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Court Delay Caused by the Bar?

by Hans Zeisel

Not so, says Professor Zeisel, who shows that delay for the individual litigant in the trial of his suit has no connection with the general delay in litigation in a given court. Statistically, he declares, the preferment of some cases and the deferral of others does not create delay in the court, as long as other cases are ready for trial. Accordingly, he concludes that courts should cease blaming court delay on lawyers with too many cases.

THERE IS AN understandable pre-occupation in some of our courts with efforts to share the responsibility for their inordinate delay with somebody else. And so we hear occasionally that part, if not the whole, of the blame must be put at the doorstep of the trial bar. The negligence trial business, so the argument goes, is highly concentrated in a few law firms, and



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since these firms have not enough lawyers to try their cases in time, delay necessarily ensues.

Conceivably, the courts might make it their business to see that litigants do not suffer delay by bringing their cases to firms in which most of the trial business is concentrated. But before such steps are taken, it might be useful to point out and to prove that this delay for the individual litigant has in principle no connection with, and hence no influence on, *the delay of the court*.

To demonstrate this proposition, it is necessary to recall that there is only one meaningful way of measuring court delay: the average time that elapses between the point of time at which a case is ready for trial and the point at which it is actually tried.¹ This interval will not be the same for all cases, primarily because some cases are accorded preferment by the court, while others have to wait in regular order.

It will help to see the problem of individual delay versus court delay more clearly if we look at a series of three schematic graphs (page 387).

First, let us assume that all cases are being tried in regular order, each case in fact after a certain number of time units (days or weeks, it does not matter which) have elapsed. The cases will then line up for trial as shown in Table 1. Case A, having waited one hundred time units is about to reach

trial. If we further assume, to keep the mathematics simple, that each case requires one time unit for trial, Case B will move up to trial after $99 + 1 = 100$ time units, Case C after $98 + 2 = 100$ time units, and so forth. Since all cases are tried after a waiting time of one hundred units, the average waiting time is, of course, also one hundred.

Let us now assume that for cause the court accords Cases H, I and J preferment and tries them ahead of Cases A through G. We then obtain the schedule shown in Table 2. The three preferred cases have now had to wait only ninety-two time units, but the seven remaining cases had to wait 103 units (one extra unit for each preferred case). But since the time gained by the three preferred cases ($3 \times 7 = 21$) equals the time lost by the remaining seven ($7 \times 3 = 21$), the average, one hundred, remains unchanged.²

We conclude that preferment of individual cases by the court has no effect on the over-all delay of the system.

1. To be sure, not all cases are ready when they are filed, but for courts such as ours, in which delay is of the order of five years, that is a minor correction. There is, of course, the problem at which point the count is to begin. But for our purpose in this article it is sufficient to see that only a time measurement is the appropriate yardstick, not the quoting of x-thousand cases that form the backlog, even though the two are related. See ZEISEL, KALVEN & BUCHHOLZ, *DELAY IN THE COURT*, especially Chapter 4 (1959).

2. One should not point out that preferment usually is given at an earlier stage, rather than toward the end of the waiting time, as in our graph. The mathematics remains the same regardless of the time preferment is accorded.

We now consider the opposite situation—when cases, at the request of the litigants or their counsel, are deferred and admitted to trial only at a later date than that to which their original rank order would have entitled them. We begin with Table 1 and shall assume that Cases B, E and F are deferred at request of counsel and tried after Cases A, C, D and G through J have been tried. To complicate matters ostensibly, let us assume further that these three deferred cases are then tried in reverse order, F, E, and B.

Again we see that the average time of delay remains unaffected. We can now state the general rule:

No shift in the waiting order, whether at the order of the court or the request of counsel, whether forward or backward, can affect the delay of the system provided the court keeps trying cases.³

The phrase “provided the court keeps trying cases” has implications that need spelling out. It means that the deferment must not cause a gap in the trial schedule of the court; another case must be advanced in time to take its place. It follows that requests for deferment must be made in time, however the court wants to define the term.⁴

At this point it is, theoretically, possible that the Bar could cause delay of the system by having simply no lawyer available to try any of the waiting cases. But it is hardly necessary to prove that this limiting condition does not exist; what with x thousand cases waiting, there will always be one with lawyers ready for trial.

The question might be asked whether there are not circumstances under which such voluntary deferment could be the cause for justified complaint by other litigants waiting in line? Again the answer is no. Those who go to

3. Or, as one of my colleagues neatly summarized it, “If you have to eat a bag of peanuts, it doesn’t matter in what sequence you eat them.”

4. This question of trial gaps is altogether of crucial importance for the court, and to avoid them the court should use all its power and authority. The ground rule that “A request for a continuance on the day of the trial is presumed not to be bona fide” is a good one. Aldisert, *A Metropolitan Court Conquers Its Backlog*, 51 JUDICATURE 202, 207 (1968).

TABLE 1
Line-Up of Cases for Trial in Regular Order

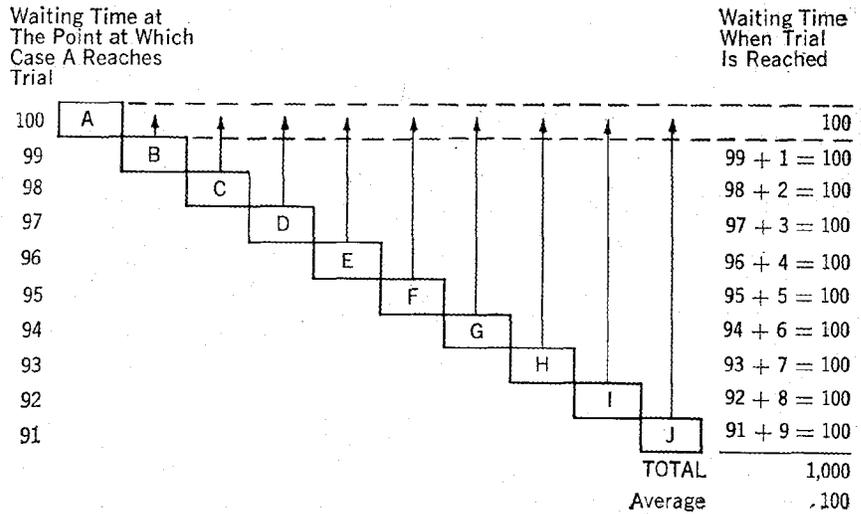
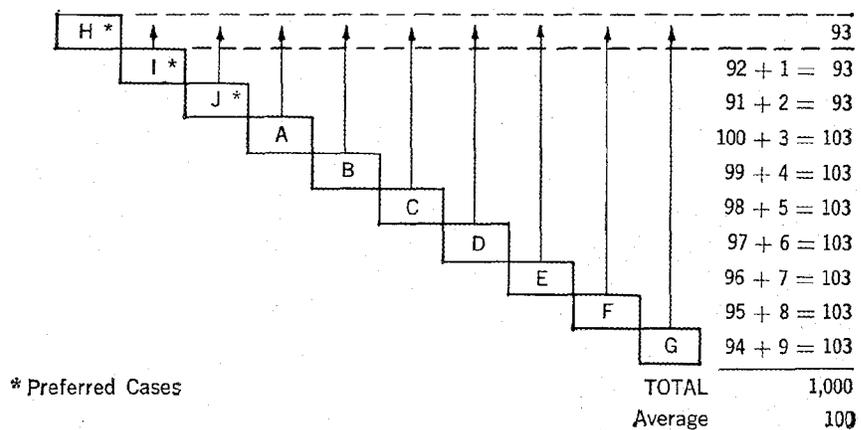
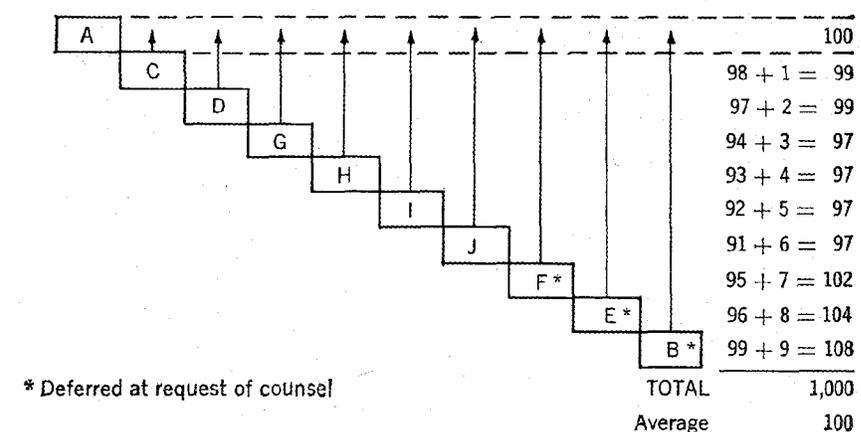


TABLE 2
Line-Up and Waiting Time With Some Cases Preferred



* Preferred Cases

TABLE 3
Line-Up and Waiting Time With Some Cases Deferred



* Deferred at request of counsel

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trial in advance of the deferred case, actually gain one "trial interval". The waiting time of the cases that come behind the new, deferred trial date remains unaffected, so they have no complaint either, since they are not worse off than before.

Although we have established that the granting of individual deferments need not affect the delay of the system, one might still ask whether such requests, even if submitted jointly by counsel on both sides, ought not be scrutinized by the court.

It would seem that as long as our courts have such major unsolved problems of their own, they should forget about this problem. Under our system, litigants as a rule make their own choice of counsel, although counsel in turn might refer the case to a specialist for trial. And if they choose a trial

lawyer who has too many cases waiting, they will know that they must wait longer for their trial than if they had chosen a less busy lawyer; and for one reason or other they will have decided that it is worth their while. It would seem that one could leave this choice to the litigants, especially if they choose on advice of counsel. As the waiting time differential between the busy and the less busy lawyer grows, the system might even provide its own corrective. The busy lawyer will increase his trial staff lest he lose clients to his less busy colleagues.

One final point: This is not the place to discuss how the high concentration of negligence claims in the hands of a few law firms might affect the interests of their clients. But since some of the concentration is in the hands of law firms that are known in the trade as

"settlors", it is just possible that this part of the concentration even alleviates the delay.⁵

Altogether then, at least for the time being, no good case can be made for a court's concern with the concentration of cases in the hands of certain members of the Bar unless, of course, it wants, for reasons of its own, to keep a red herring handy.⁶

5. "In a modern metropolitan plaintiff firm, the lawyers want to build up a certain inventory involving a given insurance carrier. This inventory has to be well balanced . . . so that a package deal can be made . . . so that, after a half day's negotiating, the entire bundle can be settled . . .". Aldisert, *supra* note 4, at 207. Judge Aldisert considers this accumulation of cases, eventually to be settled, not only bad for the plaintiff-litigants (a statement with which I agree) but also as bad for court delay (a statement I have difficulty agreeing with). To be sure, there is the possibility that pressure to settle at a time when a lawyer does not want to try a case could help the delay somewhat. But what if the lawyer's reasons are legitimate?

6. See Zeisel, *Delay by the Parties and Delay by the Courts*, 15 J. LEGAL ED. 27-36 (1962).

Course of Study on Pension and Profit-Sharing Plans

A THREE-DAY course of study on pension and profit-sharing plans will be presented at the Washington Hilton, Washington, D. C., on November 14-16 by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association.

The course will cover the basic concepts of the design of a pension and profit-sharing plan, the major problems of qualifying a plan with the Internal

Revenue Service, the various methods of investing the funds and the methods used to protect the parties. In addition, qualified and nonqualified plans will be explained, the use of qualified plan benefits in estate planning will be discussed and legislation affecting plans will be analyzed.

A major problem area—plan amendments, plan terminations and major corporate changes, such as mergers and acquisitions—will also receive atten-

tion. Special problems of executive compensation and how they are solved through qualified and nonqualified plans will be discussed.

The planning chairman for the course of study is David C. Rothman, a pension consultant and author of the A.L.I.-A.B.A. Joint Committee handbook on *Establishing and Administering Pension and Profit Sharing Plans and Trust Funds*. He will be joined by practitioners in the field.

Great Plains Federal Tax Institute

THE SIXTH ANNUAL Great Plains Federal Tax Institute will be held on December 2 and 3 at the Nebraska Center for Continuing Education in Lincoln. The institute is sponsored jointly by the Nebraska State Bar Association and the Nebraska Society of Certified Public Accountants. The featured speaker at the banquet on Monday evening, December 2, will be Hilary Seal of New Haven, Connecticut, who will discuss "Current Trends in Deferred Compensation".

Further information may be obtained from Charles E. Wright, Suite 700 First National Bank Building, Lincoln, Nebraska 68508.