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Court Delay and the Bar: A Rejoinder

Hans Zeisel

Some time ago, I tried to show that our trial courts would not increase their delay if they were to become more liberal in granting motions for continuing a trial, provided such motion is made in time, and another case, whatever its age, can be tried instead.¹ This was to refute the attempt of some courts to blame the bar for the court's delay, only because every so often a lawyer will not be ready to try a case on the court appointed day. The courts, I concluded, should not look to the bar for remedying their delay but at themselves instead.

Judge Tauro, chief of the Superior Court of Massachusetts, has written a thoughtful dissent from my thesis.² Not disputing the correctness of my theory, Judge Tauro thinks it impractical advice to the court. He then returns to the broader background of the problem by reasserting that the unwholesome concentration of the trial bar "undoubtedly aggravates court congestion." And he goes on to blame the trial bar not only for being too small but also for having too many inexperienced lawyers among its members.³

Since I share Judge Tauro's belief that blaming anybody—bar or courts—will not cure the sickness, I should like to pursue the two alleged evils of the trial bar—concentration and partial inexperience—to a point at which one can see with some precision whether or not they are indeed contributing to the delay problem.

Before discussing the merits of these claims it will be useful to recall the fundamentals of the court delay problem.

First, as we have shown,⁴ the issue is not

who or what is to blame for the delay, but rather how it can be effectively eliminated. The difference is important. Anything that increases the courts' trial load can be "blamed": more automobiles, more accidents, more claim consciousness, the parties' unwillingness to settle, and so forth. But to reduce delay is another problem, and quite a precise one at that. For a proposed remedy to be effective it must accomplish one or more of the following three objectives:

1. reduce the number of cases the courts must try,

2. reduce the court time it takes to try these cases, and

3. increase the total annual hours spent by the court in trying cases.

If a remedy does not accomplish any of these objectives, it is—to remain in the language of medicine—not more than a placebo; it may look like a remedy but be none.⁵

The argument in the article with which Judge Tauro takes issue concerns point 3. We urged the courts to be liberal in the granting of motions for continuance of a trial date, no matter how old the case, if that motion is made seasonably, and made jointly by all litigants concerned. I tried to show, that the delay measure of the court would be in no way affected by thus letting an old case grow even older, since, by definition, a younger case would take its place, thus leaving the average delay untouched. I argued that this was the only sensible way for the courts to meet the problem of lawyer concentration—if the problem existed.

The thing to remember is that there is only one way and no other that such concentration can hurt the court's efforts to eliminate delay: if this concentration brings about a situation in which a judge, who is ready to try a case, is unable to find one.

1. Zeisel, "Court Delay Caused by the Bar?", 54 *A. B. A. Journal* 886 (September 1968).

2. Tauro, "Court Delay and the Trial Bar—One Judge's Opinion," 52 *Judicature* 414 (May 1969).

3. Pp. 414, 416.

4. Zeisel, Kalven, Buchholz, *Delay in the Court* (Boston: Little, Brown, and Company, 1959), pp. 3, 4.

5. *Delay in the Court*, pp. 5, 6.

To be sure I have never been an assignment judge, but I have studied the methods used by the assignment judges in various courts. I offer two exhibits in evidence.

Exhibit one is the Circuit Court of Cook County here in Chicago. Here the assignment judge is not known to be generous in granting motions for continuance.

Exhibit two is the Pittsburgh Court of Common Pleas, which operates along the lines I have been advocating, seldom hesitating to take a younger case if the scheduled older one is not ready.⁶

I am reproducing below what are probably the most comprehensive and most recent statistics on the concentration of the trial bar in a major metropolitan area.⁷

Jury Cases Tried in the City of Chicago
in the U. S. District Court, the Circuit Court of
Cook County, and the Municipal Court,
First Department

Court Year 1967-68

Number of Cases Tried During That Year By Each Lawyer in this Group	Per Cent of Lawyers in Each Group	Per Cent of Cases in Each Group
15 and up	1.3	7.9
13 and 14	.6	2.9
11 and 12	.6	2.6
Ten	1.0	3.4
Nine	1.3	3.4
Eight	1.5	3.5
Seven	2.9	6.8
Six	4.8	9.9
Five	5.4	9.8
Four	7.4	10.3
Three	10.5	10.9
Two	18.2	12.5
One	44.5	15.2
	100.0 (959)	100.0 (2,783)

Such statistics are being compiled to shed light on the so-called concentration problem.⁸

What, if anything, do such statistics prove with respect to the one issue that is here relevant: namely whether this concentration results in a situation where a judge, ready to try a case, cannot find one?

I submit that such statistics, showing the degree of concentration of cases, prove nothing. Those who continue blaming the bar for interfering with the court's efforts to eliminate delay, must come up with one piece of evidence and one only:

Judge X, on such and such a date, at such and such an hour, was ready to try a case, but the assignment judge was unable to find one for him. As a result so and so many potential trial hours were lost.

My guess is that the Chicago court, if it were ever to publish relevant statistics on the delay problem, would report such incidents, and that the Pittsburgh court could not.⁹ It is for this reason that advocating the Pittsburgh procedure rather than the Chicago system is more than a theoretical exercise.

Judge Tauro, as I mentioned, has, however, still another arrow to his bow. He makes a point not often heard, namely that:

Conscientious but inexperienced trial lawyers tend to waste valuable court time because of their ineptness.¹⁰

Perhaps some lawyers do. But then the important question is: how many trial lawyers are inexperienced and at the same time conscientious enough to try harder than is neces-

6. There might, of course, be other reasons why the Chicago court, at the most recent count, tries cases that are on the average 58.2 months old, still leading the nation, while the Pittsburgh court has one of the best records among metropolitan courts with an average delay of only 23 months.

7. From the Cook County Verdict Reporter.

8. Some courts have statistics that go beyond recording the trial attorneys; they show the number of *pending* cases for each law firm and point to whatever concentration they reveal.

9. If such gaps never occur, then all the talk about lawyers interfering with the court's efforts to cut delay is not pertinent anyway.

10. P. 416.

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sary? How often do they waste the court's time? And, *in toto*, how much of the court's time do they waste?

All these questions need answers, and I do not know them all. But on the most important first point I happen to have some relevant statistics.

In the course of our study of the American jury system, we collected reports from judges all across the country on the jury trials over which they presided. With respect to the civil jury trials, predominantly personal injury trials, we asked the trial judges this question about the quality of counsel who tried the cases before them: "Was the plaintiff's (defendant's) lawyer an experienced trial lawyer?" Following is the summary of these reports:

Quality of Trial Counsel
As Rated by the Presiding Judge

(2291 civil jury trials)

	Plaintiff's Counsel	Defendant's Counsel	Total
	Per Cent	Per Cent	Per Cent
Experienced	85	91	88
Not experienced	15	9	12
	100	100	100

This is a good cross-section, and we thought, "If anyone can make a meaningful judgment on a question such as the quality of counsel, the trial judge can."¹¹

So here we have 12 per cent of counsel rated as inexperienced. We like to think that this is a modest percentage that bespeaks, if anything, the high quality of the trial bar.

Still, the 12 per cent inexperienced lawyers could cause some damage. But where is the evidence? Judge Tauro thoughtfully specifies that he is afraid only of the inexperienced

lawyer who is also conscientious. Is it not also possible that many an inexperienced lawyer, because he either does not know better or is not too conscientious, may interfere less rather than more with the judge's conduct of the trial? In any event, there is not much an overzealous lawyer can spoil if the judge conducts the trial with a firm hand.

There is one other danger in this imprecise blame of the bar, because the facts, if they were ever to come into the open, might well confound these accusations and turn them upside down.

It is, for instance, quite possible that the so-called lawyer concentration *aids* rather than hinders the elimination of court delay. Suppose that the more cases a law firm has pending, the greater will be the percentage of cases it will want settled without trial. If that were so—and any one of the computer-equipped courts could produce interesting statistics on this point—a more equal distribution of cases among law firms might well reduce the number of settlements, and thereby add to the courts' trial load. And as to the inexperienced trial lawyer, might not he too be more hesitant than his experienced colleague to try a case? And if he were to ask an experienced colleague to try the case for him, he must share his fee with him—another inducement for the inexperienced lawyer to settle the case.

Thus, if all the facts were on the table, we might conceivably see that the courts indeed profit from a concentrated and inexperienced trial bar. After all, only two or three per cent of all claims ever reach trial; a minute increase of that proportion could prove catastrophic.

In any event, eliminating or reducing court delay is a precise management problem which, if it is to be solved, requires precise measurements. Blame or, for that matter, praise will no longer do. In the meantime, the sickness is growing.

11. H. Kalven, Jr., and H. Zeisel, *The American Jury* (Boston: Little, Brown and Co., 1968), p. 50.