed expanding judicial resources by adding judges, para-judicial personnel, or courtroom space.

Within these limits, the goal of our inventory was to catalogue the expediting procedures that have been authorized and are in use in the 50 state trial courts, describe how they operate, and discuss the considerations that entered into their design and implementation. The available data do not permit us to evaluate these procedures. Instead, our descriptive research is intended to provide a basis for future evaluations and to serve as a tool for practitioners interested in what is being done in other jurisdictions.

METHODOLOGY

We began data collection with a census of the state courts, conducting telephone interviews with the state court administrator or his

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6Because we felt it was inappropriate to apply a uniform definition of delay across all courts, we did not collect data to measure the extent of delay in each court, or attempt to describe the size or composition of the caseload in the different courts. We allowed court officials to apply their own measure and to tell us about procedures intended to expedite the caseload in light of their own standard.

6We selected court administrators as our main interview respondents because we wanted to contact officials who were accessible, were central to court management, and had an overview of the entire court system in the state. The court administrators’ hands-on knowledge of court operations varied considerably and they often referred us to someone else for information about specific procedures. Consequently, we also interviewed some judges, attorneys, and specific program administrators, e.g., administrators...
designee in all 50 states. We asked these court officials about several
different types of efforts intended to expedite civil litigation, including
procedures to control the pace of discovery, simplify or liberalize the
motions and pleadings rules, limit continuances, manage court
resources, and promote settlement. We also asked about the use of
judicial arbitration and medical malpractice screening. (For a copy of
the telephone interview protocol, see Appendix B.) The interviews
identified statewide court efforts that had been authorized by state law,
supreme court rule, or chief justice’s or administrator’s directive, and
gave us a broad overview of activity in the state courts. They did not
provide information on the extent of implementation of the procedures
in the local trial courts, or on detailed characteristics of the procedures.
The court officials were not asked to evaluate the effectiveness of their
efforts, but they often commented on their experiences in designing or
operating certain procedures, and provided their impressions of
implementation problems. The information we obtained reflects the
perspective of court management personnel almost exclusively: We did
not interview trial judges, attorneys, or litigants about their
experiences with the specific court efforts.

In addition to surveying all of the state courts, we interviewed
officials in 40 metropolitan courts of general jurisdiction. (For a list of
the metropolitan courts sample, see Appendix C.) By selecting courts
in the 10 largest metropolitan areas of the country and other courts to
which state officials referred us or where specific procedures were au-
thorized, we were able to obtain more detailed information about specific
procedures and to learn about the adoption and implementation of
procedures at the local court level. While the metropolitan sample is not
statistically representative of all metropolitan courts in the United
States, it does include courts located in 26 of the states and in all regions
of the country.

In conjunction with our telephone interviews, we collected docu-
ments describing specific procedures, including statutes and court
rules. In some cases these are simply general authorizations for local
courts to adopt a procedure; in others, specific features of procedures are
defined. Of course, statutes and rules reflect the intentions of their
authors, and rules may or may not be implemented as written; some-
times they may not be implemented at all. Moreover, statutes and rules
do not reflect the informal practices that may be undertaken at the
discretion of an individual court or judge.

of medical malpractice screening panels. The following provide broad overviews of the
role of court administrators: Berkson, Hays, and Carbon (1977, pp. 164-202); Friesen,

7 For a list of the state court offices contacted, see Appendix A.
To confirm and update the information obtained by telephone and document review, we mailed survey forms to the court officials we had spoken with in each of the state and metropolitan courts. We asked them to verify our information about procedures in their courts and to add any other information required to update our database. (See Appendixes D, E, and F for a copy of the verification form and for instructions for completing it.) This verification was conducted during November and December 1980, several months after the telephone survey. We obtained completed verifications from 45 of the state courts and 33 of the 40 metropolitan courts. Nevertheless, because the courts are actively changing their procedures, this Report may contain some information that is no longer correct and may omit procedures that have been adopted recently. In the following section, we present a brief summary of efforts to reduce pretrial delay in the civil courts. Sections III and IV present detailed descriptions of two general categories of approach to pretrial delay problems.
II. OVERVIEW OF COURT EFFORTS TO REDUCE PRETRIAL DELAY

Our interviews with court officials focused on specific procedures to expedite civil litigation—their objectives, characteristics, and use—but also gave us an overview of the scope of court activities around the country and the types of procedures proposed or implemented to reduce delay. We found widespread interest and activity in efforts to expedite civil litigation; many courts were planning new attacks on the problem and others were continuing long-standing efforts. Procedures currently in use range from informal efforts by individual judges to state laws mandating formal programs, from procedures intended only for a subset of the total caseload to procedures that affect every case.

SCOPE OF EFFORTS TO REDUCE PRETRIAL DELAY

Regardless of their perceptions of the extent of the delay and congestion in their courts, most court officials seemed anxious to streamline pretrial procedures to achieve better management of the process. Table II.1 indicates the extent of court activity. All but two states have authorized one or more formal procedures intended at least in part to expedite cases. In addition, many states are currently reviewing their pretrial procedures and planning changes to speed up the processing of cases. In 20 states and 7 of the 40 metropolitan courts, officials told us that proposals were planned or awaiting approval. Thirteen states and 8 metropolitan courts have experimental programs under way.

Some states whose backlogs have long been a serious problem have used expediting procedures for many years; others have only recently turned their attention to this issue. For example, Pennsylvania introduced judicial arbitration in some of its major courts over 25 years ago, while the state of Washington began implementing mandatory arbitration in the summer of 1980. Of the 35 states that reported on the status

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1The term "court officials" refers primarily to the court administrators, but also to other court management personnel we interviewed, such as judges, attorneys, and specific program administrators.

2Appendix G contains equivalent tables for the metropolitan court sample.
Table II.1

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of their expediting procedures, about one-third introduced most of their procedures more than 5 years ago.\textsuperscript{3} Over 40 percent began introducing expediting procedures more than 5 years ago but have continued these activities up until the present.\textsuperscript{4} Finally, about one-quarter of the 35 states reported that most of their efforts have occurred within the last 5 years.\textsuperscript{5} Although most state officials reported that their local courts have their own procedures—both formal and informal—for expediting civil cases, we include in this Report only formal statewide procedures and formal procedures adopted by our sample of local courts.

**TYPES OF PROCEDURES**

The majority of expediting procedures are authorized by court rules of civil procedure or by directives from the chief judge or state court administrator. At the local level, individual courts also authorize procedures mainly by court rule or by order of the presiding judge. Many procedures to expedite cases are authorized by revisions to the Federal Rules of Civil Procedure, which most states have adopted, either verbatim or with some variation, in the last 40 years. For example, some states have revised rules regarding pretrial discovery to place time limits on this process, and some states have revised the rules authorizing pretrial conferences in order to make settlement one of their explicit purposes. A provision for dismissal of inactive cases has long existed at the defendant's motion, but many courts have now made this type of dismissal an option of the court.

In addition to revising former practices, a number of state and metropolitan courts have introduced totally new techniques. For example, screening panels for medical malpractice cases were initiated in the early seventies in over 20 states.\textsuperscript{6} Some courts have implemented modern information systems to track and monitor the progress of cases, and some are using management science techniques (e.g., queueing theory and optimum sequencing), and innovative settlement programs (e.g., mini-trials). Many court officials, however, believe it is their

\textsuperscript{3}Colorado, Hawaii, Illinois, Louisiana, Maryland, Michigan, Nebraska, North Carolina, Oklahoma, Wisconsin.

\textsuperscript{4}Alabama, Alaska, Arkansas, California, Massachusetts, Maine, Minnesota, Missouri, Montana, New Mexico, New York, Pennsylvania, Vermont, Virginia, Wyoming.

\textsuperscript{5}Connecticut, Delaware, Iowa, Kansas, Kentucky, North Dakota, South Carolina, Texas, Washington.

\textsuperscript{6}Although mainly designed in response to escalating malpractice liability insurance premiums, these panels are included in the inventory because they are intended to reduce the number of cases going to jury trials by providing an alternative forum for their disposition.
general approach to problems of court management and case delay that is significant, not the individual procedure.

We found a wide assortment of procedures in the courts, including settlement programs, judicial arbitration, mandatory malpractice screening, improved management of court resources, efforts to enforce strict continuance policies, and techniques for simplifying the pretrial motions process and discovery. Some of these procedures are quite prevalent; others are not. For example, most state court systems have procedures for inactive case dismissal, but very few states or local courts have adopted late settlement penalties. Some procedures (e.g., settlement programs) are typically authorized statewide, but implemented at the discretion of the local courts. A number of procedures are used consistently by the courts once they are implemented, while others are employed only periodically.

The overall approach to expediting cases also varies among the courts. Some courts concentrate on reducing the number of cases on the trial calendar by diverting them to alternative forums, such as arbitration hearings; others tackle specific problems affecting the entire caseload, such as continuance policies. Still other courts focus on resource management—for example, by reassigning judges to congested courts. Finally, some court administrators told us that their approach is to confront the entire pretrial process, to take a "total case management" view by introducing procedures to control each of the major phases of pretrial from filing of the complaint to commencement of trial. In Section III we discuss the problem of coordinating management procedures.

FACTORS AFFECTING COURT EFFORTS

Many court officials expressed frustration over constraints on their ability to introduce changes to expedite cases. These constraints arise out of several aspects of the court system, including the attitude of the court toward delay, the relationship among the various participants in the court system, the size of the criminal caseload, and the supply of resources available for remedying delays. The organization of the court—its structure, management, and rule-making authority—is also an important factor in determining the types and scope of efforts to expedite litigation.

Many of these issues have been discussed extensively in the litera-
ture on management. Here we briefly touch on the issues that seemed to be of most concern to the court officials we interviewed.

**Court Attitude**

Courts have traditionally had a laissez faire attitude toward the pace of the pretrial process. Many administrators told us they believed it was the court's responsibility to have a judge and a courtroom available when the attorneys were ready to try the case, but the amount of time consumed before the case is brought before the court for resolution was not the court's concern. These courts also assume it is their obligation to adjudicate whatever cases come before them. In general, they construe their role as strictly adjudicatory and passive. For instance, several court officials told us that they felt it was inappropriate for the court to become involved in the settlement process. In courts of this kind, control of the pretrial process is largely left in the hands of the attorneys, and responsibility for delay is attributed to the bar.

In its research on delay in the courts, the National Center for State Courts popularized the expression "local legal culture" as a description of the traditional, established attitudes and practices of the bar and bench. (Church et al., 1978, Ch. 4). Court officials we interviewed pointed out that this environment affects the outcome of efforts to expedite litigation. Court administrators in particular often remarked that their efforts meet with resistance from judges and attorneys who are accustomed to and satisfied with traditional practices.

In many courts, however, where interventionist attitudes have emerged, the courts seek to wrest control over the pretrial process from the bar. These courts believe it is their responsibility to manage cases efficiently and consider delay to be their responsibility. Advocates of case management in the courts say that "case management requires the court to ensure that the pending caseload progresses according to court-prescribed time standards through pleadings, discovery and motions to disposition." (Sipes, 1980, p. 6).

**Relationships Among Participants**

In addition to the attitude of the legal community, the relationships among the participants in a judicial system are particularly important to the successful implementation of efforts to expedite cases. Successful
implementation of changes in procedure depends on the support of the local bar. In some courts, the bar and bench consult prior to introducing changes in practice; in others the bar is asked to approve of new proposals; and sometimes the bar is not consulted or is resistant to changes.

The relationship between the judges and the administrative office of the courts is also important. Seeing the changes as a threat to their established authority, judges sometimes resist changes advocated by management-oriented administrators. One court administrator told us that he had arranged a delicate compromise with the judges whereby they would accept changes he had planned to improve court efficiency as long as he promised not to interfere with their control of their own calendars. Another court administrator told us that he had carte blanche approval from the chief judge to introduce whatever changes were necessary to expedite the caseload.

Judicial Resources and Total Caseload

Given that reforms to speed up pretrial processing may have the effect of temporarily or permanently increasing court workload, it is obviously necessary for the courts to carefully consider what resources will be necessary to actually implement a program. Some court administrators told us that they were awaiting the appointment of additional judges before implementing planned changes, but others use retired judges to supplement their bench or reassign judges to handle overflow cases when new policies are introduced. In this situation, the size of the civil caseload may be the factor determining whether the court can use certain procedures that might increase the judicial time required to process each case.

The size and status of the criminal caseload in the court also influence efforts to expedite civil litigation, since constitutional guarantees of speedy trial for criminal defendants dictate that their cases take priority. Given that criminal cases have precedence over civil cases, the criminal caseload will always have the potential to compound any delay on the civil side.

In some respects, the criminal division can be helpful to the civil side. For example, some court administrators have borrowed procedures that have been successful in reducing criminal caseload delay and applied them to the civil division. And in many courts, resources that the Law Enforcement Assistance Administration made available to the criminal division for developing techniques like automated systems for tracking cases have been used to benefit the civil side.
Organizational Factors*

The organization of courts—both the overall structure of the state court system and the internal structure of individual courts—is another essential factor affecting efforts to expedite litigation at the local and state level.

The structure of the court system—its unification or decentralization—influences the relationships among the individual courts, and has been a hotly debated issue since the beginning of this century.\textsuperscript{10} While there are arguments both for and against unification, we found that most state court administrators feel that a more unified system gives them greater flexibility and more resources to alleviate court delay. For example, the trial court of general jurisdiction in multi-tiered systems is often heavily involved with appeals cases from lower courts. In addition, jurisdictional limits on the lower courts affect the caseloads of the general trial courts.\textsuperscript{11} If there is only one court of general jurisdiction, it is reportedly easier for the court to shift personnel as needed among the different districts to equalize caseloads.

Centralized management of the courts is an important feature where research and planning are required. In states with centralized court management, more resources are available to the local courts to assist with their problems. For example, in several states technical assistance teams are provided by the state office of court administration.

And yet, while centralization is considered by many to be an important factor in improving court management, opponents point out that court systems must have flexibility to allow different procedures for local courts and their unique problems. One court official, commenting on the need for local court flexibility, remarked that "rigid rules adopted in the past had often achieved perverse results."

The extent of the highest court's authority to promulgate rules for the general jurisdiction courts is also an important factor in determining what programs are introduced. Some courts have the rulemaking authority to initiate and revise at their discretion. Others are forced to seek legislative approval for proposed reforms. This dependence was reported by some officials to constrain the court's efforts to improve its own procedures. Moreover, some legislatures, believing that the courts

\textsuperscript{9}A bibliography on the court unification literature is provided in Carbon and Berkson (1977).
\textsuperscript{10}For a review of the court unification movement, see Berkson and Carbon (1978).
\textsuperscript{11}Procedures such as increasing the jurisdiction of small claims or other lower courts, making lower courts courts of record, changing the statute of limitations, increasing filing fees, etc., may affect pretrial delay but are not included in our inventory because they relate to the question of whether a case will be filed, and in which court, and do not apply to its progress through the pretrial process.
are moving too slowly toward reform, impose programs that court officials believe to be unresponsive to court needs.

In addition to statewide organizational factors, the organization of the local courts, including the way in which cases are filed and assigned, affects efforts to reduce delay. Some court officials believe that an individual calendar system promotes greater efficiency by placing responsibility for expediting cases on the individual judge, while others feel a master calendar system provides more flexibility for processing the caseload efficiently.\(^\text{12}\)

But the most critical organizational issue at the local court level seems to be the need to have all personnel within a local court report to a central authority. Various metropolitan court administrators told us that they have no authority over personnel in the clerk's office and thus could not force them to implement new procedures. Others indicated that because members of the judges’ staffs were independent of the court's administration, it was difficult to coordinate their different practices. Independent court clerks and court reporters pose similar management problems. This lack of centralization is a matter of concern not only to local court officials, but also to state court administrators who consider local administrators’ lack of authority over personnel an obstacle to implementing changes in procedures.

While court officials touched on a wide range of issues in our interviews, we are not able to pursue all of them in depth. Rather, we have tried to briefly highlight some of their major concerns in order to illustrate the variety of contexts in which court managers operate and the dynamics and constraints of different court environments on the planning and implementation of expediting efforts. Furthermore, court officials did not raise other issues related to delay that may appear more important to different participants, such as attorneys and litigants, or legal scholars. Clearly, the role of the court in affecting delay and the impact of its organizational and political environment are worthy of further, detailed study.

In considering the wide range of activity and varying approaches to problems of delay, we found it useful to distinguish two categories of strategy and to organize our findings and discussion according to them. The categories are:

- Management strategies that streamline or improve court management of cases progressing through the system.
- Diversion strategies that reduce the number of cases progressing toward trial by providing alternative forums for their disposition.

\(^\text{12}\)For a comparative study of calendaring systems, see Fall (1974).
Section III describes the management procedures we identified in our survey, and Section IV, the diversion procedures.
III. MANAGEMENT EFFORTS TO REDUCE PRETRIAL DELAY

The management strategies we discovered in our survey focus on streamlining the pretrial process, and increasing court control over the pace of case preparation. These efforts by court management are attempts to respond to critics who attribute pretrial delay to long-standing traditions that have led to inefficient resource management and to attorney control over the pace of litigation.

In fact, the two problems are closely interwoven. Historically, each judge operated independently, adopting his own policies and his own system for scheduling cases, usually in response to the attorneys' needs. In some courts the attorneys were responsible for scheduling cases for trial; the judge came when called to the courtroom. No single office or person knew the status of the court's entire caseload, nor was responsibility for coordinating the actions of individual judges, and attorneys held de facto control over the pace of litigation.

As the number of cases grew, and pressure mounted to process them more expeditiously, the courts responded by imposing centralized administrative structures. Judicial councils were formed and chief justices and presiding judges were allocated administrative duties. The 1974 report of the American Bar Association Commission on Standards of Judicial Administration set forth the following standard for court administrative services:

The court system should have administrative services to facilitate the making of policy, including calendar management, selection and management of non-judicial personnel, budgeting, management of auxiliary services, monitoring of court operations through records and statistics, and planning for future needs. (American Bar Association, Standards, p. 86.)

But many judges are neither interested in nor trained in organizational management, and since the scarcity of judicial time is one source of the court's delay problems, adding to the judges' responsibilities is not necessarily an attractive option. Not surprisingly, state court systems have turned increasingly to the management field to fill the gap. After World War II, administrative offices of the courts began to be established and are now authorized in every state. The head of this office—known as the executive officer, administrative director, or court administrator—is usually a judge or attorney with management training, or a professional manager trained in court administration.
Through these offices and under the authority of chief justices anxious to improve court efficiency, many procedures have been instituted or revised to simplify various aspects of the pretrial process and improve caseload management and resource allocation.

Many courts, however, believe that efficient resource management and simplified procedures are not sufficient to reduce delay. Activist court administrators believe their efforts to improve efficiency are often thwarted by attorneys who, pursuing their own interests, are often eager to delay the progress of their cases. What an attorney may see as a necessary tactic to improve his client’s position in the litigation, such as repeated requests for continuances, is seen by the court as a delaying tactic that impedes efficient allocation of judicial resources. Delays and costs increase as cases are repeatedly called and then continued because attorneys are not ready or judges are not available.

Management-oriented courts have, therefore, increasingly turned their attention to techniques for controlling the pace of attorneys’ case preparation and encouraging adherence to court schedules. A number of courts now attempt to schedule and direct the entire process. Some intervene at particular points in the pretrial process, perhaps by limiting the time for discovery. Others have chosen to focus on a particular class of cases, by establishing “fast tracks” for simple cases, for example.

In all, we identified about 25 procedures that appear to represent management approaches to reducing pretrial delay. We have categorized them according to their main objectives:

- Efficient resource management.
- Expeditious pretrial processing.
- Establishment of firm and certain trial dates.

As Table III.1 demonstrates, 47 states have adopted one or more management procedures. (See Table G.2 in Appendix G for the distribution of these procedures among the metropolitan courts.) Not surprisingly, the greatest number (43) concentrate on procedures to improve the management of court resources. Twenty-nine states have procedures intended to expedite the pretrial process, and 21 states have statewide procedures to establish firm trial dates by enforcing strict continuance policies. Every state listed in Table III.1 has adopted procedures in at least one of these categories, but only 12 court systems have statewide procedures in all the management categories. These last figures are interesting in light of the assertion that efforts to reduce delay can succeed only if there is an integrated or “total case management” approach (Nejelski, 1980, p. 6).

In the remainder of this section we discuss each functional catego-
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<tr>
<th>State</th>
<th>Efficient Resource Management</th>
<th>Efficient Pretrial Processing</th>
<th>Expeditious Pretrial Processing</th>
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ry, describing the specific procedures that apply, and the pattern of their adoption around the country.

EFFICIENT RESOURCE MANAGEMENT

Major efforts to improve the management of court resources began with the introduction of operations research and computer technology into the court system. Computer data-systems make previously irretrievable information available to managers for planning, scheduling, and evaluation, allowing management-oriented courts to develop extensive information systems to monitor and classify cases. With information about the status of the caseload, the court can develop time standards for processing cases, as well as realistic, firm schedules for judges and courtrooms, and can more effectively project the need for additional judges and courtroom space.

When a backlog of cases develops in the court, thus lengthening the pretrial process, increased time to disposition results directly from an inadequate supply of court resources to process the caseload. Traditionally, the solution to these problems has been to increase the supply by adding judges or more courthouses. In recent years, as resources have become more constrained, the courts have attempted instead to increase the effective supply by more efficiently managing the limited resources available. In some courts, New York, for example, the result has been longer working days and shorter vacations for the judges. But in addition to stretching the resources in this manner, many courts are giving more attention to discerning the actual demand, and then more efficiently managing resources to meet it.

Courts have adopted two types of procedures to manage their resources more efficiently: (1) procedures that attempt to identify the demand for court resources by monitoring the status of the caseload in the system, and (2) procedures that attempt to ensure that the supply of resources matches the demand by allocating adequate court resources to handle the caseload. Both types of efforts are necessary for good management; to schedule judges and courtrooms efficiently, the court must know the size and composition of the caseload.

Pattern of Adoption

Forty-three states have authorized at least one of the resource management procedures shown in Table III.2. Procedures intended to identify the demand for resources include:

- Using computer information systems for case monitoring.
• Classifying cases by age, type, complexity, etc. for assignment to special expediting tracks.
• Providing a scheduling office or scheduling personnel for centralized assignment of cases.
• Dismissing inactive cases.
• Penalizing the parties for last-minute settlements.

The resource management procedures intended to provide an adequate supply of court resources to the caseload include:

• Establishing goals and standards as guidelines for the court to follow in expediting case disposition.
• Providing technical assistance to individual courts on management and resources problems and planning.
• Reassigning judges as needed across and within jurisdictions to handle overflow.
• Providing for judicial accountability for delay or failure to meet court standards in disposing of cases.

Computer Monitoring

Table III.2 shows the 11 states that have statewide computer systems operating in at least some trial courts. Of the 40 metropolitan courts surveyed, 12 have computerized information and communication systems (see Table G.3 in Appendix G) and others are planning computer systems for their civil caseload. The sophistication of the systems varies considerably, from those that can only inventory the caseload to those that can do extensive monitoring and produce all the noticing of appearances required for the complete processing of a case. Some courts have had difficulty obtaining funding to develop or expand a system; others lack the technical expertise required to operate complex systems. In some cases, funding and operational difficulties have been overcome by linking the civil caseload into an already operating system in the criminal or municipal court.

One review of computer technology in the courts pointed out twelve possible uses for an automated system, including "the ascertainment of alternative modes and consequences of allocating resources; the discovery of facility needs; and an opportunity for planning, programming and budgeting . . . more efficient calendaring . . . more comprehensive data collection; concise storage of information; the testing of managerial procedures; and the performance of clerical duties." (Gazell, 1977, p. 285.) Among the courts in our survey, we found that computers are being used for indexing cases (including case classification), docketing, calendaring (motions and trial), case tracking and noticing, and statis-
### Table III.2
STATES WITH PROCEDURES FOR EFFICIENT RESOURCE MANAGEMENT

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tical reporting on the status of the caseload as well as on personnel and budgeting needs. These capabilities enable the courts to identify attorney schedule conflicts when assigning trial dates, to schedule all cases being handled by one attorney for settlement conferences on the same day, to monitor deadlines and schedules, to produce productivity reports for the judges on the number of cases they have pending, and to identify inactive cases for dismissal. All of these tasks are made easier using automation.

Nevertheless, none of the court officials who commented on their computer systems reported total satisfaction with their contribution to caseload management, a sentiment also reflected in the findings of a study by the National Center for State Courts on the application of computer technology in the state courts. That study points out that if computers have failed to meet their potential for aiding caseflow management, it is largely because "courts have failed to adequately assess their needs, design an integrated computer system to meet those needs, and properly manage the computer and personnel." (Greenwood et al., 1977, p. 5.) Nonetheless, this technology has made a considerable impact on a number of courts. For example, the Philadelphia Court of Common Pleas has implemented a new module in its automated case tracking system to identify all cases that have failed to be ready for trial within the time specified by a new Supreme Court order. In Boston the computer was used in the summer of 1980 to identify about 2900 inactive cases, which were eventually dismissed. Undertaken manually, these tasks require substantial clerical manpower and recordkeeping; with large caseloads, they may be impossible.

In general, computer information systems have been applied to civil case processing to facilitate (1) information retrieval on the size and composition of the caseload, (2) classification and organization of the caseload, (3) flexibility and certainty in scheduling, and (4) reduction of time and manpower for docketing and other clerical tasks. Implementation of most of the remaining resource management procedures we discuss could be greatly simplified by computer technology.

Classifying Cases

Eight state court systems and 12 of the 40 metropolitan courts surveyed reported case classification procedures used to categorize the caseload by age, complexity, length, special priority, type of case, etc. With the caseload thus divided, the court has better information about what resources will be required to dispose of it. If the court separates the complex cases from the simple ones, it can treat each group accord-
ing to its needs—assigning simple cases to smaller time slots, or assigning complex cases to a special judge for supervision of the discovery process.

In the Superior Court of the District of Columbia, a master calendar court where cases are usually assigned to different judges at different stages, "complex or potentially lengthy" cases are assigned to an individual judge for all proceedings. These cases, called Civil-I cases, can be so classified by a court screening committee, a screening calendar judge, request of counsel, or recommendation of a civil division judge or commissioner assigned to the case. Cases are classified according to estimated trial length, estimated number of witnesses and exhibits, factual and legal issues involved, or need for supervision of discovery by the court.

After classification, different standards are applied to the Civil-I and Civil-II cases. A similar system for classification, or "Preassignment," has been adopted in King County Superior Court in Seattle, Washington. Louisiana and Maine also classify lengthy and complex cases separately, while the superior court of Suffolk County (Boston), Massachusetts, separates lengthy and old cases for special treatment.

A number of factors were reported to affect implementation of case classification programs. First, the mechanics of classifying cases are important to consider in terms of their impact on court resources. A simple method such as computer screening is far less costly to a court than screening by a judge. Another factor to consider is the reaction of the local bar to case classification. One court administrator noted that attorneys who did not want their cases put on the accelerated track for simple cases could purposely complicate them so that they would not be eligible for the classification. Finally, having different classifications necessitates multiple recordkeeping, separate calendars, or other dual systems for their management.

Scheduling Offices

Three states and 14 of the metropolitan courts surveyed have scheduling offices at the individual court level for centralized assignment of cases. In Wilmington, Delaware, the scheduling office also processes all requests for continuances. In other courts, the scheduling office, or calendaring office as it is sometimes called, monitors the progress of cases through the various stages, assigning dates for completion of discovery, readiness for trial, conferences, and for trial.

Proponents of centralized case scheduling, with their system-oriented perspective, believe that centralization provides greater flexibility and gives the court greater control over the pace of its litigation.
With centralized scheduling the court can coordinate the activities of its various departments, balancing the workload in each and transferring cases and borrowing resources as needed to handle overflow. Because the mechanics of case assignment are similar in both, courts with master calendaring and courts with individual calendaring systems can use scheduling offices.

Dismissing Inactive Cases

One of the most commonly authorized procedures shown in Table III.2 is a statewide provision for dismissal of inactive cases, or, as it is known in many courts, "docket cleaning." Such rules are in place in 25 states and eight metropolitan courts in our survey (see Table G.3). These inactive dismissal rules derive from Rule 41 of the Federal Rules of Civil Procedure, which specifies that a defendant can move to have a case dismissed for lack of prosecution. In the state and local versions discussed here, the rules provide that the court may on its own motion dismiss a case for lack of prosecution. The purpose of these rules is obviously to remove "deadwood" from court dockets and files, since inactive cases may not actively use court resources, but they inflate the caseload size, take up clerical recordkeeping and handling time, and make resource management and planning more difficult.

The period of inactivity after which a case may be dismissed varies from state to state. Typically, after one year in which no action has been taken, the court notifies the plaintiff attorney that unless the case is reactivated within a specified period of time, it will be dismissed without prejudice for lack of prosecution. In other courts, the action can be dismissed if the certificate of readiness is not filed by a certain date—again, usually one year from the filing date. In some courts the period of time is less than a year; in others, much longer—two or three years in some courts.2

The mechanics of dismissal also vary in complexity. In Connecticut, the computer system screens cases every six months to identify those that have not filed a readiness document within twelve months; cases are then given two weeks to file or be dismissed. Connecticut also assigns court costs to the party whose case is dismissed. In other states, all inactive cases are called for assignment, and if neither party ap-

1In Little Rock, Arkansas, and Bloomington, Indiana, the period is as short as sixty days; in Cincinnati, Ohio, it is six months; in Phoenix, Arizona, it is nine months in which to file a certificate of readiness; Florida allows six months for completion of service or the case will be dismissed.
2Maryland, 18 months; Massachusetts (except Boston), 3 years; Vermont, 2 years; St. Louis, Missouri, 2 years).
pears, the case is dismissed. In California if neither party appears at the trial-setting conference, the parties can be ordered to show cause why it should not be dismissed. In other courts, the plaintiff is notified when a case is eligible for default, and if the plaintiff does not move for default judgment, the court dismisses the case for lack of prosecution.

There are several problems in designing and implementing inactive dismissal rules:

- Unless the court is prepared to process an additional caseload, it cannot stimulate dormant cases into action. As one administrator said, "The court has to be able to move cases before it can force cases to move."
- When to dismiss inactive cases is also an issue. If a case is dismissed too early, attorneys may refile, submit a motion simply to reactivate the case, or file a certificate of readiness even though the case is not ready for trial. Appeals on such decisions ultimately add to the workload of the court.
- The mechanics for disposing of cases can be costly and time consuming if there is no computer-assisted system to identify cases. To counter this problem, one court administrator suggested that dismissal should simply be automatic after a stated period of time.

**Penalizing Attorneys for Late Settlement**

New Hampshire, some courts in Maryland, and the courts in Detroit and Washington, D.C., enforce penalties against attorneys who settle their cases on the courthouse steps after a judge, jury, and courtroom have been provided. Other courts are planning to institute such policies.

A number of factors, however, make this procedure seem unattractive to many courts, and the court administrator in Maryland reported that it is not widely applied. First, if a court applies a penalty to attorneys in such cases, they may appeal the action, resulting in perhaps longer delay before the disposition of the case. Further, unless specifically prohibited, the financial penalty may be passed on to the attorney's client. Finally, attorneys may evade the penalty for late settlement before trial by simply agreeing between themselves to allow the trial to commence and then, shortly into the proceedings, announce that they agree to settle the matter.
Goals and Standards for Disposition of Cases

Eight state court systems have adopted case disposition goals and time standards to promote expeditious disposition of civil cases. Over half of these programs were adopted within the last five years. Some programs are still in an experimental stage, and some courts are planning to adopt time standards in the future.

Goals and standards authorized by the chief justice or the judicial conference in the state provide a framework within which the local courts and individual judges must adapt their practices to process their caseloads within a specified time period. Proponents of goals and standards suggest that before they are adopted, the court should thoroughly review its current case management system. One commentator noted that the review and evaluation of the current system was as important a process as the establishment of the new standards, since the entire pretrial process can be affected. For example, when the court sets a goal of final disposition for all cases within a specific time, it must provide the judges with guidelines for efficient case management. It may suggest that judges supervise the discovery process to ensure that attorneys expedite case preparation; it may suggest expediting motion practice by responding more quickly to motions taken on advisement; or it may suggest that the judges attempt to limit the continuances they grant.

In Kansas, which recently adopted time standards, the court proposed a full case management program for achieving final disposition of civil money suits within a median time of 180 days from date of filing. Included in the Kansas plan is provision for an initial discovery conference to be held no later than 60 days after the complaint is filed. A similar plan has been proposed for Washington, D.C., where the civil caseload is divided into complex and regular cases, which would be treated separately.

Connecticut’s program removes the oldest cases from its docket and then sets standards for future disposition time. In Ohio there is a goal of two years for final disposition of all civil cases. In New York, which has had standards and goals for the disposition of cases in effect since 1974, there are regular statewide reviews of each court’s progress toward disposing of all cases within 15 months of filing. These reviews act as spurs to the courts to review and improve management; tightened continuance policies reportedly result when a court sees that it has fallen behind in the standings.

The biggest problem in setting statewide goals and standards is determining a realistic disposition time that all courts can meet. Moreover, the guidelines need to be flexible enough to accommodate all types of cases. Finally, such efforts will most likely be successful only to the
extent that the local courts and individual judges as well as the practicing bar and other participants are motivated to work together toward the objective.

Technical Assistance

Ten state court administrative offices reported having technical assistance staffs available for consulting with local court personnel to provide expertise and help on specific management problems. Technical assistance personnel have been used in these courts to consult on calendar management, facilities planning, and records management systems development.

In some states (e.g., Oregon), technical assistance staffs are sent out only at the individual court's request; in others (e.g., New Mexico) they are dispatched as trouble-shooters to courts that administrators' offices believe need help with caseload problems. Some local court personnel feel they benefit from outside expertise; others resent the intrusion.

In addition to technical assistance for court management personnel, some states conduct training programs for new judges and continuing education programs for experienced judges, to disseminate management information, including material about innovations in practice.

Reassigning Judges

Transferring judges from one court to another to expedite court business and equalize workloads among judges in different jurisdictions is a significant feature of centralized administration in some courts. Twenty-eight state court systems and eight local courts order such transfers. Judges are transferred to make up for vacancies, illness, and vacations, but especially for congested calendars. They can be transferred either strictly among circuits or districts within the same court level or they may be reassigned across court levels from lower to upper trial courts and to appellate courts. In some local courts (e.g., Denver, Colorado) there are roving judges who serve only to pick up the overflow from the regularly assigned judges. Sometimes retired judges are called upon to supplement the judicial workforce (e.g., in Los Angeles, California, and St. Paul, Minnesota). Such temporary reassignments usually last for one or two months, but can be for shorter or longer periods depending on the need of the court and the willingness

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3This procedure is different from regular rotation of judicial assignments practiced, for example, in Connecticut and Maine.
of the judge involved. The largest reassignment of judges we found in our survey was in New York, where judges were transferred from rural areas to eleven congested urban court districts.

Reassigning judges does not always benefit the court to which the judge is assigned, and may cause problems for the judge's "home" court. To minimize this possibility, the level of experience of the judge who is to be transferred and the types of cases before the court he is to assist must be considered. Although lower court judges often ask to serve in upper courts to obtain more experience, they cannot be expected to be as efficient in a short space of time as the judges who regularly serve on that bench. In fact, a California court observer has pointed out that whatever the advantages of appointing inexperienced judges to upper courts, it results in "a continual orientation program" and "can contribute only marginally to the disposition of cases." (Kleps, 1980.) Another factor that must be considered is the impact of the judge's absence on the calendar of the court he is to be assigned from. The absence of a particularly productive judge may cause a backlog of cases to develop in a formerly current court. Although reassignment of judges has been successful in helping individual courts prevent or reduce extensive backlogs, it can be difficult to implement if judges are not willing to serve in other courts.

Judicial Accountability

Another approach to better resource management is to monitor judicial productivity and apply pressure on judges who do not process cases expeditiously. As one court observer pointed out, the failure of judges to rule on discovery motions and various motions for dismissal of a case can be a major source of pretrial delay. Although most courts have implicit authority to carry out such a policy, only ten states have formally authorized it, perhaps because the tradition of judicial independence and the attitude of collegiality among judges make it difficult to institute policies of supervision and sanction. Most courts specify how long a judge may take to rule on motions before him or to rule on cases taken under advisement, but these rules are not usually accompanied by sanctions (e.g., financial penalties, removal from a case, etc.). Rather, remedial action is left up to the discretion of the chief justice in the rare case of an attorney who requests his intervention. Attorneys do not always have an incentive to obtain expeditious rulings from the judges, and even when they do, they are understandably reluctant to antagonize the judge who will later act on their motion or try their case.

Some court officials reported that they have developed pragmatic approaches to these problems. For example, in one state the chief justice
will take action to obtain disposition of an outstanding matter without identifying the attorney or litigant who has appealed for assistance. In other states, the status of each judge's caseload is reviewed automatically by an independent board or by the clerk's office. Louisiana has an unusual provision that authorizes the clerk of the court to review outstanding cases on the judges' docket and withhold a portion of the salary of any judge who has a case under advisement for more than thirty days. In some states, peer pressure is used as each judge's caseload status reports are published regularly by the court. Many court officials feel that periodic reporting of this kind serves as the best incentive because "no one likes to be at the bottom of the list."

EXPEDITIOUS PRETRIAL PROCESSING

In this category we include procedures aimed at expediting the pretrial process by simplifying and limiting motions, pleadings, and discovery. Some of these efforts focus on individual cases, providing custom scheduling or management. Other procedures are applied to the caseload as a whole, limiting time or simplifying steps. Regardless of the approach, these efforts are notable because they demonstrate the court's commitment to streamlining procedures. We expect that more courts will adopt procedures to expedite the pretrial process in the future because of the recent activity in many jurisdictions, and because so many court officials indicated that pretrial motions and control of discovery are serious problems in their courts.

In his famous speech entitled "The Causes of Popular Dissatisfaction With the Administration of Justice," Roscoe Pound noted, "The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point." Some court observers believe that the antagonistic nature of our litigation process unnecessarily complicates the pretrial process from its beginning. The plaintiff tends to disclose as little as possible of his claim in his complaint, causing the defendant to initiate a series of challenges to the complaint and then to replies by the plaintiff before the dispute can be defined. Then, the discovery process, which can take many months or several years to complete, is also fraught with debate and contention between the parties to the dispute, and involves repeated motions to the court to intervene. It is not surprising, then, that even though most cases do not bear the costs of trial, many incur considerable costs in the pretrial stages of litigation.

Most state court rules governing discovery are very similar to those in the Federal Rules of Civil Procedure. These rules were intended to
place responsibility for the scope of discovery firmly with the attorneys, who were to proceed without the need for court intervention. Since those rules became operative, however, many practitioners have observed that their broad scope and the "Unjustified demands for and refusals to provide discovery prolong litigation and drive up its costs." (Renfrew, 1979, pp. 264-265.) Attorneys, intending to use discovery to delay the process or harass opponents, admit that much information requested is "wholly irrelevant," that "fishing expeditions" are the motivation behind many requests, and that procedures they regularly employ are not necessary for all cases (Robinson, 1980). In another survey of discovery practice by attorneys, it was found that, "While the litigators identify many ways in which the character of lawyering encumbers and disrupts the discovery process, they also locate much of the blame for the system's problems in the behavior of judges and the inefficiency of the judicial machinery." (Brazil, 1980, p. 219.)

In response to such criticism, courts have made efforts to simplify and limit pretrial procedures. Specifically, controlling the pace of discovery is an increasingly common objective of court management, and courts have placed limits both on the scope of discovery and the time allowed for it. They have further established procedures to permit court intervention in the process on a case by case basis.

Pattern of Adoption

As shown in Table III.3, 29 states and 23 of the 40 local courts surveyed have formally authorized adoption of one or more of the following procedures to expedite pretrial processing:

- Using mail and telephone to expedite motions processing.
- Requiring counsel to negotiate conflicts before seeking court resolution.
- Assigning parajudicial personnel to hear discovery motions.
- Limiting the number of interrogatories.
- Limiting the elapsed time allowed for discovery.
- Holding conferences for the purpose of scheduling discovery.
- Assigning penalties for frivolous motions.
- Simplifying pretrial procedures.

Many courts, while lacking formal rules or directives, employ these procedures informally at the discretion of local courts, or individual judges. In addition to the procedures listed above, most courts have adopted some time limits for attorneys and judges to adhere to in processing motions, but no one we interviewed reported their strict enforcement by the court. Many courts, in an effort to relieve some of
the burden on clerical personnel who must file and handle the quantity of papers generated by attorneys during pretrial litigation, have standardized the forms used for pleadings and motions. Most state court rules include provisions for compelling discovery from unwilling parties and for protecting parties from unnecessary or abusive requests. They also specify the amount of time to be allowed for compliance with requests. We do not include these procedures in our detailed description below since they can be enforced only if attorneys request court intervention, and as one study of discovery concluded, "reliance on court control of discovery through attorney initiative ... is ineffective in securing timeliness." (Connoily, Holleman, and Kuhlman, 1978, pp. 18-26.) The procedures discussed below are measures the court initiates and oversees.

Mail/Telephone Motions

Some courts regard the mail and the telephone as acceptable alternatives to the time-consuming and costly practice of using attorneys' and judges' valuable time to require in-person filing and arguing of motions. Six state court systems and four metropolitan courts have formally authorized mail/telephone motions processing, not only for motions but for scheduling, settlement, and other pretrial conferences.

In some of these states the mail and telephone are used mainly to relieve attorneys of long distance driving to the courthouse. For instance, in Phoenix, Arizona, use of the telephone for civil motions arguing was instituted after a flood that made it impossible for some attorneys to reach the courthouse. In other courts telephone motions have been introduced to save judicial time. One judge had a phone installed at the bench so that he could dispose of motion matters during recesses in trial proceedings.

Telephone hearings on motions use speakerphone systems that enable all the conferees, each of whom may be in a different location, to converse. (Costs for the telephone call are usually assigned to the attorneys.) Courts using the telephone for hearings reported that both attorneys and judges are generally satisfied with the procedure. It is somewhat surprising that more courts do not make use of the telephone to save time and costs, but attorneys and judges accustomed to in-person arguments may be unwilling to alter their methods, or attorneys may feel there is a disadvantage to being on the telephone when the opposing counsel is at the courthouse in person. The superior court in Phoenix has overcome this bias by requiring both attorneys to be on the phone, even when one is present at the courthouse. Another factor to be considered in introducing telephone conferences is the impact on
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<th>Mail/Telephone Motions</th>
<th>Require Pre-Motion Negotiation</th>
<th>Parajudicials for Pretrial</th>
<th>Limit Number of Interrogatories</th>
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settlement, which is generally believed to be promoted by personal contact between the attorneys. These issues are being addressed in a study of telephone conferencing by the American Bar Association's Action Commission to Reduce Court Costs and Delay.

Requiring Counsel to Negotiate Discovery Conflicts

Four states and three local courts in our survey have formal procedures to encourage attorneys to attempt to resolve conflicts, such as discovery disputes, before asking the court to intervene, and a number of other states have proposed such procedures. These rules are intended (1) to save judges' time on motions that would not need to be brought to court if one or both attorneys were willing to negotiate a solution and (2) to curtail delay in the progress of discovery while motions are pending.

A typical example of this measure is a California Judicial Council rule, effective January 1980, that applies to motions to compel answers to interrogatories, or for requests regarding disclosure. It provides that such motions be accompanied by a statement from the moving attorney that a "reasonable attempt to resolve the objections and disputed issues with opposing counsel" was made but was unsuccessful (West's Annotated California Codes, p. 23). The rule further specifies that if the court finds no good reason why the issue was not resolved it may assign the costs of the motion—including the attorneys' fees—to the unreasonable party. Although this rule appears to give attorneys a strong incentive to confer before coming to court, it is commonly ignored by attorneys in jurisdictions where it is not rigorously enforced.

Assigning Parajudicials to Hear Discovery Motions

In a few of the courts we surveyed, commissioners, masters, referees, or other parajudicial personnel are assigned to handle motion hearings and disposition. Parajudicial personnel can also be used in a number of other ways to save more expensive and limited judicial time. However, only New Hampshire, New Mexico, and New York, and five of the metropolitan courts reported using parajudicial personnel to hear discovery motions. This is hardly surprising, since motions are often complicated and may affect the substance of the case. Given the importance of having a well-qualified decisionmaker, many courts are

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4For a detailed review of the uses of parajudicial personnel in the courts, see National Center for State Courts, Parajudges (1976).
wary of the considerable time and expense that can be added to a case if parajudicial decisions are appealed.

Limiting the Number of Interrogatories

Fourteen state court systems place a limit on the number of interrogatories that can be asked of any single party—from a maximum of 30 in most courts (e.g., Iowa, Maine, Maryland, Massachusetts, Wyoming) to a maximum of 50 or 60 in others (e.g., Georgia, Hawaii, Minnesota). Five metropolitan courts have their own limits on the number of interrogatories. These rules were made in response to perceived abuse in the use of written interrogatories. Specifically, these courts believe that in most cases the number of interrogatories required of any party need not exceed the maximum allowed; and, if necessary, the parties could request the court to allow them to exceed the limit.

Some courts hesitate to introduce such limits because of the difficulty of making them fair. If unrealistic maximums are specified, the court risks added work in hearing resulting motions to exceed the maximum. Research in this area has yet to determine how much the amount of discovery required in civil cases before the state courts varies by type of case, and the current evidence is contradictory. In its study of discovery among civil cases in the federal district courts, the Federal Judicial Center reported that most cases involve little if any discovery. But a sample of Chicago lawyers interviewed about their discovery practice in a recent study stated that the amount of discovery, its timing, and delaying tactics employed vary considerably depending on the type of case (Brazil, 1980, pp. 222-223). If, in fact, the average case requires little discovery, the enforcement of strict limits may not significantly reduce time to disposition.

Limiting the Time Allowed for Discovery

Court rules requiring that discovery must be completed within a specific, limited period are intended to: (1) prompt early initiation of discovery, and (2) improve schedule control by the court.

6Interrogatories can be directed only to opposing parties. They are drafted and submitted in writing and the interrogated party must answer them in writing under oath, but there is no third party involved to ask the questions or record responses.

6Except for diversity jurisdiction cases, the federal district courts are likely to have a higher percentage of more complex cases than are the state courts of general jurisdiction.

7Requests include interrogatories, depositions, requests for documents and things, admissions requests, subpoenas duces tecum, written questions, and motions for physical or mental examination. (See Connolly, Holleman, and Kuhlman, 1978.)
Nine states and nine of the metropolitan courts surveyed have
discovery time limits varying from four months to two years from the
time the case is filed, often according to the type of case. For instance,
in the court of the District of Columbia there is a limit of seven months
for complex cases and four months for simple cases. In the Cook County
(Chicago) court the rules specify that discovery must be concluded
within two years after the case is filed.

Again, limiting discovery may not be appropriate in all cases.
Courts may have to develop complex rules that account for different
case characteristics or be prepared to deal with many motions to exceed
limits. Moreover, one court administrator noted that placing limits on
the time for discovery might induce attorneys to automatically initiate
and conduct discovery. Clearly, setting time limits for the completion
of discovery must be adjustable to the time period required for a case
to reach trial.

Holding Conferences to Schedule Discovery

Nine state court systems and seven metropolitan courts have formal
requirements for conferences between counsel and a judge to dis-

cuss and schedule discovery for the case. In several other courts,
conferences to discuss discovery are an informal court practice, and in
a number of courts there are plans to introduce such conferences for
some or all cases.

These discovery conferences are known as "scheduling confer-
ences," "precalendering conferences," "status conferences," or "early
pretrial conferences." Although frequently limited solely to discovery
issues, they may also include settlement discussions and the setting of
trial or pretrial conference dates. In some courts the conference is
mandatory for all cases; in others it can be convened at the discretion
of the judge or on request of one of the parties. It is usually held quite
early in the pretrial stage of the case, so that the participants can
determine the scope of discovery required for their case preparation and
schedule the time to carry it out.

Representing the most assertive control the courts have adopted
over the pace of discovery, these conferences have been criticized for
giving the judges too much control, and for providing an opportunity
to control the content as well as the pace of discovery. They also contrib-
ute more work to the already busy schedule of the judge. Because of the
latter consideration, it has been suggested that attorneys should meet

8A study of effects on amount of discovery in the Federal Courts provides some
empirical evidence to support this hypothesis. (See Flanders, 1977.)
on their own to set out a schedule and report it to the court, thereby allowing the court to supervise progress while using little judicial time.

Most courts seem to agree that some intervention is required on their part in the heretofore attorney-controlled realm of discovery. The main debate is about whether general standards can be imposed or whether each case should be dealt with individually.

Assigning Penalties for Frivolous Motions

Several courts reported increasing concern that substantial numbers of motions, especially those involving discovery, are made frivolously or in bad faith. As explained above, the filing of motions is often used simply as a delaying tactic on the part of an attorney. In some cases, incompetent or inexperienced attorneys bring unnecessary motions, resulting in delay of proceedings, wasted judicial time, and added costs to litigants.

Six states and three metropolitan courts reported formal financial sanctions against such practices. Typically, the penalty consists of assigning court costs and attorney fees to the moving party. This penalty can be a considerable sum in cases where many attorney hours were required to prepare to defeat the motion.

Difficulty with appeals and enforcement are problems the courts anticipate when procedures like this are implemented. Moreover, judges are wary of becoming unpopular with the bar, and attorneys do not like to request the costs penalty if they can anticipate having similar costs assigned against them in another case. But on the other hand attorneys have criticized the courts for their leniency in applying sanctions. The Brazil (p. 246) study of discovery practice found that "80 percent of the lawyers interviewed would favor increased use of the sanctioning power."

One suggested alternative to court-assigned penalties is asking local bar associations to improve self-regulation.

Programs to Simplify the Entire Pretrial Process

Two states have adopted special across-the-board programs to simplify the entire pretrial process for certain cases. California has an experiment under way to reduce the costs of litigation, and for many years New York has had a voluntary program in its courts intended to provide a simplified pretrial procedure.

The Economical Litigation Project (ELP), a pilot program in the superior and municipal courts in two counties in California, has been
in operation for three years and is expected to be continued. Comparable to an expanded small claims court, which is also designed for simplified adjudication of small cases, the program targets the entire pretrial process for simplification and streamlining. Under this program all civil cases valued at less than $25,000 are subject to procedures designed to reduce and simplify pleading, limit pretrial motion procedures, eliminate most discovery (although a pretrial exchange of specified information is required), and simplify trial procedures. The program's goal is to have superior court cases ready for trial within 90 days from the date of filing.9

In 1961 New York introduced a similar program for any civil case where all parties agreed to submit to the simplified procedure. The main difference between this and the ELP is that in the New York program right to jury trial is waived. Called the New York Simplified Procedure for Court Determination of Disputes (SPCDD), the program was designed specifically for commercial litigation but is available for all types of cases, including current controversies and controversies arising after contractual agreement to submit to the SPCDD. It was intended "to promote the speedy hearing of such actions and to provide for such actions a procedure that is as simple and informal as circumstances will permit." (McKinney's Consolidated Laws of New York, p. 611.)

In New York's program, commencement of the suit is simplified by eliminating the summons and pleadings. The court may allow an amended statement of the facts and direct pretrial disclosure of evidence and discovery, and may require a pretrial conference. At the trial, the rules of evidence are relaxed unless "the court shall otherwise direct." Because this latter clause leaves the level of informality at the trial somewhat uncertain, many attorneys appear unwilling to submit disputes to the SPCDD. In theory, however, it is an additional example of court efforts to provide simplified procedures for certain cases.

As suggested by the New York experience, programs designed to simplify pretrial procedures meet with a degree of resistance. For instance, it has been suggested that making court procedures easier for litigants to resolve threatens the livelihood of the legal profession (Kline, 1978, pp. 17-18). Lawyers may also be reluctant to familiarize themselves with a set of wholly different procedures for certain types of cases in certain courts. Indeed, one review of the California experiment stated that, "Without doubt, the most difficult problem under the

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9 A similar experiment in economical litigation has recently begun in one general jurisdiction court in Kentucky. In that court eligibility for the program is determined by the subject matter, not the amount in controversy, and cases are being randomly assigned to the program to permit controlled comparison. This program includes close case management by the court and a goal of trial disposition within 130 days from filing of the complaint.
ELP rules has been an initial massive unawareness that they exist." (Epstein, 1980, p. 41.)

In addition to the reservations of the bar, some feel that pretrial procedures may jeopardize the full investigation, preparation, and just hearing of disputes. While it can be argued that reduced litigation costs allow more small meritocratic claims and defenses to be brought to court, assignment of such cases to ELP programs may violate constitutional equal protection guarantees. But it still remains to be seen whether savings are actually realized by these programs and, if so, whether they are passed on to the litigants.

FIRM TRIAL DATES

Advocates of caseflow management believe that setting and maintaining firm trial dates is a critical factor in establishing court control over the caseload. Firm trial dates supposedly force case preparation and provide an incentive for attorneys to settle. In addition, they enable courts to allocate resources more efficiently to meet the demand for trials.

But to establish such a system the court must be sure that it can provide judges and courtrooms when cases are scheduled, and must prevent cases from being continued because attorneys are not prepared or have conflicts in their schedules. In short, the court must have a strict continuance policy. If it is enforced, attorneys know they must be prepared on the date set.

In most courts, however, judges are fairly accustomed to granting continuances as requested. Shifting to a strict enforcement policy is difficult because it places judges in the awkward position of having to arbitrarily deny what would otherwise be reasonable requests. Some courts have responded to judicial reluctance by trying to remove some of the burden from the individual judges. In some instances the courts (e.g., Seattle, Washington) have established strict courtwide policies beyond the individual judges' control; other courts have tried to make it more difficult for attorneys to move for a continuance, e.g., by requiring motions for continuance in writing, accompanied by an affidavit demonstrating "good cause" for the request.

Pattern of Adoption

Most courts have a general policy on granting of continuance requests. In some courts the rules specify strict grounds on which continuances can be granted, while in others the language is very general, leaving much to the discretion of individual judges.
Twenty-one state court systems and 22 of the 40 metropolitan courts surveyed reported at least one special procedure aimed at limiting continuances (see Table III.4). Such procedures include the following:

- Arbitrarily limiting the number that can be granted in a single case.
- Establishing cutoff dates after which no requests will be heard.
- Requiring a written motion or affidavit with requests.
- Requiring client signature on requests for continuances.
- Assigning a special judge or office to rule on all requests.
- Monitoring the number granted by individual judges.
- Assigning penalties for continuances.

The first four of these procedures are intended to make continuances more difficult to obtain. Massachusetts and ten of the metropolitan courts surveyed strictly limit the number of continuances obtainable—some by eliminating grounds for requests, and others by specifying exactly how many may be granted. The main argument against such a strict policy is that cases appeal and often win on the grounds that the restriction on continuances caused a violation of due process and right to counsel protections.

In many courts, obtaining a continuance traditionally required very little of the attorney—frequently no more than a phone call to the judge’s secretary. Now many courts are deliberately making the process more burdensome for the attorney, in hopes of screening out frivolous requests. Twelve state court systems and five metropolitan courts require that a motion for continuance be accompanied by an affidavit certifying the need for the continuance. The courts vary considerably on the strictness of their criteria for acceptable “need.” Four other state court systems and nine metropolitan courts require that requests for continuance be filed with the court in writing. The New Hampshire courts and the Court of Common Pleas in Pittsburgh, Pennsylvania, require a client’s signature on requests for continuances. Requiring a client’s approval of continuance requests at least ensures that the client knows and approves of the reason for the delay. Seven states and two of the metropolitan courts surveyed have authorized judges to assign jury, court, or opposing party costs to attorneys responsible for trial continuances.

The last three procedures shown in Table III.4 have been introduced to make it easier for the judges to refuse requests for continuances. In some courts (e.g., Alaska) one judge, who is committed to the strict continuance policy, is assigned to hear all continuance requests. If the judge who hears continuance requests is also the judge responsi-
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*Mail verification not obtained.*
ble for trial scheduling, he will be motivated to deny all but the most necessary requests. In other courts (e.g., Delaware), all requests come to a special administrative office, and by being released from the discretion of individual judges are subject to a more consistent policy.

In addition to the above strategies, court administrative offices can monitor the practices of individual judges more closely. When the court is attempting to enforce a strict continuance policy, judges can exert peer pressure on those of their colleagues who, according to regular status reports, appear not to be cooperating with the program.

In summary, enforcing strict continuance policies is difficult—for both judges and attorneys. Moreover, if enforcement is too arbitrary, it can deprive litigants of a fair hearing. But such policies are critical to overall caseload management, because the court cannot control its calendar unless it can assure firm trial dates. Once a policy of firm and certain trial dates has been established, the court is obligated to meet its own schedule. Courts we surveyed experienced periods of readjustment, but with advance notice to the bar and continuing communication concerning court management, attorneys and judges appear able to adjust their practices to meet firm trial dates.

SUMMARY

In this section we have reviewed three categories of procedures authorized by state courts that are intended to improve court management of the pretrial stages of litigation. These procedures have been initiated to achieve the following intermediate objectives:

- Efficient management of court resources to assure adequate supply for the caseload demand.
- Expeditious pretrial processing using simplified and streamlined procedures with greater court supervision over the progress of cases.
- Firm trial dates established through strict continuance policies.

The overall objective of the procedures is to assure that the caseflow is controlled and that this control resides with the court and not with attorneys.

\[10\] It is important to note that these procedures have not all been widely implemented in all the courts or by all the judges in a system. Their inclusion here is not on the basis of their proven effectiveness since evaluation of individual procedures was not part of the inventory scope. The amount of delay reduction or management improvement sought by the courts which have authorized these procedures varies considerably, and we do not intend for the reader to equate the courts on any measure or standard of delay.
Management efforts include a number of procedures designed to regulate judicial behavior (e.g., continuance policies), and others aimed at attorney behavior (e.g., limiting the time allowed for discovery). Some procedures, such as dismissal of inactive cases, are applicable to any case in the system, while others apply only to a subset of cases. Procedures such as economical litigation projects have been only recently introduced in a few states, while others, such as reassigning judges, have been used for many years in most states. Finally, the courts in which these procedures operate are very different from one another, each having its own set of characteristics and participants, and often different results are obtained with the same expediting procedures.

In the remainder of this section we examine two types of policy issues that arise when management strategies are applied in courts: (1) issues related to the efficiency objectives of these procedures, and (2) issues related to the impact the procedures have on the equity of judicial outcomes.

Management Strategies and Efficiency Outcomes

In discussing the efficiency outcomes of court management strategies, one must consider the available resources, the enforcement mechanisms, the standardization of procedures, and the integration of procedures in a total case management program.

Court Resources. Many management procedures require new court expenditures to be implemented. Expenses might include large financial investment for a computer system, extra clerical personnel for classifying cases or identifying inactive cases on the docket, or additional judge time for scheduling status conferences. With limited resources already strained, new management strategies may constitute a substantial burden.

Enforcement of Procedures. Other management procedures, such as those limiting continuances or controlling the pace of discovery, are dependent on judicial enforcement. But a number of factors contribute to the ability and willingness of individual judges to enforce them.

- As discussed above, there is usually strong opposition to court reform efforts, both from judges and attorneys, making enforcement responsibilities unwelcome.
- Because judicial time is limited, involvement in enforcing management procedures results in less time available for adjudication of caseloads.
- Judges who have traditionally been criticized for poor manage-
ment skills (although it is not clear that they should be expected to possess good management skills), when left to their own procedures, cannot be expected to be better managers with court-authorized procedures.

- Judicial independence is a time-honored tradition. One court official told us, "We jealously guard the individual discretion of the judge to maintain the process and procedure he thinks is best to maintain the cases on his calendar." Given this tradition, it is unlikely that individual judges will enthusiastically enforce procedures with which they disagree.

- Although it is not clear how attorneys view court management efforts, the support of the local bar for specific procedures reportedly has a major effect on the court’s ability to enforce them.

Standardization of Procedures. Another problem that many management procedures meet is that they must apply uniformly to cases of widely varying nature and complexity. Because of the variation, some management efforts may be wasted on cases that do not require them, while other types of cases fall through the cracks of the procedures.

Integration of Procedures. According to many court officials and researchers, the key to achieving management objectives lies in integrating them effectively in an overall management effort. In courts all around the country we found that officials had adopted systems approaches to delay and congestion problems in an attempt to identify the different points in the pretrial process at which cases can become delayed and the various levers for affecting the delay. For example, many court officials reported that the trial date is the critical factor driving the pace of the case—both because its preparation lags until trial is near and because it is more likely to settle as the trial date approaches—but in order to set firm trial dates, several parts of the system need to be coordinated. First, the court has to know when cases will be ready for trial. (In some courts this is accomplished by close scheduling of the pretrial process, in others by monitoring the progress of cases through the process.) Second, the court has to have resources available to hear cases when they are assigned. (Procedures to assure adequate resources include case classification and reassignment of judges.) And, finally, the court has to ensure through a strict continuance policy that cases will be ready when called for trial. This is an oversimplification of a total case management approach to establishing firm trial dates, but serves as an illustration of the goal of integration and coordination of procedures to achieve management objectives.
Management Efforts and Equity Outcomes

Ideally, management procedures should result in reduced delay and congestion in the courts without altering, unless to improve, the quality of justice obtained. Although we know of no research that measures the impact of management efforts on the fairness of outcomes, we expect that these procedures could have an effect on litigation that extends beyond their expediting objective.

Intervention of the Court in the Pretrial Process. Because many management efforts require judicial intervention in the pretrial processing of cases, a broad policy question arises about the extent to which judges should be involved in caseflow management. Explicitly authorizing judicial intervention in case management implies a shift in court thinking about the appropriate judicial role in litigation, which, it has been strongly argued, must, in the interest of justice be that of a relatively passive moderator (Frankel, 1975). Activist, management-oriented judges are subject to the criticism that their neutrality, essential to just decisionmaking, is threatened by their intervention in the pretrial management of a case, or that their intervention is controlling or shaping the substance of a case as well as its pace. As judges intervene more directly in case management, additional safeguards of impartiality, such as separating the trial and pretrial judicial roles, are becoming more widely considered.

Changes in Attorney Behavior. To the extent that court management strategies focus on the behavior of attorneys, issues concerning how these efforts themselves affect attorneys and what impact certain changes have on case preparation and client representation inevitably arise. Some attorneys have expressed the opinion that judicial intervention in case management puts attorneys’ duty to the court at odds with their duty to clients, and involves the court in the previously private attorney-client relationship. While some court managers report that the bar is able to conform easily to management efforts once they become well known, and others told us about extensive cooperation between the court and the bar on planning improvements in court management, a number of managers pointed out that attorneys usually find loopholes to circumvent procedures they object to.

Quality of Representation and Rights of Litigants. As suggested above, intervention in case management may give judges invisible, unreviewable power over attorneys, and this power can jeopardize a client’s case. Efforts at court management are sometimes viewed by the bar as infringements on clients’ constitutional rights to due process and equal protection. As public institutions, the courts are responsible to uphold litigants’ constitutional rights to counsel, trial by jury, due process, and equal protection, but procedures that select certain cases
for special treatment, such as "fast tracks," or procedures that place limits on case preparation, such as discovery cutoffs, or dismissal of inactive cases may be interpreted as violations of those rights. However, the very intention of court management procedures is to protect litigants by reducing the delay in the system that acts as an obstacle to the hearing of legitimate claims of people who cannot afford the long wait for a day in court.

Costs and Benefits of Management Efforts to the Public

From the public perspective, management efforts raise somewhat different issues. On one level the question of cost-benefit analysis is straightforward: How much improvement is there in the system, and what is the cost in public investment to achieve it? Without systematic evaluation of management efforts this equation cannot be written. We simply do not know the costs or the amount of delay reduction these procedures achieve. Nor do we know the permanent impact, if any, that efforts to reduce delay and congestion have on the administration of justice. In the next section we describe efforts to divert cases from trial—a strategy that may indeed have a major impact on the nature of the administration of justice.
IV. DIVERSION EFFORTS

Court efforts to divert cases from trial to alternative forums are based on the assumption that in order to reduce court congestion and costs, courts must reduce pretrial caseloads. This is probably a fair assumption because as cases progress through the pretrial process toward trial, they consume increasing amounts of court resources and time before disposition. Diversion strategies emphasize the value of alternative—faster and less expensive—forums for adjudication. Most courts engaged in diversion programs select special cases for the alternative mechanism, trying to identify those requiring the fewest judicial resources. There is a growing sentiment among court officials that certain types of cases that present no major questions of law or fact simply do not require formal adjudication. Litigants, too, appear to believe that the courts are either inappropriate or too busy to attend to them, and are turning to private means of dispute resolution for certain cases.

We have identified only three types of pretrial diversion efforts that apply to cases already filed with the courts: judicial arbitration, medical malpractice screening procedures, and settlement programs. Many courts and legislatures have designed other kinds of strategies that divert cases from the court altogether rather than only from trial—for instance, increasing filing fees, awarding attorneys' fees, changing liability laws (e.g., no-fault legislation), small claims courts, and neighborhood justice centers, which are intended to divert cases from ever being filed in the general jurisdiction courts. These efforts are not included in this report because for the most part they do not apply to cases in the pretrial phase of litigation. Similarly, private courts, rent-a-judge programs, mini-trials, and private arbitration are not included in our study because they work outside the courts entirely.

The efforts described in this section share several characteristics. First, they are all intended to provide earlier disposition for diverted cases using minimal court resources. Judicial arbitration adjudicates disputes; malpractice programs screen cases; and settlement programs mediate disputes. A measure of the effectiveness common to all of these diversion programs is whether the programs finally dispose of a large enough percentage of the diverted cases at a large enough reduction in cost to be worth the invested court resources. (Most programs, however, have not been so evaluated because the courts generally do not monitor the costs of the program, and because without a true experimental design it is difficult to determine the number of cases disposed of solely
as a result of the diversion.) Each of the diversion procedures by definition places some obstacle in the path of the litigant who seeks jury trial, and so each is vulnerable to critics who argue that constitutional rights of equal protection and due process for litigants are at least threatened and may be seriously jeopardized by diversion procedures.

In this section we describe in detail the three diversion efforts mentioned above. We discuss their purpose, their typical operation, the pattern of their adoption by state and metropolitan courts, various features of their design, and the key issues involved in implementing them.

JUDICIAL ARBITRATION

One increasingly popular diversion program, judicial arbitration (also called court-annexed arbitration, court-administered arbitration, or compulsory or mandatory arbitration), involves court-administered programs that attempt to reduce the number of cases going to trial by diverting some to an alternative adjudication forum. In these programs, litigants in certain types of cases present their arguments to an informal hearing held by parajudicial personnel. The hearing results in a disposition that is filed in court. If either party is dissatisfied with the arbitrator’s award, it can appeal the decision and request a trial de novo. Arbitration programs are intended to speed disposition of arbitrated cases, and, by diverting part of the caseload, to expedite those remaining in the pretrial process as well. The programs are also intended to reduce both court and litigant costs.

Judicial arbitration differs from classic arbitration, which historically has been founded on the principles of voluntary agreement to arbitrate and agreement to accept the arbitrator’s judgment as final and binding, in a number of significant ways best explained by a brief history of the arbitration tradition in this country.

Since colonial times classic arbitration has served as an alternative to judicial resolution of disputes. It has been used extensively in commercial and industrial matters where parties to a contract voluntarily agree to seek binding arbitration of their dispute, or agree at the time of negotiation to arbitrate disputes that develop during the contract period. The American Arbitration Association, a nonprofit organization, has administered private arbitration for business, government, and industry for many years. Private judges and the National Private Court are recent additions to the choice of private alternatives to court adjudication. Since 1920, most states have passed arbitration legislation making contractual agreements to arbitrate enforceable by the
courts. These laws are all similar to the Uniform Arbitration Act drafted in the 1950s, according to which the courts are empowered to decide whether a written agreement to arbitrate exists, and to order the parties to arbitrate as agreed. The act also specifies procedures for the conduct of arbitration.

Judicial arbitration is a more recent development. Faced with growing caseloads and increased delay, several states have passed laws authorizing the imposition of judicial arbitration for certain cases. By requiring litigants to arbitrate, the courts hope to reach a greater number of cases than might volunteer for the process. Because parties are compelled to arbitrate, the programs all provide the right to appeal the arbitrator’s decision, thus preserving constitutional guarantee of right to jury trial. Thus far, there has been no successful challenge to the constitutionality of a judicial arbitration program.

The Typical Arbitration Program

Judicial arbitration programs active around the country are all quite similar. (See Table IV.1 for the pattern of adoption of arbitration programs.) For instance, all place some jurisdictional limit on case eligibility. Usually only civil actions for relatively small amounts of money, typically less than $10,000, are mandated. The methods for determining eligibility vary somewhat. Cases are assigned almost automatically in some states (e.g., Pennsylvania) where the amount claimed must be included in the complaint or certificate of readiness. In other programs (e.g., California, New Hampshire, and Ohio), judges screen each case.

The timing of assignment to arbitration also varies; some states decide at the time the case is filed, while others wait a number of months (or years) until the pretrial conference or until a certificate of readiness is filed. Once slated for arbitration, eligible cases are placed on a separate arbitration calendar to await appointment of the arbitrator and a hearing date.

There may be only one arbitrator or a panel of three to five members. In most jurisdictions with arbitration programs, local attorneys, chosen from lists provided by bar associations, contribute their time pro bono to serve as arbitrators. The attorneys are usually required to have a minimum of five years experience as a member of the bar. Assignment of arbitrators to a case can be by stipulation of the parties or by a random draw from the available pool. Usually there is provision permitting parties to strike or veto one or more of the arbitrator candidates selected by the court.

Attorneys for both parties, the parties themselves, and any wit-
<table>
<thead>
<tr>
<th>State</th>
<th>Title</th>
<th>Authorization</th>
<th>Date Authorized</th>
<th>Current Scope</th>
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<tbody>
<tr>
<td>Alaska</td>
<td>Arbitration of Small Claims</td>
<td>State Law A.S. §09 43.190</td>
<td>1972</td>
<td>Not implemented</td>
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<tr>
<td>Arizona</td>
<td>Arbitration of Claims</td>
<td>State Law A.R.S. §12-133</td>
<td>1974</td>
<td>3 counties including Phoenix and Tucson</td>
</tr>
<tr>
<td>California</td>
<td>Judicial Arbitration</td>
<td>State Law C.C.P. §1141.10-32</td>
<td>1978</td>
<td>14 counties*</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Compulsory Arbitration</td>
<td>Supreme Court Rule, Temporary Rules of Compulsory Arbitration</td>
<td>1978</td>
<td>2 counties (Merrimack, Rockingham)</td>
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<tr>
<td>Ohio</td>
<td>Compulsory Arbitration (Hamilton and Stark)</td>
<td>Local Judicial Rules</td>
<td>1970-1972</td>
<td>3 counties including Cleveland and Cincinnati</td>
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<tr>
<td></td>
<td>Mandatory Arbitration (Cuyahoga)</td>
<td>Hamilton County Rule 24</td>
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<td>Stark County Rule 16</td>
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<td>Cuyahoga County Rule 29</td>
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<tr>
<td>Washington</td>
<td>Mandatory Arbitration of Civil Actions</td>
<td>State Law R.C.W. Ch.7.06</td>
<td>1979</td>
<td>King County (Seattle)</td>
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</tbody>
</table>

*Mandatory in all courts with 10 or more judges.
nesses must appear at the arbitration hearing, which is private and usually held in the arbitrator's office. During the hearing both sides present their cases with testimony by witnesses and depositions. The rules of evidence in the proceedings are relaxed and "liberally construed," with much of the formality and time-consuming factors in a trial eliminated. A typical hearing takes a few hours, and there is usually no transcript. After the hearing, the arbitrators have a specified amount of time—usually 15 to 25 days—in which to file their award with the court; and the litigants also have a specified amount of time in which to reject the award and request a trial de novo, at which no evidence of the arbitration hearing is permitted. If the award is not challenged, the suit is ended and the decision is legally enforceable. If trial de novo is requested, the case is placed back on the trial calendar.

Most programs include a monetary disincentive to request trial de novo, in the form of a penalty or assignment of costs if the requestor does not better his position at trial. Enforcement of the penalty is not consistent across programs, and the penalty only applies if the trial is held. Merely requesting trial de novo does not impose the penalty on the litigant, although a deposit is often required.

**Pattern of Adoption**

Table IV.1 shows the pattern of adoption of judicial arbitration programs in the United States. Nine states—including heavily populated industrial states of the East and Midwest, as well as Western states with far less density, industrialization, and population—have authorized programs. In seven of the nine states, the authorization was by state legislative action; in Ohio, it was by local court rules. In New Hampshire, the state supreme court was responsible for authorizing the program, which is operating on an experimental basis.

As noted earlier, the programs are known by a variety of titles. The Nevada program is limited to motor vehicle damage actions only. The Alaska statute is general, providing only that the courts may adopt judicial arbitration for certain cases. In contrast, the California statute specifies which courts must adopt the program, as well as many of the procedures for its implementation.

Although Pennsylvania has had a judicial arbitration program for more than twenty years, most states have authorized theirs during the last ten years. The mandatory program has been adopted most recently in Washington state (1979) and California (1978). The usual pattern

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1California had a voluntary arbitration program in use in some superior courts before 1975.
features of implementation has been to commence the program in the major metropolitan court and to expand it gradually around the state. For instance, in Pennsylvania the program began in Philadelphia, quickly expanded to Pittsburgh, and now operates in most counties. The same pattern has evolved in New York and is expected in California and Washington. But in Arizona and Ohio, which have both had programs over six years, the scope has not extended beyond the original counties in which it was implemented. None of the courts in Alaska has implemented the program.

Features of Arbitration Programs

The key features characterizing an arbitration program are the following:

- The jurisdictional limit and how it is applied.
- The timing of case assignment.
- The arbitration personnel and their compensation.
- The disincentive to request trial de novo.

Table IV.2 gives a profile according to these features for each state that has a judicial arbitration program. We discuss the features in detail below.

The Jurisdictional Limit. In general, the monetary limit for judicial arbitration is relatively low. Although the limit on eligibility differs considerably—from $3,000 to $50,000—most states set the maximum between $5,000 and $10,000. The dollar limit in federal courts with experimental arbitration programs is $100,000. Several states have raised the limit since originally authorizing the program in order to include a greater proportion of the caseload. Legislation in Pennsylvania recently authorized an increase in the limit there from $10,000 to $20,000 in some courts. The Court of Common Pleas in Philadelphia has decided to experiment by increasing the limit to $15,000 and will consider arbitrating larger cases in the future. In New York, when the limit was increased, the arbitrators were required to have additional experience. In New Hampshire, where the limit is much higher than in the other states, the court assigns cases at its discretion to the arbitration mechanism, but in most other courts the assignment is automatic if the case is below the eligibility limit.

The central argument for limiting arbitration’s jurisdiction to small cases is the belief that these are the most likely to be disposed of through arbitration. If cases cannot be resolved by arbitration, it makes no sense to divert them since it will only add to their cost and the total time to disposition. Many court officials believe litigants with
Table IV.2
FEATURES OF JUDICIAL ARBITRATION PROGRAMS

<table>
<thead>
<tr>
<th>State</th>
<th>Jurisdictional Limit</th>
<th>Application</th>
<th>Timing of Assignment to Arbitration</th>
<th>Arbitration Panel</th>
<th>Arbitrator's Fee*</th>
<th>Appeal Disincentive</th>
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<tbody>
<tr>
<td>Arizona</td>
<td>$5,000</td>
<td>Automatic</td>
<td>10 days after filing certificate of readiness</td>
<td>1 or 3 attorneys(^b)</td>
<td>$50/day</td>
<td>Arbitrators' fee</td>
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<tr>
<td>California</td>
<td>$15,000</td>
<td>Automatic</td>
<td>Earliest of 90 days before trial or 9 months after placed on civil active list</td>
<td>1 attorney(^c)</td>
<td>$150/day</td>
<td>Arbitration and trial costs, plus certain expert witness costs</td>
</tr>
<tr>
<td>Nevada</td>
<td>$3,000(^d)</td>
<td>Automatic</td>
<td>Any time</td>
<td>None, or hourly fee</td>
<td>Arbitration costs(^f)</td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>$50,000</td>
<td>Discretion of court</td>
<td>Minimum of 3 months after filed</td>
<td>1 retired judge(^b)</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>New York</td>
<td>$6,000</td>
<td>Automatic</td>
<td>Filing of certificate of readiness</td>
<td>1 or 3 attorneys(^b)</td>
<td>$35/case</td>
<td>Arbitrators' fee plus costs subsequent to award</td>
</tr>
<tr>
<td>Ohio</td>
<td>$5-10,000</td>
<td>Discretion of court (Hamilton, Cuyahoga counties)</td>
<td>Pretrial conference</td>
<td>3 attorneys</td>
<td>$50/case (Hamilton, Stark Counties)</td>
<td>Arbitrators' fee (Cuyahoga County); Appeal fee, plus arbitrators' fee (Hamilton, Stark Counties)</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>$5-10,000(^e)</td>
<td>Automatic</td>
<td>Filing of certificate of readiness</td>
<td>3 attorneys</td>
<td>$35/case</td>
<td>Arbitrators' fee(^f)</td>
</tr>
<tr>
<td>Washington</td>
<td>$10,000(^b)</td>
<td>Automatic</td>
<td>Filing note of issue</td>
<td>1 attorney(^i)</td>
<td>$178.80/day</td>
<td>Trial and attorney costs</td>
</tr>
</tbody>
</table>

NOTE: Only states with operational programs are shown.

\(^a\)Hearing panel chairman sometimes receives higher fee.
\(^b\)Parties may stipulate to their own arbitrator.
\(^c\)Court may substitute retired judges.
\(^d\)Auto cases only.
\(^e\)Stipulated to by parties, or court appointed according to Nevada Uniform Arbitration Act.
\(^f\)Not recoverable.
\(^g\)$20,000 in Philadelphia and Allegheny Counties, but in practice Philadelphia's limit is $15,000; Pittsburgh's limit is $10,000.
\(^h\)Proposed increase to $25,000 before legislature.
\(^i\)Local courts may develop own rules for panel composition.
larger cases will automatically file an appeal. Others believe that an informal hearing using parajudicial personnel is inadequate to adjudicate large cases. Sometimes jurisdiction is limited because court officials feel they lack the resources to process the cases that would be added if a higher maximum were set.

However, there are courts that are moving toward higher limits because, they argue, in order to make the investment in running the program worthwhile, a great many cases must be arbitrated so that a large number will be disposed of. The Alaska court has decided not to implement the program because the limit authorized by the legislature was considered too low to counter the costs of running the program.

**Timing of Case Assignment.** The timing of case assignment to arbitration varies among the different programs. Table IV.2 shows the point in the pretrial process at which cases are assigned in each of the existing programs. If cases are assigned automatically upon filing or soon after the complaint is filed, more cases are diverted to arbitration than if the court assigns them closer to trial, when a significant proportion have already settled. Moreover, assignment to arbitration at a late date may defeat the very purpose of the program since most of the pretrial delay has already occurred. Basically, the argument for early assignment of cases to arbitration is that the cases can be disposed of before the court incurs the costs and delay of processing them. The argument for late assignment is that discovery is more likely to be complete and that cases remaining on the court's docket at that stage are those least likely to settle without court intervention.

The method of assignment varies among the courts. In some the amount of money involved in the case is filed in an *ad damnum* with the complaint, and assignment to arbitration is therefore automatic. In others, the case must be valued to determine its eligibility for arbitration. Some courts use clerical personnel for case evaluation; others ask the plaintiff's attorney for a value; and some require a judge to review the case and determine eligibility. The latter approach is obviously the most expensive in time and money, but clerical evaluation has been rejected in some jurisdictions by attorneys who feel that judicial review is necessary.

**Arbitration Personnel.** In most programs, attorneys serve as arbitrators and are paid a nominal fee for their service. In New Hampshire one retired judge has been handling all arbitration cases. Several states permit the parties to the dispute to stipulate to an arbitrator by selecting an attorney, a judge, or a lay person. The number of arbitrators varies, but most courts assign a panel of three to each case.

The nominal fee paid the arbitrator(s) in each state is shown in Table IV.2. As the table shows, arbitrators are paid by the day in some states and by the case in others. The customary amount is between $35
and $50 per case, although in California and Washington it is much higher. In New Hampshire the arbitrator receives no compensation.

The size and composition of the arbitrator panel and the level of compensation are determined by: the willingness of the local bar to serve as arbitrators for very little compensation; the number of arbitrators needed to handle the projected caseload without delays; the distribution between the plaintiff and defense bar, both in the local area and in the pool; and the type of cases to be arbitrated. In addition, the courts consider a number of issues in establishing rules for arbitrator selection. First, they must determine the level of experience they will require of potential arbitrators. They must also be careful to keep the workload distributed evenly among attorneys in the pool. Funds must be kept available for increasing compensation as needed over time. And the arbitrators must be monitored to assure expeditious handling of assigned cases.

Appeal Disincentive. For arbitration to be a success, more cases must be finally disposed of at the arbitration hearings than go on to trial. Thus, most courts, while anxious to preserve the guarantee of right to jury trial, want to strongly discourage litigants from appealing the arbitrator’s decision. To this end they have incorporated certain disincentives to appeal in their programs. The disincentive can be one or any combination of the following: an appeal fee, paid at the time the appeal is filed; repayment to the court of fees paid to the arbitrator(s); and payment to the court and the other party of trial costs, including the opposing party’s attorney fees.

Many more cases request trial de novo than are ever actually tried. For example, in the California program’s first year requests were filed for about 40 percent of the arbitrated cases, but the number actually tried appeared to be only about two percent (Hensler, Lipson, and Rolph, 1981, pp. 32-35). This may be because the request for trial frequently acts as an additional leverage in settlement negotiations. Or sometimes an attorney may automatically file trial de novo requests to protect himself from subsequent complaints by his client, or to delay enforcement of the award. In evaluating an arbitration program’s effectiveness, it is therefore important to examine the number of cases that actually are tried rather than the rate of requests for trial de novo.

Arizona, California, and Washington specify that a penalty must be paid only if the appealing party does not better his position at the trial. This approach provides no disincentive to merely requesting trial as a negotiation strategy, but discourages a party from taking the case as far as trial. Nevada, New York, Pennsylvania, and Cleveland require the appealing party to pay the costs of arbitration regardless of the trial outcome, or of whether a trial is actually held. New York is an example of a state with a combination of recoverable and nonrecoverable disin-
centives; a party must make a nonrecoverable payment of the arbitrator's fees at the time the case is appealed, and if the appealing party does not obtain a trial judgment more favorable than the arbitrator's award, he must pay the opposing party's costs from the time of the award. Only New Hampshire has no appeal disincentives.

The disincentives in most programs are not very strong, especially when the amount of money involved in the dispute is quite high. Moreover, they are not enforced in all courts—sometimes because there is no administrative machinery to inform trial judges that an arbitration decision was previously reached. Actually, it is impossible to have very strong disincentives because any real obstacle to the right to jury trial will be found unconstitutional. Although constitutionality of arbitration programs has so far been upheld, the threat of constitutional challenges has probably served to limit the application and use of disincentives.

MANDATORY MEDICAL MALPRACTICE SCREENING

The second type of diversion program we investigated is currently used for medical malpractice cases only, but has been suggested as a model for screening other types of tort actions, such as product liability cases, and may foreshadow a trend toward specialized adjudicatory bodies. As we describe below, medical malpractice panels provide the most complete diversion from the court system. Many of the programs are designed to handle cases before they are filed with the court and are administered entirely outside the court system. This type of diversion effort is also unique because it developed not in response to problems of court congestion but in response to trends in court outcomes. The chief motivation for, and effect of, this procedure may be to change case outcomes, but because operation of these programs often bears directly on the pretrial process, we include it with the other diversion efforts we describe.²

Mandatory screening of medical malpractice cases has been used to divert cases from trial since 1974, when it was first authorized by the New York legislature.³ Screening panels have since been instituted in

²Some authorizations explicitly state that speedy disposition as well as settlement negotiation of claims is one of the purposes of the program, but most do not.

³Before 1974, screening was voluntary in New York. Seven other states have also passed legislation providing for screening of malpractice cases at the plaintiff's or defendant's election. These voluntary programs were authorized in Arkansas, Connecticut, Delaware, Kansas, Maine, New Hampshire, and Virginia. Arkansas and Connecticut have since abolished their programs, and most of the others are rarely invoked. Delaware,
many states in response to the perceived medical malpractice insurance crisis of the early to mid-1970s that was caused by huge escalation of malpractice insurance premiums. The objectives of the panels were reportedly to reduce the number of cases going to trial and the amounts of money awarded. They were designed to provide experts instead of juries to determine liability, to weed out frivolous cases, and to promote earlier settlement of meritorious claims. Cases diverted to screening panels were intended to be more quickly disposed of, leading, if enough cases were involved, to a reduction of the court's overall workload. The end result would be an increase in resources to expedite litigation remaining in the system. From our interviews we learned that only about half the states where the program was originally authorized have had enough cases to warrant the establishment of an ongoing operation, and many of the states that set up a system have had implementation problems resulting in long backlogs of cases pending before the panels and general dissatisfaction.

Typical Screening Panels

Forums for deciding malpractice suits, typically known as review or screening panels, always include one or more neutral physicians before whom the case must be presented before it can be either filed or brought to trial in the court. A typical panel is composed of one attorney, one physician, and either a judge or a lay person.

In most states the panel is authorized to make a decision on tort liability only, after an informally conducted hearing of the claim. The parties to the action have the right to appeal the panel's decision, and the panel findings as to liability are usually admissible at any subsequent trial. Like the judicial arbitration programs, screening programs often include a disincentive to appeal, such as assignment of panel costs to the appellant or allowing the panel's findings to be admitted at the trial.

The states are about evenly divided in instituting the screening procedures prior or subsequent to the filing of a complaint in court. As would be expected, most states with precomplaint screening use an executive agency to administer the program, while most states with postcomplaint screening administer the program through the court system. But all panels seek to substitute expert evaluation of a claim

however, is an exception. In that state the panel is convened at the request of either party, usually the defendant. Although many states also provide for screening or arbitration of malpractice cases by contractual agreement between parties to an insurance policy, etc., we did not include these programs in our inventory review.
in the atmosphere of an informal, private review for the formal and public adversary proceedings of trial.

Pattern of Adoption

Table IV.3 shows the pattern of adoption of mandatory medical malpractice screening panels around the country. A total of 23 states authorized these programs. As the variety of program titles suggests, there was no single model. Quite often the authorization for screening panels was included in a larger package of medical malpractice legislation intended to modify the tort law in response to the perceived malpractice crisis. In some cases the screening panels were an extension of the professional review panels that already existed to advise doctors of their potential liability when threatened with a malpractice case. Others were structured similarly to already existing voluntary arbitration programs. About half the programs were designed for administration by the courts. Of the remaining half, some were to be administered by executive agencies, some by medical commissions, and some by insurance commissions.

Seventeen of the panels were authorized during 1975-76, many as emergency legislation. This rate did not continue (none have been authorized since 1978), but panels continue to be proposed, and a bill is planned for the 1981 Congress to consider their adoption in the federal courts.

Malpractice screening panels have been extensively challenged on constitutional grounds in 14 of the 23 states where they are mandatory. The challenges have been made on several different grounds, including:

- Violation of equal protection guarantees;
- Restriction of access to courts;
- Restriction of right to trial by jury;
- Violation of due process guarantees; and
- Violation of provision for separation of powers.

Among the measures adopted were a "cap" or recovery limit on awards; periodic or installment payment of awards; delayed disbursement of future medical expenses; the exclusion of government employees and facilities from the law's coverage; requirement that claimants deduct collateral benefits from their claims; and prohibition of an "ad damnum" clause. In some states legislation also provided for the establishment of patient compensation funds and joint underwriting associations. For a review of many state medical malpractice reform efforts see Duke Law Journal (1976, pp. 1417-1468) or Abraham (1977, pp. 489-532).

A legal review of the constitutional challenges to screening panels is contained in "Comment: Constitutional Challenges to Medical Malpractice Review Boards," Tennessee Law Review (1979, pp. 607-648), but a number of cases have been decided since its publication.
The responses of the state supreme courts to these attacks have varied considerably. The highest courts in four states (Missouri, Illinois, Florida, and Pennsylvania) have declared the panels unconstitutional; trial courts in two other states have also found screening unconstitutional. The four supreme courts that declared screening unconstitutional based their decisions on different grounds. Other courts subsequently found these grounds insufficient to declare screening invalid in their own jurisdictions.

In Missouri the supreme court held the screening requirement to be an unconstitutional restriction of access to the courts. In Illinois the finding of unconstitutionality was based on a separation of powers argument that the use of screening panels required a delegation of judicial power to nonjudicial personnel, and the court also held that mandatory screening restricted the right to trial by jury. In Florida and Pennsylvania panels were declared unconstitutional in their application after an earlier finding of constitutionality on their face. Florida ruled against panels on due process grounds and Pennsylvania ruled against them as a violation of right to jury trial. Although several states have used equal protection arguments to strike down other sections of malpractice legislation, only two trial courts in Ohio have found that the screening panels constituted a violation of the equal protection laws.

While constitutional analyses of malpractice screening have customarily focused on the rights of plaintiffs, the Florida Supreme Court declared the statute establishing screening panels to be in violation of physicians' rights. The statute had specified that each screening panel must terminate after ten months so that the plaintiffs would not be deprived of access to the courts if the panel failed to act expeditiously, but the court found that although this limitation protected the plaintiffs' rights, it was in fact depriving physicians of their right to be heard by the panels. Because the court had originally declared the statute unconstitutional, this decision was significant in finding the program unconstitutional in practice.

Even more significant in this regard is the 1980 decision of the Pennsylvania Supreme Court. It found the program to be

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*Ohio and Tennessee. A statutory amendment to the legislation in Tennessee brought the program into compliance with the Constitution.


3Aldana v. Holub, 381 So.2d 223 (1980).


<table>
<thead>
<tr>
<th>State</th>
<th>Title</th>
<th>Authorization</th>
<th>Date</th>
<th>Administration</th>
<th>Current Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>Expert Advisory Panel</td>
<td>Alaska Statutes §9.55.536</td>
<td>1976</td>
<td>Court</td>
<td>Constitutionality Upheld</td>
</tr>
<tr>
<td>Arizona</td>
<td>Medical Liability</td>
<td>Arizona Revised Statutes §12-565</td>
<td>1977</td>
<td>Court</td>
<td>Constitutionality Upheld</td>
</tr>
<tr>
<td>Florida</td>
<td>Medical Liability Mediation Panel</td>
<td>Florida Statutes §768.44.47</td>
<td>1975</td>
<td>Court</td>
<td>Declared Unconstitutional</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Medical Claim Conciliation Panel</td>
<td>Hawaii Revised Statutes §671.11</td>
<td>1976</td>
<td>Department of Regulatory Agencies</td>
<td>Operational, but rarely used</td>
</tr>
<tr>
<td>Idaho</td>
<td>Prelitigation Medical Malpractice Claims Panel</td>
<td>Idaho Code §6-1001</td>
<td>1976</td>
<td>State Board of Medicine</td>
<td>Operational</td>
</tr>
<tr>
<td>Illinois</td>
<td>Medical Review Panel</td>
<td>Illinois Statutes 110 §58.2</td>
<td>1975</td>
<td>Court</td>
<td>Declared Unconstitutional</td>
</tr>
<tr>
<td>Indiana</td>
<td>Medical Review Panel</td>
<td>Indiana Statutes §16.5-9-1</td>
<td>1975</td>
<td>Court</td>
<td>Constitutionality Upheld</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Medical Review Panel</td>
<td>Louisiana Revised Statutes §40:1299</td>
<td>1975</td>
<td>Commissioner of Insurance and Court</td>
<td>Constitutionality Upheld</td>
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<tr>
<td>Massachusetts</td>
<td>Medical Malpractice Claims Screening Tribunal</td>
<td>Massachusetts Laws C.231 §60B</td>
<td>1976</td>
<td>Court</td>
<td>Constitutionality Upheld</td>
</tr>
<tr>
<td>Missouri</td>
<td>Professional Liability Review Board</td>
<td>Missouri Statutes Ch.538</td>
<td>1977</td>
<td>Attorney-General</td>
<td>Declared Unconstitutional</td>
</tr>
<tr>
<td>State</td>
<td>Medical Malpractice Panel</td>
<td>Code/Statute</td>
<td>Year</td>
<td>Body of Law</td>
<td>Decision</td>
</tr>
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</tr>
<tr>
<td>Montana</td>
<td>Medical Malpractice Panel</td>
<td>Montana Code Annotated,</td>
<td>1977</td>
<td>Supreme Court</td>
<td>Operational</td>
</tr>
<tr>
<td></td>
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<td>(Title 2) Ch.6, §27-6-101</td>
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<tr>
<td>Nebraska</td>
<td>Medical Review Panel</td>
<td>Nebraska Revised Statutes §44-2840</td>
<td>1976</td>
<td>Court</td>
<td>Constitutionality Upheld</td>
</tr>
<tr>
<td>Nevada</td>
<td>Medical-Legal Screening Panels</td>
<td>Nevada Revised Statutes Ch.41A.010</td>
<td>1975</td>
<td>State Associations of Physicians, Lawyers, and Nurses</td>
<td>Operational, but rarely used</td>
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<tr>
<td>New Jersey</td>
<td>Medical Malpractice Panel</td>
<td>New Jersey Civil Practice Rule 4:21</td>
<td>1978</td>
<td>Court</td>
<td>Operational</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Medical Review Panel</td>
<td>New Mexico Statutes §41-5-14</td>
<td>1976</td>
<td>Medical Review Commission</td>
<td>Operational, but rarely used</td>
</tr>
<tr>
<td>New York</td>
<td>Medical Malpractice Panel</td>
<td>New York Consolidated Laws Ar9.5 §148-a</td>
<td>1974</td>
<td>Court</td>
<td>Constitutionality Upheld</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Medical Review Panel</td>
<td>North Dakota Century Code §32-29.1-01</td>
<td>1977</td>
<td>Court</td>
<td>Operational, but rarely used</td>
</tr>
<tr>
<td>Ohio</td>
<td>Arbitration Board</td>
<td>Ohio Revised Code Annotated §2711.21</td>
<td>1975</td>
<td>Court</td>
<td>Declared Unconstitutional in some trial courts</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Arbitration Panel for Health Care</td>
<td>Pennsylvania Statutes §1301.101</td>
<td>1975</td>
<td>Department of Justice</td>
<td>Declared Unconstitutional</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Medical Liability Mediation Panel</td>
<td>Rhode Island General Laws §10-19-1</td>
<td>1976</td>
<td>Court</td>
<td>Operational</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Medical Malpractice Review Board</td>
<td>Tennessee Code §23-3401</td>
<td>1975</td>
<td>Department of Public Health</td>
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<tr>
<td>Wisconsin</td>
<td>Patients Compensation Panel</td>
<td>Wisconsin Statutes Insurance Code §655.02</td>
<td>1975</td>
<td>Director of Patients Compensation Panel</td>
<td>Constitutionality Upheld</td>
</tr>
</tbody>
</table>

*Information not available.
unconstitutional in practice even though it had upheld the program's constitutionality in previous challenges. The Pennsylvania court came back to the issue two years after its earlier decision, examined statistics demonstrating lengthy delay occasioned by screening, and concluded that in practice the requirement was depriving plaintiffs of their right to trial by jury. The court noted that 73 percent of the cases filed with the screening administrator since 1976 had not been resolved as of mid-1980.

In each of the eight states upholding the constitutionality of screening, the courts have found that the right to trial by jury is not unreasonably restricted by screening. However, with one exception (Indiana, 1980), these decisions were rendered in 1978 or earlier, when experience with the screening statutes was limited and the courts tended to construe the statutes on their face value rather than in practice.

Now, almost three years after most of these decisions, several courts may possibly follow Florida's and Pennsylvania's lead and examine case statistics to determine whether screening is unconstitutional in practice. Such a reexamination can be anticipated in states that have had difficulty administering their screening programs and currently have substantial case backlogs.

Features of Medical Malpractice Screening Panels

The key features of mandatory malpractice screening include:

- The scope of the panel.
- The time of assignment to screening.
- The size and composition of the panel.
- The type of hearing.
- The disincentives to appeal.

In this section we describe the variation among the programs and the issues that arise in designing and implementing them.

The Scope of the Panel. In the majority of programs, the panel's findings relate only to the question of liability, but seven panels also award damages when liability has been found. Including damages in

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the scope of the panel hearings adds to the formality, complexity, and preparation requirements for the hearing. One study recommended that in order to obtain dispositions at the panel stage, damages should be included (Philip and Faust, 1977). However, in states where the panel determines damages—and particularly in Maryland, where the determination is admissible and presumed to be correct—the issue of damages appears to escalate the adversary nature of panel proceedings. This reportedly tends to harden the opposing positions, and, because considerable resources are already invested, make it worthwhile to continue the battle in the courtroom. In contrast, Massachusetts, which limits the decision to whether or not there is a "legitimate question of liability," has a high settlement rate.

**Time of Assignment.** Eleven states require that cases be screened before they may be filed in court, and most of these panels are administered by agencies outside the courts. One argument for precomplaint screening is that publicity about the claim is minimized and the medical professional's reputation is protected if the screening panel's award is accepted. On the other hand, panels may be more vulnerable under these circumstances to constitutional challenge on grounds of denying access to the courts and separation of powers. When such a challenge was made in Tennessee, the statute had to be amended to provide for postcomplaint screening. Three of the four states where screening has been declared unconstitutional had panels that were convened before the complaint was filed and were all administered outside the courts.

As Table IV.4 shows, eight states conduct screening after the case is filed in court. In all of these programs except Tennessee, the court administers the screening panels, and in four of them (Arizona, Massachusetts, New Jersey, and New York) a judge is included on the panel. It is believed that if the panel is convened under the court's administration after the complaint is filed, there may be greater incentive for settlement, since a settlement-oriented judge may be part of the panel and a trial date may be approaching.

We are unaware of any comparisons of precomplaint and postcomplaint panels, but clearly if settlement is an objective of screening, the effect of screening on incentives to settle the case should be considered.

**Size and Composition of the Panel.** The key issues concerning panel size and composition have to do with recruiting panelists, convening hearings, and the role of the various groups who make up the hearing panels.

Four states have three-member panels, composed solely of medical

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14In New York, where screening is done under the court's administration after the complaint is filed, it is apparently not uncommon to convene a settlement conference immediately after the panel submits its finding.
### Table IV.4
FEATURES OF MANDATORY MALPRACTICE SCREENING PANELS

<table>
<thead>
<tr>
<th>State</th>
<th>Scope of Findings</th>
<th>Timing Before or After Filing Of Complaint</th>
<th>Panel</th>
<th>Size and Composition</th>
<th>Compensation</th>
<th>Immunity</th>
<th>Hearing</th>
<th>Appeal Disincentives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>Liability only</td>
<td>After</td>
<td>3-Expert</td>
<td>Expenses only</td>
<td>Yes</td>
<td>No</td>
<td>Informal</td>
<td>Yes Possible</td>
</tr>
<tr>
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<td>Liability only</td>
<td>After</td>
<td>3-Joint</td>
<td>$50/day</td>
<td>Yes</td>
<td>Yes</td>
<td>Formal</td>
<td>Yes No</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Liability and Damages</td>
<td>Before</td>
<td>3-Joint</td>
<td>Expenses only</td>
<td>Yes</td>
<td>Yes</td>
<td>Informal</td>
<td>No Possible</td>
</tr>
<tr>
<td>Idaho</td>
<td>Liability and Damages</td>
<td>Before</td>
<td>3-Joint</td>
<td>None</td>
<td>Yes</td>
<td>No</td>
<td>Informal</td>
<td>No No</td>
</tr>
<tr>
<td>Indiana</td>
<td>Liability only</td>
<td>Before</td>
<td>3-Expert</td>
<td>$25/day plus expenses</td>
<td>Yes</td>
<td>Yes</td>
<td>Informal</td>
<td>Yes No</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Liability only</td>
<td>Before</td>
<td>3-Expert</td>
<td>$25/day</td>
<td>Yes</td>
<td>No</td>
<td>Informal</td>
<td>Yes No</td>
</tr>
<tr>
<td>Maryland</td>
<td>Liability and Damages</td>
<td>Before</td>
<td>3-Joint</td>
<td>-1</td>
<td>No</td>
<td>No</td>
<td>Informal</td>
<td>Yes Yes</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Liability only</td>
<td>After</td>
<td>3-Joint</td>
<td>$50/day</td>
<td>No</td>
<td>No</td>
<td>Informal</td>
<td>Yes No</td>
</tr>
<tr>
<td>Montana</td>
<td>Liability only</td>
<td>Before</td>
<td>6-Joint</td>
<td>$40/hour plus expenses</td>
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<td>No</td>
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<td>Before</td>
<td>3-Expert</td>
<td>$30/day plus expenses</td>
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<td>No</td>
<td>Informal</td>
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<tr>
<td>Nevada</td>
<td>Liability only</td>
<td>Before</td>
<td>6-Joint</td>
<td>-1</td>
<td>Yes</td>
<td>No</td>
<td>Informal</td>
<td>Yes No</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Liability only</td>
<td>After</td>
<td>3-Joint</td>
<td>-1</td>
<td>Yes</td>
<td>No</td>
<td>Informal</td>
<td>Yes No</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Liability only</td>
<td>Before</td>
<td>6-Joint</td>
<td>-1</td>
<td>Yes</td>
<td>No</td>
<td>Informal</td>
<td>Yes No</td>
</tr>
<tr>
<td>New York</td>
<td>Liability only</td>
<td>After</td>
<td>3-Joint</td>
<td>-1</td>
<td>No</td>
<td>No</td>
<td>Informal</td>
<td>Yes No</td>
</tr>
<tr>
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<td>Liability only</td>
<td>Before</td>
<td>5-Joint</td>
<td>$50/day plus expenses</td>
<td>No</td>
<td>No</td>
<td>Informal</td>
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<td></td>
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<td>After</td>
<td>3-Joint</td>
<td>Varies by County</td>
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<td>Formal</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>Rhode Island</td>
<td>Liability and Damages</td>
<td>After</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Liability and Damages</td>
<td>After</td>
<td>3-Joint</td>
<td>$50/day plus expenses</td>
<td>Yes</td>
<td>Informal</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
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<td>Liability and Damages</td>
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<td>5-Joint</td>
<td>$75/day plus expenses</td>
<td>Yes</td>
<td>Formal</td>
<td>No</td>
<td>Possible</td>
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</table>

NOTE: Programs declared unconstitutional are not included in this table.

a Judge, physician, attorney.

b Someone with personal injury claims experience, physician, attorney.

c If liability finding is unanimous.

d Layperson, physician, attorney.

e Attorney non-voting chairman.

f Not specified in program authorization.

g Attorneys and physicians.

h Master, physician, attorney.

i 2 physicians, 2 laymen, 1 attorney; or 3 attorneys, a physician, and petit juror.

j Information not available.
professionals. (These are labeled “expert” in Table IV.4.) These programs, two of which provide for a nonvoting attorney as chairman of the panel, are limited to findings of liability only. The 15 other states provide for joint panels selected from the medical and legal professions. The composition of these panels varies somewhat; about half include lay persons and the other half include a judge or special master. A typical configuration consists of one lay person, one attorney, and one physician, but some panels contain as many as six members (e.g., three attorneys and three physicians).

The argument for small panels is that they are less burdensome to the medical and legal communities who serve on them, and are easier to convene and to coordinate. This is important in view of certain recruitment problems. Some statutes require a medical panelist from the same specialty area or from the same locality as the defendant. When a rare specialty or a small community is involved, it can be difficult to find someone eligible or willing to serve. Medical societies have had to generate lists of specialists in all areas, and the community boundaries have sometimes had to be extended.

Other recruitment problems involve plaintiffs’ attorneys who do not favor the panels and are unwilling to participate for the small compensation offered by most programs. Both physicians and attorneys are hesitant to participate when they face the threat of being called to testify at a subsequent trial. A few programs originally provided for panelists to be called at trial so that prevailing plaintiffs would have the benefit of an expert witness free of charge; some have since changed this provision or provided for other nonmember expert witnesses because panelists complained about having to testify. Twelve of the 19 programs currently implemented provide that panel members shall have no role at a later trial.

The composition of the panels is related to their main objectives. Joint panels are claimed to be more effective because complex, difficult cases may require both medical and legal expertise to evaluate. Lay people are sometimes included on the panel to serve as watchdogs to prevent cronyism between the two professions. And including a judge apparently assists in settling the case at the panel and provides an authoritative, moderating influence on the attorney and physician members (Thomas, 1980, p. 982).

**Type of Hearing.** In some states the hearing is an informal, unrecorded proceeding with relaxed rules of evidence lasting no longer than a few hours. Some panels consider only written evidence to keep the proceeding brief and informal. In these cases the scope is usually

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10 This is true in Indiana, Louisiana, Nebraska, and North Dakota. But these programs provide that the panels may be convened in order to respond to the questions of either party prior to the issuance of findings.
limited to findings of liability, and the panel is oriented toward
settlement of the case. Settlement is an implicit objective of quite a few
panels, but is usually encouraged at the discretion of the individual
panelists.

Although greater formality is costlier, it may better ensure that the
panel findings will meet legal standards. It may also, however, result
in lengthy discovery requirements, cumbersome trial-like proceedings
with attendant delays, and duplication of effort. One official told us that
preparing for the panel hearing was as difficult and time-consuming as
preparing for trial, and that attorneys felt the panels doubled their
work. The five states that hold formal panel hearings all reported
difficulties and criticisms of their programs.

Disincentives to Appeal. Medical malpractice screening panels
must permanently dispose of cases if real savings to the court and
litigants are to be achieved. To encourage parties to accept the panel’s
findings and settle their disputes, all but four programs provide some
disincentive to pursuing the case to trial.

The admissibility of the panel’s finding at trial can operate as a
disincentive if the loser is taking the case to trial. While admissibility
may be an incentive for the winner to go on to trial, it is at the same
time an incentive for the loser to make a good settlement offer. In some
states the finding is admissible only if it is unanimous. In other states
a majority finding is admissible, but the jury is instructed that it should
give no more weight to the finding than it does to any other evidence.
To be effective, the disincentive must be concrete, but to avoid constitu-
tional challenge, it must not be construed as prejudicing the jury’s
decision or prohibiting the party’s right to trial.

Another type of disincentive imposes financial penalties on claim-
ants who go on to trial but do not obtain a more favorable award. These,
similar to the financial disincentives of judicial arbitration, are not
very great in most cases and are not employed in most states. Maryland
and Massachusetts assign the costs of trial to the party requesting trial
if he or she does not prevail. In several other states the authorizing
legislation allows the court to assign panel and trial costs.

Summary

Mandatory malpractice screening programs have been authorized
in 23 states, but have since been declared unconstitutional in 4 of them.
In states where they are still operating, some (e.g., in Massachusetts
and New Jersey) are reported to be efficiently processing cases and
disposing of them at the hearing stage. Other states reported serious
backlogs and administrative problems, and a few (e.g., Hawaii and
Montana) reported very little demand for the panels because of the
small number of malpractice cases filed since the programs began. In
some states statutory amendments and changes in procedure have been introduced to address specific problems, and administrators of these programs are optimistic that such changes will improve the efficiency of the panels over time. But constitutional challenges continue to be made and may yet prove to be insurmountable in jurisdictions where the process is not functioning expeditiously.

Screening panels were generally established without any provision for evaluation, and perhaps as a result, statistical data on the operation of the panels and their impact on the settlement of cases are not collected in many states and are incomplete in most others. Although the variation in procedures provides a good opportunity for evaluating the effects of a number of factors, no such comparative analysis has been conducted. Nor has there been an empirical evaluation of the panels' effects on medical liability insurance premiums.

SETTLEMENT PROGRAMS

About 90 percent of civil cases filed in court are disposed of without trial, usually through private settlement during the pretrial stages of litigation. In fact, pretrial settlement is probably the objective of most attorneys even as they file a case with the court. This settlement process is often informal and is carried on outside the court between the parties and their attorneys, although in many jurisdictions it has been common practice for attorneys to occasionally ask judges to assist either by merely providing a neutral meeting place for the parties, or by actively aiding negotiation. Decisions about which cases are negotiated and the timing of settlement are usually left to the parties and their attorneys.

Heavy caseloads and trial backlogs make early settlement of cases an attractive option for courts seeking to reduce delay. Knowing that many civil cases are candidates for pretrial settlement, and having a tradition of informal involvement with settlement negotiations, some courts have instituted their own formal settlement programs. In this type of dispute resolution, the court provides mediation as the alternative to adjudication of the dispute. We distinguish these formal, court-sponsored programs from the private settlement process, which plays a central role in the pretrial stage of most litigation.16

16Other settlement devices not reported in use by the court officials we interviewed include mini- or mock trials, and economic sanctions for failure to negotiate a settlement.
In the United States, the pretrial conference reportedly was first instituted by a judge of the Circuit Court of Wayne County, Michigan, in about 1930 (Millar, 1952, pp. 230-231). The practice proved so successful in expediting courtroom proceedings and clearing dockets that during the late 1930s it was copied in Suffolk County (Boston), Massachusetts, Hamilton County (Cincinnati), Ohio, and Los Angeles County. In 1938 it was incorporated as Rule 16 of the Federal Rules of Civil Procedure.

The ostensible purpose of the pretrial conference is to formulate the issues to be tried: The case law that deals with pretrial makes references to simplifying and narrowing the issues to be tried; eliminating the uncontroverted issues and crystallizing the remaining claims and defenses; and eliminating surprise that could delay the trial.

Over the years, however, the pretrial conference has also served in many courts as an opportunity for negotiation and settlement of the case. Settlement tended to become a by-product of the conference simply because the conference provided an opportunity for the opposing parties to get together. In other courts, settlement resulted from efforts by the convening judge to reach a compromise between the parties. Because most rules instituting pretrial conferences authorize consideration of "such other matters as may aid in the disposition of the action" (Federal Rules: Civil Procedure, 1974), judges could legitimately find settlement negotiation within the scope of the conference and their role in it. Other judges believed that involvement in settlement was totally inappropriate for the judiciary and excluded it from pretrial hearings. This divergence of opinion explains why court settlement practices have often been informal, and conducted at the discretion of the individual judge instead of explicitly incorporated into the pretrial conference. However, some courts over the years began to explicitly treat settlement as an equal or primary purpose of the pretrial conference.

In addition to modifying pretrial conference procedures, courts have adopted other settlement mechanisms, including: mediation, which combines features of the pretrial settlement conference and judicial arbitration; mock trials, designed to give the attorneys an opportunity to present their case and obtain an objective evaluation of its probable outcome; court-ordered conferences between opposing counsel (without a judge), for the purpose of good-faith settlement negotiation; court-ordered conferences between opposing counsel before a panel of neutral attorneys who provide objective evaluation and encourage a settlement agreement; and incentives to early good-faith settlement
negotiation in the form of fees and penalties if the trial outcome is not
more favorable than the pretrial offer/demand.17

In some courts, settlement is a by-product of other procedures in
tended to expedite the pretrial process. It may result from conferences
convened for the purpose of scheduling discovery and subsequent stages
of the pretrial process, or from enforcement of strict continuance poli-
cies that compel attorneys to settle cases when they are not prepared
for trial.18 Most courts are keenly aware of the relationship between
these procedures and settlements.

In the remainder of this section we describe only mechanisms
specifically intended to achieve settlement of disputes. The procedure
most widely used is the pretrial settlement conference.19

Typical Settlement Conferences

A typical settlement conference is held between opposing counsel
authorized to make agreements for the parties, and a judge assigned to
pretrial conferences or to the particular case. It is convened at the
discretion of the judge or at the request of one of the parties. In some
courts, attorneys are required to submit a pretrial statement of issues
before the conference, and a pretrial order regarding the outcome is
issued by the court after the conference. The conference may be held
early in the pretrial phase of the case or just before trial is scheduled.
If an agreement is reached at the conference, the dispute is terminated;
if not, it is usually assigned a date and proceeds eventually to trial.

At the conference, each side briefly presents its case to the judge.
The settlement techniques vary from judge to judge, and, with any
given judge, from case to case. Sometimes a judge places a value on the
case and tries to bring the two parties into agreement over it. In other
cases, the judge will only point out to each side the strength of the
opposition's case and the weaknesses of its own. But the key feature of

17Rule 68 in the Federal Rules of Civil Procedure (also incorporated in a number of
states' court rules) is the source of several similar proposals of this nature, but none of
the court officials we interviewed mentioned this rule or any similar procedure as one
of their settlement mechanisms, although a number of proposals (e.g., California's "Set-
tlement Offer and Sanctions" program) have been introduced in state legislatures in the
last year. A proposal for such a settlement procedure was made to the ABA Action
Commission to Reduce Court Delay. The procedure requires an offer/demand relatively
early in the pretrial process. If the two do not overlap, the case is sent for a period of
mediation. If it eventually goes to trial, the trial costs (and perhaps attorneys' fees) will
be assigned to the party whose position is not improved. For a detailed description of this
procedure, see Nejelaki (1979).
18See discussion in Section II.
19Use of settlement conferences is informal local court practice in Alabama, Hawaii,
Louisiana, Maryland, Montana, Nebraska, North Dakota, and Texas.
the conference is informality and the atmosphere of compromise generated by the judge or other third party.

Pattern of Adoption

In many jurisdictions, settlement conferences are used by one or more judges but are not required by formal policy or rule of the court.²⁰ In others, settlement is reported as a purpose of the pretrial conference but is not explicitly referred to in the court rule.²¹ In the ten states listed in Table IV.5, a formal court order or court rule either authorizes settlement conferences or specifies settlement as one of the main purposes of the pretrial conference, for some or all cases. Twenty-two of the metropolitan courts in our sample reported using formally authorized settlement conferences by at least some judges. (For a list of these courts, see Table G.6 in Appendix G.)

As shown in Table IV.5, most of these conferences are known as pretrial conferences and reflect modifications made to the pretrial conference rule modeled on the Federal Rules of Civil Procedure.²² Only Pennsylvania has authorized the conferences by court order. Table IV.5 also shows the year in which settlement conferences were first authorized in each state, from as early as 1940 in Connecticut to as recently as 1979 by court order in Pennsylvania. Los Angeles has had a settlement conference policy for over 20 years, while the District of Columbia instituted settlement conferences for all cases as recently as 1980.

Connecticut, Michigan, Oklahoma, and Pennsylvania have active programs in all courts of general jurisdiction. In California, most courts use settlement conferences, but in Kansas and Massachusetts only a few do. Practice varies widely at the local level in all states.

An alternative settlement program does not use judges as mediators, but requires opposing counsel to negotiate themselves or with neutral attorney mediators. In Alaska, Idaho, Indiana, Maine, North Carolina, and Rhode Island, courts require opposing counsel to hold a conference on the possibility of settlement before trial. Sometimes this requirement is in addition to a regular pretrial conference, and sometimes it is in place of it. Throughout Connecticut, settlement confer-

²⁰Use of settlement conferences is informal local court practice in Alabama, Hawaii, Louisiana, Maryland, Montana, Nebraska, North Dakota, and Texas.
²¹Most of the courts in these states (Alaska, Illinois, New Mexico, and Wisconsin) include settlement within the scope of their pretrial conference. In addition, seven other states reported local court rules authorizing settlement conferences.
²²Most of these courts still include the purposes of the original pretrial conference in their current rule.
<table>
<thead>
<tr>
<th>State</th>
<th>Title</th>
<th>Authorization</th>
<th>Date Authorized</th>
<th>Current Scope</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>Settlement conference</td>
<td>California Rules of Court §213</td>
<td>January 1957</td>
<td>Most courts*</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Pretrial conference</td>
<td>Connecticut Practice Book §265</td>
<td>January 1940</td>
<td>All courts</td>
</tr>
<tr>
<td>Kansas</td>
<td>Pretrial conference</td>
<td>Kansas State Annotated Rules of Supreme Court §140</td>
<td>_ b</td>
<td>Some courts</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Conciliation</td>
<td>Massachusetts Rules of Civil and Appellate Procedure Rule 16</td>
<td>July 1974</td>
<td>Some courts</td>
</tr>
<tr>
<td>Michigan</td>
<td>Pretrial conference</td>
<td>General Court Rules, Rule 301</td>
<td>January 1963</td>
<td>All courts^</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Pretrial conference</td>
<td>New Hampshire Revised Statutes. Superior Court Rules §491 App. Rule 51</td>
<td>_ b</td>
<td>Some courts</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Pretrial conference</td>
<td>Civil Practice Rules, Superior Court §4:25</td>
<td>September 1953</td>
<td>_ b</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Pretrial conference</td>
<td>Rules for District Court, Rule 5</td>
<td>1973</td>
<td>All courts</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Pretrial settlement conference</td>
<td>Supreme Court Order</td>
<td>November 1979</td>
<td>All courts</td>
</tr>
</tbody>
</table>

*State rule authorizes local court rules.

^Data not available.

^Except Wayne County which has a separate mediation program.

^Mail verification not obtained.
ences are arranged between opposing counsel before a panel of neutral attorneys. The general jurisdiction courts in Los Angeles and Miami have experimental attorney settlement conference programs. This procedure is also used in the Newark (New Jersey) court and a similar procedure is employed in Detroit. The Detroit program, known as mediation, involves an informal hearing of the dispute before a panel of volunteer attorneys who attempt to mediate and name a compromise award. The program includes a provision for disincentives to appeal the case to trial de novo. 23

Another procedure, known as a "mock trial" or "mini-trial," brings opposing counsel together to present their cases before the litigants and a neutral third party having judicial and substantive expertise in the matter under dispute. The litigants themselves negotiate after hearing the case, and if they are not successful the third party gives an opinion. The decision can be binding or nonbinding, depending on how the parties set up the procedure. Mini-trials are similar to private arbitration, and are initiated primarily by litigants involved in complex commercial cases (Green, Monks, and Olson, 1978, pp. 493-511).

Features of Settlement Programs

The key features of settlement programs—the eligibility of cases for the procedure, the timing of the conference, and the personnel involved—are described below. Table IV.6 shows the general characteristics of formal settlement conference programs in the ten states that have implemented them, although there may be some variation at the local court level.

Mandatory or Discretionary Application. In three states settlement conferences are mandatory for all civil money suits; in two states they are mandatory for all cases requesting jury trial; and in four they are completely discretionary. Twelve of the metropolitan courts in our sample have rules or court directives authorizing mandatory settlement conferences; ten provide for discretionary settlement conferences. (For a list of these courts, see Table G.6, Appendix G.)

In choosing between a mandatory or discretionary settlement program, the court must decide which would be more efficient given the court's resources. To be effective the program has to divert more cases than the judges could try in the time they spend holding settlement conferences.

23Mediation is a favored settlement mechanism for civil cases in the circuit courts in Michigan and has been used in Wayne County (Detroit) since 1971. For a description of the program, see Miller (1973, pp. 290-294).
Table IV.6
FEATURES OF FORMAL SETTLEMENT CONFERENCES

<table>
<thead>
<tr>
<th>State</th>
<th>Application</th>
<th>Timing of Assignment</th>
<th>Third Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>Discretionary&lt;sup&gt;a&lt;/sup&gt;</td>
<td>Before trial date</td>
<td>Judge</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Discretionary&lt;sup&gt;b&lt;/sup&gt;</td>
<td>Before trial date</td>
<td>Judge or his designee</td>
</tr>
<tr>
<td>Iowa</td>
<td>Discretionary&lt;sup&gt;b&lt;/sup&gt;</td>
<td>Before trial date</td>
<td>Judge</td>
</tr>
<tr>
<td>Kansas</td>
<td>Discretionary&lt;sup&gt;a&lt;/sup&gt;</td>
<td>After trial date</td>
<td>Judge</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Discretionary&lt;sup&gt;a&lt;/sup&gt;</td>
<td>After trial date</td>
<td>Judge or master</td>
</tr>
<tr>
<td>Michigan</td>
<td>Mandatory</td>
<td>Before trial date</td>
<td>Judge</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Discretionary&lt;sup&gt;b&lt;/sup&gt;</td>
<td>Before trial date</td>
<td>Judge</td>
</tr>
<tr>
<td>New Jersey&lt;sup&gt;d&lt;/sup&gt;</td>
<td>Discretionary&lt;sup&gt;b&lt;/sup&gt;</td>
<td>Before trial date</td>
<td>Judge</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Mandatory&lt;sup&gt;d&lt;/sup&gt;</td>
<td>Before trial date</td>
<td>Judge</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Mandatory</td>
<td>Before trial date</td>
<td>Judge</td>
</tr>
</tbody>
</table>

<sup>a</sup>Some local courts in these states have mandatory settlement conference.
<sup>b</sup>Mandatory for cases requesting jury trial.
<sup>c</sup>Money and property cases only, discretionary for all others.
<sup>d</sup>Mail verification not obtained.

The arguments for mandatory settlement conferences are that all cases are amenable to settlement if an opportunity can be provided for negotiation between the parties, and that the number of cases actually disposed of is worth the extra investment of court resources. Courts with discretionary programs usually focus on the cases requesting a settlement conference, although they may also assign certain cases that would otherwise require a lengthy trial to resolve. By focusing on cases likely to settle, courts apply their resources only to good candidates for disposition and leave the remaining cases to proceed at their own pace toward trial. The only empirical study of the pretrial conference supports this approach, showing that the rate of settlement for cases ordered to pretrial conference was no higher than the rate for cases requesting a conference. The findings also demonstrated that the mandatory pretrial conference did not reduce the amount of time required for trial compared to the same elective group (Roseberg, 1964, pp. 45-50).

Some courts make conferences mandatory for certain categories of cases and discretionary for others. In Connecticut the conference is mandatory for all cases requesting jury trial; Washington, D.C. has the same policy and proposes to include all cases over $10,000.

**Timing of Assignment to Settlement Conference.** In deciding
when to assign cases to pretrial conferences, the court's intention is to choose the point at which cases are most amenable to settlement. The courts must decide not only when in the pretrial process to assign cases, but whether trial dates should be established before, at, or after conferences.

Many court officials argue that providing an early opportunity for the opposing counsel to get together results in early settlement. These courts schedule settlement conferences for shortly after the filing of the complaint and answer. If the case is not settled at the conference, time schedules for discovery can be set and future conferences can be scheduled. The court's continued intervention serves as an incentive for the attorneys to avoid delaying tactics and reach a settlement. (For a description of discovery conferences, see Section III.) These tactics may, of course, work against the court. Intervening too early may cause court resources to be wasted on cases that would eventually settle on their own.

Other courts, believing that meaningful negotiations cannot take place until the attorneys have completed preparation of their cases, schedule settlement conferences soon after the close of discovery. Before the conference is held, some courts require a pretrial statement from the attorneys, forcing them to spend at least some time preparing the case for the conference. As a further incentive to come to an agreement, the court may set a trial date at this settlement conference.

Believing that "nothing settles cases like setting them for trial" (Judicial Conference, Handbook, 1964, p. 271), many courts hold settlement conferences right after assigning trial dates. Faced with an impending trial date, attorneys usually negotiate for settlement. Court officials reported that this is a real incentive only if the attorneys know that the trial date is firm. If the court does not control the calendar or scheduling, or does not have a firm continuance policy, it will have difficulty using the trial date as an incentive to settle.

As shown in Table IV.6, most courts hold the settlement conference before the trial date is assigned, but most of these assign the trial date at the time of the conference, thus providing the judge with additional leverage to encourage settlement at the conference.

Choice of Third Party. Although most settlement conferences are held before a judge (see Table IV.6), new programs that rely on attorneys as the third party are coming into use. A few courts (e.g., Connecticut superior courts, and the Newark Superior Court) are ordering settlement conferences before panels of attorneys or court counsel rather than the judges. Six other states require opposing counsel to discuss settlement on their own before, or instead of, involving the judge.

The effectiveness of the mediator depends on his or her negotiating
skill, which will obviously vary. When attorneys are used, courts may try to recruit only good negotiators to hold the conferences, but usually have to rely on volunteers whose skills vary. If judges are used and the court has an individual calendar system, the results vary from judge to judge. But if the court has a master calendar, it can assign the best negotiators to settlement conferences. A team of specialist settlement judges has been recently assigned to conduct all settlement conferences in the Los Angeles Superior Court.

In spite of differences among individuals, it is often argued that judges are the best choice to convene settlement conferences because of the respect they command from litigants and because of their objectivity. The main arguments against using judges come from judges themselves, who believe that it is inappropriate for them to intervene in the settlement process and that they will be accused of bias if they involve themselves in negotiations. For this reason, when judges convene settlement conferences, they sometimes avoid taking cases they later will have to try.

Court managers often make a different argument about the use of judges as settlement negotiators that has to do with whether it is efficient to use them in settlement if this results, as it reportedly does in many courts, in reducing the time they have for adjudication. We discuss efficiency issues of this nature more fully below.

SUMMARY

In this section we reviewed the three different approaches courts have taken to diverting cases away from trial: judicial arbitration, mandatory medical malpractice screening, and settlement programs. Each of these approaches attempts to provide an alternative early disposition mechanism for certain types of cases. Judicial arbitration applies to cases below a certain dollar limit; screening panels apply only to medical malpractice cases; and settlement conferences apply usually to all cases before the court.

The three different diversion efforts are distinguished by a number of characteristics. First, the amount of court control involved varies among the programs. Some screening panels are administered entirely outside the court system; most settlement conferences are held as part of the court's pretrial case processing. Judicial arbitration and screening panels usually use extrajudicial personnel in their proceedings, while settlement conferences are usually convened by a judge. The settlement conference is the most informal diversion, often convened only at the discretion of the trial judge. At the opposite extreme some
malpractice screening programs provide that a case cannot be filed with the court until the case has been screened, and almost all the panels are authorized by state law. Finally, the extent of implementation also varies. Only 10 states formally authorize settlement conferences, but most others use them to at least a limited degree. Only 9 states have judicial arbitration programs, however, and although 23 states have authorized mandatory medical malpractice screening, some programs are rarely invoked, some have been declared unconstitutional, and others are difficult to administer.

Like the management efforts discussed in Section III, diversion efforts share a number of common characteristics, the most significant of which is that they all provide an alternative to formal adjudication of disputes. As is the case with management efforts, the nature and characteristics of diversion efforts also raise certain efficiency and equity policy questions. For diversion efforts, these questions are related to the net costs and benefits, to the court system and its litigants, of administering the diversion, and to the appropriateness of diversion efforts as an alternative to court adjudication.

**Diversion Efforts and Efficiency Outcomes**

**Court Resources.** Several factors determine to what extent diversion programs drain court resources. Sometimes only clerical time for scheduling hearings is involved, but often judicial time enters in, for example in a settlement conference or in some malpractice screening panels. Some programs also use courtroom space and other facilities. For these reasons, a diversion program may result in reduced court capacity to handle cases ready for trial, whether or not diverted cases are speeded up.

Choosing which cases to divert is crucial to minimizing court expenditures. If a high rate of diverted cases returns to court for eventual disposition, the program will clearly cost more than it will save. But most court officials we spoke with feel that a greater number of cases are resolved by the diversion program than go on to trial or to later settlement. There are few data, however, to support this belief.

One important question that must be addressed in figuring the real cost of a diversion program is whether a significant number of cases would have settled on their own without drawing on the resources of the court. Those who believe many cases would indeed settle on their own argue that cases should be assigned to programs well into the pretrial process, because if the case is assigned very early, the parties may not have had time to negotiate to obtain a private settlement. On
the other hand, when assignment comes late, both the litigants and the courts have already invested considerable time and money.

Procedures Management. As noted above, some diversion programs, mainly settlement programs and arbitration, require the courts to provide facilities and personnel for their operation, and each of these programs is subject to some of the same delay and congestion problems as the main court caseload. For instance, parties may obtain numerous continuances to prepare for the diversion procedure, or mediators may be difficult to convene and to monitor. In short, considerable court management is required to keep these procedures operating efficiently. Such requirements may only add to the management problems already present in a court. On the other hand, if little court involvement is required and the diversion program is structured simply and is easy to operate, it may expedite the court's caseload.

Specialization of Procedures. Unlike management strategies, most diversion programs apply only to certain cases, either those requesting the procedure (e.g., discretionary settlement conferences) or those identified by the court or the legislature as appropriate for the procedure (e.g., all cases less than $15,000 in value or all medical malpractice cases). Identifying the right cases for the program thus becomes essential. Court officials must decide whether to keep programs voluntary or mandate cases of a certain type or those below a certain amount of money. In the latter situation they must decide what dollar cutoff point will render a reasonable portion of the court's caseload eligible for the program.

In short, the efficiency benefits of a diversion program in terms of reduced delay must be measured both for diverted cases and cases remaining in the system. And these benefits must be weighed against administration costs, taking into consideration cases that are returned to the normal system and cases that are diverted but that would have settled on their own.

Diversion Efforts and Equity Outcomes

A second general issue concerning all diversion programs is their effect on the equity of outcomes for the litigants and the general appropriateness of diversion programs as an alternative to trial.

Outcomes for Litigants. Diversion efforts should reduce court delay by reducing the number of cases going to trial, but the outcomes in the diverted cases should remain unchanged by the alternative disposition mechanism. A fair hearing and just disposition should still be the result for the litigants. Settlers, mediators, arbitrators, and screeners are expected to provide the same fairness and objectivity as has
always been attributed to our judges. Very little evidence is available on the outcome of cases sent to diversion versus those resolved in court by trial, or private settlement, and yet in each of the diversion programs studied such questions are raised. In the case of judicial arbitration and mandatory malpractice screening, constitutional challenges have been brought against some of the programs, on the grounds of violation of due process and equal protection rights, for example. The constitutional debate about these programs continues, both on their face and in practice.

Additional questions have been raised about the effect of diversion programs on access to the courts, and whether more or fewer legitimate claims can be anticipated in courts where diversion programs are operating. Questions have also been raised about the quality of representation that litigants receive when their cases are prepared and presented to an alternative forum.

Diverting Cases from Trial. Aside from the questions about the impact of diversion on the results of cases, debate also continues about whether the courts owe a true "day in court" to all litigants. This question underlies much of the constitutional debate about right to jury trial. What is the duty of the court to its clients, both the individual litigants and the general public? And moreover, what expectations does the general public have of the courts' duty to resolve citizens' disputes?

By diverting cases from trial, more cases are resolved without resort to precedent and without public knowledge of the resolution or the process by which it is obtained. Moreover, as cases are resolved outside the purview of the court, the court is less able to oversee the way in which cases are heard and resolved. At the same time it is certainly true that very few cases are resolved under the official eyes of the court in trial anyway and that those tried to verdict wait many years in some courts to reach trial. It appears likely that unless data begin to indicate a negative impact on the quality of outcomes, more and more types of cases will be diverted from trial in the belief that an alternative method of disposition serves justice better than delay, which approaches being no justice at all.

It is on this critical question that we have the least data for evaluation. We do not know what, if any, differences exist in outcomes between cases resolved using a diversion program and cases tried or privately settled, and we do not know how satisfied litigants are with the alternative forums for disposition of their cases, given the tradeoffs they must make.
V. CONCLUSION

Across the nation, we found state courts making a variety of efforts to reduce court congestion and pretrial delay for civil cases. The courts involved include systems with serious delay problems, as well as ones that have avoided such problems; courts with highly centralized administrative systems and very decentralized ones; activist courts and traditional ones with laissez faire attitudes.

The widespread efforts to tackle court congestion reflect a growing tendency among courts to assume responsibility for setting the pace of litigation, rather than leaving this to attorneys and their clients. State courts have adopted two kinds of procedures to reduce pretrial delay:

1. Procedures intended to improve the management of cases during the pretrial stage, such as more efficient resource management, expedited pretrial procedures, and insistence on firm trial dates.
2. Procedures intended to reduce the number of cases in the system by diverting certain classes of cases from trial to alternative forums such as judicial arbitration, screening panels, and settlement conferences.

While the problems addressed by the courts share certain features, they also reflect individual differences in court structures, personnel, and caseload characteristics. Not surprisingly, courts have responded to these differences by devising numerous variations on the two basic approaches to expediting civil cases. Forty-three states are now using various procedures to improve management of court resources. Twenty-nine states have procedures intended to expedite pretrial procedures. Twenty-one states use a number of procedures to establish and ensure firm and certain trial dates. Even among diversion procedures, where there are only three real alternatives, there is an enormous amount of variety in the specific features of the arbitration, screening panel, and settlement programs adopted.

This variety provides an excellent opportunity to learn about why certain procedures fail while others succeed, about the costs of implementing each of them, and about their varying impacts on different types of litigants. Despite several years of experimentation and trial, however, little is known about the conditions under which certain procedures would be effective. For almost every procedure, one can find some court officials who believe that it is a valuable tool for combating congestion and delay, and others who believe it is ineffective. Courts
thus have few guidelines to follow in planning and designing new
efforts to deal with these problems.

While conducting our inventory, we frequently served as a "com-
munication link" among court administrators. Court officials are so
involved in the day to day operations of their own courts that they have
little time for surveying what other courts are doing, even though they
might be able to profit from such interchanges. Regular exchanges of
information could help courts contemplating new programs or improve-
ments in existing ones.

Increased exchange of information among courts, however, cannot
substitute for systematic empirical research on the costs and benefits
of different procedures. Such research has generally been lacking for
several reasons.

First, research costs money. Courts believe their problems are
caused to a great extent by inadequate resources, and are therefore
understandably reluctant to commit resources to nonoperational tasks.

Second, research takes time. Often it takes a year or more before
the results of a new procedure are observable. Without evidence that
a procedure is working, a court may not be able to sustain support for
it for such a lengthy period.

Third, measurement of the results of instituting a new procedure
usually requires comparison with an unchanged "base" state. This
often requires an experimental design in which only a randomly select-
ed subset of cases are subjected to the new procedures. But because the
courts are public institutions subject to state and federal constitutional
provisions, such experimentation may bring charges of violating due
process or equal protection standards. It also poses political problems:
Adoption of a new procedure requires developing a constituency for
change, which may be more difficult to assemble when uncertainty
about the effectiveness of the procedure is made explicit.

Fourth, because there are differences in statutory and case law
across states, as well as differences in characteristics of legal commu-
nities, many court officials believe their courts are unique. Differences
in population across the states, different political environments, and
varying court structures also make it difficult for court officials to
compare different jurisdictions. Thus there is a tendency to reject the
notion of conducting comparative research across courts, even though
such research might help to create an experimental design framework.

And finally, the tradition of frequently changing court leadership
may make research more difficult. To counter resource and political
problems, strong and sustained leadership is required. Most courts,
however, change leaders yearly, or every few years, because presiding
judges are either elected for short terms, or the position is rotated
among the judges. Not surprisingly, some judges are more aware of research needs than others.

In addition to cost-benefit assessment of specific expediting procedures, there is a growing need to confront other critical issues raised by such court efforts. What is the proper role of the court in dispute settlement? Are there tradeoffs between efficiency in dispute resolution and the equity of dispute outcomes, and if so, what are they? At what point does court intervention to expedite litigation become court management of case development?

Basic research about the characteristics of disputes that enter the court, the sources of delay in resolving these disputes, and the costs and benefits of delay for both litigants and the courts can contribute to the continuing policy debate on these issues.
Appendix A

STATE COURT SYSTEMS
INCLUDED IN INVENTORY

Alabama

*Circuit Courts*
Administrative Office of the Courts
817 South Court Street
Montgomery, Alabama 36130

Alaska

*Superior Courts*
Administrative Director of Courts
Alaska Court System
303 K Street
Anchorage, Alaska 99501

Arizona

*Superior Courts*
Administrative Director of the Courts
State Capitol
209 Southwest Wing
1700 West Washington Street
Phoenix, Arizona 85007

Arkansas

*Circuit Courts*
Executive Secretary
Judicial Court
Justice Building
Capitol Grounds
Little Rock, Arkansas 72201

California

*Superior Courts*
Director
Administrative Office of the Courts
601 McAllister Street
San Francisco, Calif.

Colorado

*District Courts*
State Court Administrator
Judicial Department
215 Colorado State Judicial Building
2 East 14th Avenue
Denver, Colorado 80203

Connecticut

*Superior Courts*
Deputy Chief Court Administrator
Supreme Court
231 Capitol Avenue
P.O. Drawer N, Station A
Hartford, Connecticut 06106

Delaware

*Superior Courts*
Superior Court of Newcastle County
2nd Floor Judge's Chambers
Public Building
Wilmington, Delaware 19801
Florida
Circuit Courts
State Court Administrator
Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

Indiana
Superior Courts
State Court Administrator
Supreme Court of Indiana
State House, Room 323
Indianapolis, Indiana 46204

Georgia
Superior Courts
Director
Administrative Office of the Courts
500 Georgia Justice Center
84 Peachtree Street, N.W.
Atlanta, Georgia 30345

Iowa
District Courts
Office of Court Administration
Supreme Court
Capitol Building
10th and Grand
Des Moines, Iowa 50319

Hawaii
Circuit Courts
Administrative Director of Courts
Supreme Court
Judicial Building
P.O. Box 2560
Honolulu, Hawaii 96813

Kansas
District Courts
Judicial Administrator
Supreme Court
Kansas Judicial Center
301 West 10th Street
Topeka, Kansas 66612

Idaho
District Courts
Director
Administrative Office of the Courts
Supreme Court Building
451 West State Street
Boise, Idaho 83702

Kentucky
Circuit Courts
Administrative Office of the Courts
Bush Building
403 Wapping Street
Frankfort, Kentucky 40601

Illinois
Circuit Courts
Deputy Director
Administrative Office of Illinois Courts
Room 2010
30 N. Michigan Avenue
Chicago, Illinois 60602

Louisiana
District Courts
Deputy Judicial Administrator
109 Supreme Court Building
301 Loyola Avenue
New Orleans, Louisiana 70112
Maine
Superior Courts
State Court Administrator
Supreme Judicial Court
P.O. Box 4820 D.T.S.
Portland, Maine 04112

Maryland
Circuit Courts
State Court Administrator
Administrative Office of the Courts
Court of Appeals Building
361 Rowe Boulevard
P.O. Box 431
Annapolis, Maryland 21404

Massachusetts
Superior Courts
Acting Executive Secretary
Supreme Judicial Court
1300 Courthouse
Boston, Massachusetts 02108

Michigan
Circuit Courts
Court Administrator
State Court
Administration Office
320 North Washington Street
P.O. Box 30048
Lansing, Michigan 48909

Minnesota
District Courts
State Court Administrator
Supreme Court of Minnesota
William Mitchell Law Center
40 North Milton Street
Suite 300
St. Paul, Minnesota 55104

Mississippi
Circuit Courts
Executive Assistant
Supreme Court
Carroll Gartin Justice Bldg.
450 High Street
Jackson, Mississippi 39205

Missouri
Circuit Courts
Director of Planning
Training & Research
Supreme Court Building
Jefferson City, Missouri 65101

Montana
District Courts
Court Administrator
Supreme Court
300 Capitol Building
Helena, Montana 59601

Nebraska
District Courts
Court Administrator
Supreme Court
2412 State Capitol
1445 K Street
Lincoln, Nebraska 68509

Nevada
District Court
Director
Administrative Office of the Courts
Capitol Complex
Carson City, Nevada 89710
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<td>Oklahoma City, OK 73105</td>
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<td>Philadelphia, PA 19102</td>
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Rhode Island

Superior Courts
Honorable Anthony J. Giannini
Rhode Island Superior Courts
Providence County Courthouse
250 Benefit Street
Providence, RI 02903

South Carolina

Circuit Courts
Assistant Court Administrator
Bankers Trust Tower
1301 Gervais Street
Columbia, SC 29211

South Dakota

Circuit Courts
State Court Administrator
Supreme Court
Capitol Building
Pierre, South Dakota 57501

Tennessee

Circuit Courts
Executive Secretary
Tennessee Supreme Court
422 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219

Texas

District Courts
Office of Court Admin.
of the Texas Judicial System
600 Texas Law Center
1414 Colorado Street
P.O. Box 12066
Capitol Station
Austin, Texas 78711

Utah

District Courts
Deputy Administrator
Office of the Court
Administrator
907 East South Temple Street
Suite 201
Salt Lake City, Utah 84102

Vermont

Superior Courts
Director of Trial Court
Administration
Supreme Court
111 State Street
Montpelier, Vermont 05602

Virginia

Circuit Courts
Assistant Executive Secretary
Supreme Court of Virginia
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

Washington

Superior Courts
Deputy Administrator
for the Courts
Temple of Justice
Olympia, Washington 98504

West Virginia

Circuit Courts
State Court Administrator
E-404 State Capitol
1800 Kanawha Boulevard
Charleston, WV 25305
Wisconsin
*Circuit Courts*
Research Analyst
Wisconsin Administrative
Office of the Courts
Madison, Wisconsin 53702

Wyoming
*District Courts*
Court Coordinator
Supreme Court Building
Capitol Avenue at 23rd Street
Cheyenne, Wyoming 82002
Appendix B

NATIONAL COURT INVENTORY PROTOCOL
(facsimile)

Contact:  Update Contact Information:
- other person(s) spoken to
- correct address and phone

Introduction:
The Institute for Civil Justice, The Rand Corporation

Project:
We are conducting a study of procedures used by the civil courts to expedite resolution of civil cases. Our focus is to find out about all types of procedures which have as their purpose speeding up dispute resolution, encouraging settlement before trial, reducing costs, and reducing the time it takes to go through the judicial system.

By formal efforts we mean the passage of legislation or promulgation of rules or other directives by the court. At this point in our study we want to learn about these types of formal efforts as opposed to informal efforts by individual judges to expedite civil litigation.

The procedures I’d like to ask you about refer only to civil actions for monetary damages in the ______ (specify court) _______.
Mandatory Court Administered Arbitration
Do you know of any efforts in (jurisdiction) to adopt mandatory arbitration?

YES    NO

Medical Malpractice Screening Panels
Do you know of any use of medical malpractice screening panels in (jurisdiction)?

YES    NO

Limit Discovery
Do you know of any efforts in (jurisdiction) to control the pace of discovery, such as a rule that sets a discovery cutoff date, or limits the number of interrogatories? any directives by the presiding judge?

YES    NO

Simplify Pleading
Have there been any efforts in (jurisdiction) to simplify or liberalize the
pleading rules, such as permitting narrative pleading or placing a limit on motions?

YES  NO

(page 5)

**Pretrial**

Have there been efforts in (jurisdiction) to encourage the use of pretrial conferences for promoting settlements? any directives by the presiding judge?

YES  NO

(page 6)

**Strict Continuance**

Have there been any efforts in (jurisdiction) to encourage policies of strict continuance, such as the Certificate of Readiness procedures? presiding judge directives?

YES  NO

(page 7)

**Auditors**

Have there been any efforts in (jurisdiction) to encourage the use of nonjudicial personnel such as masters, auditors, or referees in a pretrial capacity in order to promote settlement? directives from the presiding judge?

YES  NO
(page 8)

Other

Other than the things we have been talking about, have there been efforts in (jurisdiction) in the area of court administration or case management in order to speed up the resolution of cases? such as case classification or case scheduling and monitoring?

YES

NO
Appendix C

METROPOLITAN COURT SAMPLE

Maricopa County, AZ
Superior Court
Trial Court Administrator
Maricopa County Superior Court
201 West Jefferson
Phoenix, Arizona 85003

Los Angeles County, CA
Superior Court
Executive Officer
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012

San Francisco County, CA
Superior Court
Director
Administrative Office
of the Courts
601 McAllister Street
San Francisco, CA

Denver County, CO
2nd District Court
Clerk and Administrator
Denver District Court
256 City and County Building
1437 Bannock Street
Denver, Colorado 80202

District of Columbia
Superior Court
Associate Judge
Superior Court of the District of Columbia
Washington, D.C. 20001

Dade County, FL
11th Circuit Court
Presiding Judge
635 Dade County Courthouse
73 West Flagler
Miami, Florida 33130

Duval County, FL
4th Circuit Court
Presiding Judge
Room 206
Duval County Courthouse
Jacksonville, Florida 32202

Fulton County, GA
Atlanta Circuit Court
Court Administrator
Room 704
2202 Fulton County Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30303

Cook County, IL
Circuit Court
Associate Clerk of Court
1001 Daley Center
Chicago, Illinois 60602

Monroe County, IN
Superior Court
Court Administrator
First Floor
Courthouse
Bloomington, Indiana 47401
Jefferson County, KY  
30th Circuit Court  
Office of Court Administrator  
600 West Jefferson  
Louisville, Kentucky 40202

Orleans Parish, LA  
Civil District Court  
Presiding Judge  
Civil District Court Building  
421 Loyola  
New Orleans, Louisiana 70112

9th Judicial District, LA  
District Court  
Presiding Judge  
9th Judicial Court  
P.O. Box 1769  
Alexandria, Louisiana 71301

Baltimore City, MD  
8th Judicial Circuit Court  
Civil Assignment Commissioner  
Civil Courts Building  
111 North Calvert Street  
Baltimore, Maryland 21202

Suffolk County, MA  
Superior Court  
Executive Secretary to the Chief Justice  
Suffolk County Superior Court  
Dept. of the Trial Courts  
Courthouse, Pemberton Square  
Boston, Massachusetts 02108

Wayne County, MI  
3rd Circuit Court  
Court Administrator  
Wayne County Circuit Court  
1207 City-County Building  
Detroit, Michigan 48226

Ramsey County, MN  
2nd District Court  
Judicial District Administrator  
Ramsey County District Court  
Room 853, Courthouse  
St. Paul, Minnesota 55102

Hennepin County, MN  
4th District Court  
Court Administrator  
4th Judicial District  
1251C Government Center  
Minneapolis, MN 55487

Jackson County, MO  
16th Circuit Court  
Assistant Court Administrator  
Jackson County Circuit Court  
415 East 12th Street  
Kansas City, Missouri 64106

St. Louis County, MO  
21st Circuit Court  
Director of Judicial Administration  
St. Louis County Circuit Court  
7900 Zarondelet Avenue  
Clayton, Missouri 63105

St. Louis, MO  
Circuit Court of the City of St. Louis  
Circuit Court Administrator  
10 North Tucker Boulevard  
St. Louis, Missouri 63101

Clark County, NV  
8th District Court  
District Judge  
District Court for Las Vegas  
Las Vegas, Nevada
Philadelphia County, PA
*Court of Common Pleas*
Administrator of the Court
*Court of Common Pleas*
370 City Hall
Philadelphia, PA 19107

King County, WA
*Superior Court*
Superior Court Administrator
King County Courthouse
Seattle, Washington 98104

Shelby County, TN
*15th Circuit Court*
Deputy Clerk of Court
Courthouse, Room 202
140 Adams Avenue
Memphis, Tennessee 38103

Davidson County, TN
*10th Circuit Court*
Circuit Court Clerk
Davidson County Circuit Court
504 Courthouse
Nashville, Tennessee 37201

Dallas County, TX
*District Court*
Administrative Judge
1st Admin. Judicial District
Dallas County Courthouse
600 Commerce Street
Dallas, Texas 75202

Harris County, TX
*District Court*
Administrative Judge
164th District Court
301 Fannin Street
Houston, Texas 77002

Richmond, VA
*Circuit Court*
Chief Deputy Clerk
Richmond Circuit Court
Div. II
10th & Hull Street
Richmond, Virginia 23224
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<th>AUTHORIZATION</th>
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<td>Limit number of interrogatories</td>
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<td>Time limit for answers to interrogatories</td>
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<td>Uniform interrogatory forms</td>
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<td>Complete discovery within specified time</td>
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<td>Counsel may request discovery cut-off</td>
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<td>Court specified, compulsory discovery</td>
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<td>Scheduling conference</td>
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<td>Time limit for Certificate of Readiness</td>
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<td>Master to hear discovery motions</td>
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<tr>
<td>Other (Specify)</td>
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*Such as Chief Justice/Court Administrator order, memo or recommendation.
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<td>PROCEDURES INTENDED TO LIMIT MOTIONS/PLEADINGS</td>
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<td>Standard forms for pleadings</td>
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<td>Single time period for making motions</td>
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<tr>
<td>Mail or telephone motions</td>
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<tr>
<td>Submit statement of attempt to resolve before making motions</td>
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<td>Time limit for court response motions</td>
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<td>Written continuance motion</td>
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<td>Client signature on continuance motion</td>
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* Such as Chief Justice/Court Administrator order, memo or recommendation
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| PROCEDURES INTENDED TO PROMOTE SETTLEMENT        |               |                |
| Mandatory settlement conference with judge, before trial date set | | |
| Mandatory settlement conference with judge, after trial date set | | |
| Discretionary settlement conference with judge, before trial date set | | |
| Discretionary settlement conference with judge, after trial date set | | |
| Settlement conference before panel of attorneys | | |

*Such as Chief Justice/Court Administrator order, memo or recommendation*
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*Such as Chief Justice/Court Administrator order, memo or recommendation*
Appendix E

MAIL VERIFICATION
INTRODUCTORY LETTER

THE
INSTITUTE FOR
CIVIL JUSTICE

THE RAND CORPORATION, 1700 Main Street, Santa Monica, California 90406 • (213) 937-0471

During the past several months we have been compiling an inventory of procedures used by state trial courts to expedite civil litigation. You may recall that we talked with you on the telephone about specific rules and practices adopted for this purpose in the trial courts in your jurisdiction.

We have completed the data collection for this study and are now in the process of drafting the final report. In order for this to be a useful reference tool for practitioners and researchers concerned with problems of court delay, the material we publish must be as complete and current as possible. To assure this accuracy, we need your assistance in verifying and updating the information we have obtained about procedures in your courts.

In the next few days you will receive a check-list of all the procedures we have been studying. On the form we have noted the procedures we believe are in place in your courts. Please verify this information and check off any additional procedures which you use that we have not noted. Because we know there are many demands on your time, we have designed the form to take only a few minutes to complete.

Thank you for your cooperation. We appreciate your contribution to our research and will send you a copy of the report when it is completed.

Sincerely,

Patricia Ebener
Research Associate

PE:me

101
Appendix F

MAIL VERIFICATION
INSTRUCTIONS LETTER

A few days ago we wrote to you requesting your assistance with verifying the information we have compiled about procedures in your court to expedite civil litigation. Enclosed is the verification form we described.

The information recorded on the form is based on our interview with you and review of statutes, court rules and any material you sent to us. We would like you to check the form carefully, correct any misinformation and add anything that we may have omitted. We want the inventory to include all procedures in the ---COURT--- that were intended, at least in part, to speed up case disposition or reduce litigation costs, whether or not they have proven effective. If you have any other material which would help us to understand the provisions of specific procedures, we would appreciate your sending it to us.

Because we have an immediate publication deadline to meet, we need your response as soon as possible. Please complete the form and return it in the enclosed postpaid envelope by November 12. If you have any questions, did not receive the previous letter, or would prefer to respond by telephone, please call me collect at (213) 393-0411, extension 7850.

Thank you again for your cooperation. I look forward to hearing from you.

Sincerely,

Patricia Ebener
Research Associate
Appendix G

METROPOLITAN COURT TABLES

Data presented in these tables reflect the formal rules and directives of the local court only. Many of these courts are subject to statewide rules and policies as well. It is necessary to review the tables in the text for applicable statewide procedures in order to know all the procedures in place in the local court.
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<tr>
<td>Seattle, Washington</td>
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</tr>
<tr>
<td>Washington, D.C.</td>
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<td>●</td>
</tr>
</tbody>
</table>

*Mail verification not obtained.
Table G.6  
METROPOLITAN COURTS WITH FORMAL SETTLEMENT PROGRAMS

<table>
<thead>
<tr>
<th>Metropolitan Area</th>
<th>Conference with Judge</th>
<th>Conference with Panel of Attorneys</th>
<th>Conference between Opposing Counsel¹</th>
</tr>
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<tbody>
<tr>
<td>Albany, New York⁴</td>
<td>-</td>
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</tr>
<tr>
<td>Alexandria, Louisiana⁴</td>
<td>e⁴</td>
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<tr>
<td>Atlanta, Georgia</td>
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<td>-</td>
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<tr>
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<td>e⁴</td>
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<td>Chicago, Illinois</td>
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<tr>
<td>Cincinnati, Ohio</td>
<td>e⁴</td>
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<tr>
<td>Cleveland, Ohio</td>
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<td>Detroit, Michigan</td>
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<td>Las Vegas, Nevada</td>
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<tr>
<td>Los Angeles, California</td>
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<tr>
<td>Manchester, New Hampshire</td>
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<tr>
<td>Manhattan, New York</td>
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<tr>
<td>New Orleans, Louisiana</td>
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<tr>
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<td>Washington, D.C.</td>
<td>e⁴</td>
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</tbody>
</table>

NOTE: These programs are authorized by statewide or local court rule or directive.  
¹Court ordered conference, or court required statement of attempt to settle.  
²Mandatory.  
³Mediation program which includes appeal disincentive.  
⁴Mail verification not obtained.
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