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Is the Trial Bar a Cause of Delay?

By Hans Zeisel — Harry Kalven, Jr. — Bernard Buchholz

This article is one chapter of a new book Delay in the Court described in the footnote. The two preceding chapters documented the loss of court time per year and per day, suggesting that the available judicial manpower is not being used as effectively as theoretically it might be. Whether concentration of the trial bar contributes to delay is here examined. Not infrequently courts complain that they are ready to try a case but that busy counsel, because of trial commitments elsewhere, cause postponement and delay. This chapter presents data on the exact degree of this concentration, and the limits of its possible effect on delay. Ways are discussed by which the courts can protect themselves, leaving initiative for necessary correctives to the self-interest of the bar.

Delay in the Court, by Hans Zeisel, Harry Kalven, Jr., and Bernard Buchholz, is a systematic study of court congestion. The study pools the resources of the lawyer and the social scientist in attacking the problem of court congestion. It is the first of a series of books which will report the research conducted at the University of Chicago Law School on judicial administration and on the American jury system. Because of the timeliness and importance of this study, the Journal is publishing one of its 23 chapters—Chapter 17, which we think will be of special interest to the legal profession. The book is published by Little, Brown and Company, 34 Beacon Street, Boston.

The popular view is that there are relatively few lawyers engaged in active trial work, that they are extremely busy, that they frequently have conflicting trial dates or commitments, that the adjustment of these conflicts requires their cases to be continued, and that this frequently leaves the court without cases ready for trial.

The point has been put with special force by Judge Schwartz of the Illinois Appellate Court in Gray v. Gray. The opinion is a notable judicial essay on the problem of court congestion and the concentration of the trial bar. After reviewing the development of the assignment system in Cook County, Judge Schwartz goes on to say:

One of the special problems intended to be solved was that of the many motions for continuance on account of prior engagement pressed upon judges by trial lawyers. A trial bar variously estimated at fifty to one hundred and fifty lawyers tries the vast majority of cases of consequence in courts of record in this county. The number is wholly inadequate and, in the view of the assignment judge and to our knowledge, constitutes one of the principal barriers to the prompt dispatch of the business of the court. Some of these lawyers have more than

TABLE I
Concentration of Pending Cases by Size of Firm
(Attorney of Record)

<table>
<thead>
<tr>
<th>Firms with Cases Pending</th>
<th>Percent of Firms</th>
<th>Percent of Cases</th>
<th>Representing Plaintiff</th>
<th>Representing Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over 1,000 cases</td>
<td>0.4</td>
<td>10.2</td>
<td>2.0</td>
<td>34.3</td>
</tr>
<tr>
<td>Over 500 cases</td>
<td>6.9</td>
<td>51.0</td>
<td>6.7</td>
<td>62.9</td>
</tr>
<tr>
<td>Over 100 cases</td>
<td>30.1</td>
<td>86.6</td>
<td>35.5</td>
<td>98.1</td>
</tr>
</tbody>
</table>

500 cases on their calendars; a few, more than 1,000. It had become the practice for many such lawyers to enter their individual appearances and to insist that the representation of their client was personal, so that frequently they would not only have a number of cases on the trial call of an individual calendar, when that system was in effect, but sometimes had cases on five or ten calendars at the same time. They were thereby always in position to ask for continuances on account of engagement and to determine which case it would serve their purpose to try first. It was not uncommon for judges to call forty or fifty cases in an unsuccessful effort to find one ready for trial. Trial judges, in a desperate effort to find work, would communicate with each other as to which case the busy lawyer should try, and sometimes disputes arose between judges as to the court in which the lawyer should first be required to go to trial.

Consideration of the lawyer side of the delay problem raises a series of related questions, which are worth analyzing separately.

To begin with, there is little doubt that the degree of economic concentration in the large metropolitan centers is striking. We do not have data directly for New York on the distribution among law firms of pending suits but data from other jurisdictions are highly suggestive. Table I furnishes statistics for another major city of the jury cases pending in all the state courts of unlimited civil jurisdiction.

Table I is to be read as follows: the 0.4 percent of the plaintiff firms that have over 500 cases pending (there are no plaintiff firms with over 1000 cases) handle 10.2 percent of all cases; the 6.9 percent with over 100 cases (which include the 0.4 percent in the "over 500" group) handle 51.0 percent of all cases. For the defendant firms: the 2.0 percent that have over 1000 cases pending handle 34.3 percent of all cases, and so forth. In both groups, it appears, one third of all firms handle something like 90 percent of the cases.

Such economic concentration may be significant for a variety of reasons; it may invite inquiry as to how law business is handled by lawyers in New York, Hartford, and Fairfield counties, in Connecticut.

2Lawyers have on occasion been equally outspoken about the matter but with a somewhat different view of who is to blame. See for example, the remarks of Harry Dworkin of the Cleveland bar: "... assuming further that the case, at long last, appears at the foot of the active list, what then? Why nothing happens, at least not for a long time. The lawyer is, however, called upon to alert his client and witnesses in the event the case should be called. At this stage there commences a game which requires adeptness at crystal gazing and legal legerdemain to guess when the case is likely to be called. Finally, the case will have advanced to the top of the list and a frantic last minute call is made to the parties and witnesses to meet said lawyer in the assignment room on the morrow. At the appointed time, although your case is 'next to go,' you discover—to your dismay and embarrassment—that all of the rooms are engaged with the previous day's cases, or you learn that opposing counsel is engaged in another trial of court. And so, you try to entertain the assembled group by treating them to the conditioning process of watching other trials, and by other means at hand to assuage their unhappiness at being called away from their employment and business and being required to just sit around and wait. The net result is that when the case is finally sent into a room for trial, the litigant has all but given up, and the witnesses have 'gone home.'" Dworkin, "Let's Arbitrate," 25 Cleveland B.A.J. 107 (May, 1954). And a lawyer-psychoanalyst has found evidence of a new category of neurosis. Ebenstein, "A Psychologist Looks at the Calendar Call," 4 The Advocate No. 9, p. 225 (Bronx County Bar Assn.) (Dec. 1957).

3Judge Baldwin, "How Can We Expedite the Business of the Courts?" 27 Conn. B.J. 1 (1953), gives some data on the concentration of the bar in New Haven, Hartford, and Fairfield counties, in Connecticut.
recruited; it may suggest possibilities of "block" settlements of a number of cases at one time; and it may indicate that there is a problem about the speed of settlement of those cases which are settled before trial. But whatever its significance for such issues, tracing its impact on court delay requires further analysis.

Effect of Lawyer Concentration on Delay

In our view, lawyer concentration can affect delay only if two conditions are present: first, the concentration must produce conflicting trial commitments and hence continuances in some cases; and second, the granting of such continuances must produce gaps in the trial scheduling because another case is not immediately ready for trial. As we have shown earlier, not every continuance adds to the court's delay. If no gap in the trial schedule results, continuances are in fact a benefit to the system since they operate to grant a small preference to the cases awaiting trial behind the case continued. But when the continuance creates a gap in the trial schedule, because no other case is ready for trial, there is a net loss to the system and an increase in delay occurs.

Without a detailed hourly time record for each trial part there is no convenient way of determining how frequently a gap in the trial schedule is created by conflicting lawyer dates. Theoretically, it is clear that in a given court system a shortage of trial lawyers could become a major bottleneck. If, for example, there were only five plaintiff lawyers and five defense lawyers available in a metropolitan court, the limit of the usable judicial manpower would be set by the number of cases these ten lawyers could try in a year. However for the New York court, we do know one highly relevant fact. We know the upper limit of the possible loss created by such factors as concentration of the trial bar. It cannot exceed the total amount of judge time lost in New York as contrasted to our yardstick, New Jersey, or not more than 19 percent in all.4 We also know that by no means all of this loss is attributable to gaps in the trial schedule. Hence, even under the most drastic assumptions, the concentration of the New York trial bar can only be a minor factor in the delay of the court.

4Our yardstick, it must be admitted, is imperfect for this purpose. New Jersey may also lose judge time because of gaps created by conflicting trial commitments of counsel. To the extent to which it does so, the maximum gap is, of course larger than indicated in the text.
We can, however, approach the matter somewhat more directly. We were able to determine the degree to which the trial of law cases in the court is actually concentrated. Tables II and III show the number of lawyers who had personal injury cases reaching assignment during the five-month period from March through September, 1957.

Table II indicates that the busiest 1 percent of the plaintiff lawyers had 6.4 percent of the cases, and that each lawyer in that group appeared on the average 2.1 times per month in the court during the observed period of five court months. The busiest 5 percent (which include the busiest 1 percent) tried 22.5 of the cases and appeared on the average of 1.6 times per month, and so forth. The corresponding data for defense lawyers are given in Table III.

The concentration of cases among defense lawyers is, as one might expect, considerably greater than among plaintiff lawyers. This is but a reflection of the high degree of concentration among defendants (defending insurance companies and self-insured corporations) as against any concentration among plaintiffs.

Tables II and III then indicate that there is serious concentration of actual trial work. Some 10 percent of the active trial bar handles 35 percent of all trials. Yet the concentration falls well short of taxing the physical capacity of even the busiest lawyers. At its very peak it is 4.3 appearances per month for defense counsel and 2.1 appearances per month for plaintiff counsel; and for the busiest 10 percent the average appearances per month are 2.1 and 1.2 respectively.

**Chances of Conflicting Trial Commitments are Great**

On this perspective the problem may seem to have evaporated. But two qualifications must be added to spell out why the concentration of the bar is nevertheless a problem. First, what matters in the end is not the average ratio of lawyers to cases but rather the chances of conflicting trial commitments if cases are assigned to trial in a random sequence. The important fact here is that even a relatively low ratio of lawyers to cases can imply a very great chance of conflicting dates. Perhaps the simplest way to illustrate this is by recourse to an in-

<table>
<thead>
<tr>
<th>Cumulative Percent of Counsel</th>
<th>Number of Lawyers in Each Group</th>
<th>Appearance in Court over 5-Month Period (Percent)</th>
<th>Average Number of Appearances per Month per Counsel in This Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>Busiest 1%</td>
<td>3</td>
<td>6.4</td>
<td>31</td>
</tr>
<tr>
<td>Busiest 5%</td>
<td>14</td>
<td>22.5</td>
<td>109</td>
</tr>
<tr>
<td>Busiest 10%</td>
<td>28</td>
<td>34.6</td>
<td>168</td>
</tr>
<tr>
<td>Remaining 90%</td>
<td>258</td>
<td>65.4</td>
<td>318</td>
</tr>
<tr>
<td>Total 100%</td>
<td>285</td>
<td>100.0</td>
<td>486</td>
</tr>
</tbody>
</table>

This Table as well as Table III, unlike Table I, refers to the individual lawyers who actually tried the case, irrespective of what firm they belonged to.
Is the Trial Bar a Cause of Delay?

Approximate Scheme of Dispositions of Personal Injury Claims, New York City

THE MINUTE PERCENTAGE of personal injury claims which actually came to trial is strikingly portrayed in this "pictogram" from another chapter of the book.

Paneling a jury only. They were held there without actual trial for a period of approximately two weeks. The trial on which they were finally reached terminated December 9. During the period from November 17 to December 9 these attorneys were waiting with witnesses and all three attorneys had actually been sent into a session for trial when summoned to the United States Court. The Suffolk trial list for the week of November 21st indicates that one of these attorneys had thereon 17 cases involving in addition to himself 34 lawyers, a second attorney had 6 cases thereon involving in addition to himself 14 lawyers and the third attorney had 6 cases involving 6 to 8 lawyers. Allowing for some duplication of plaintiff's counsel, it is not too far from the truth to comment that a total of over 50 lawyers with clients and witnesses in addition were held up in the Suffolk court by this incident. At the same time a fourth defendant's counsel was on trial in the Federal District Court for 8 or 9 days during which he had on the trial list in Suffolk 14 cases held for trial involving in addition to himself 47 other attorneys.

Consequently, it is likely that the concentration for the whole of New York City is greater than indicated by our tables. The extent to which a particular court suffers from concentration will in part depend on

3 However, 24 out of 26 leading trial counsel in the New York County Supreme Court reported to us that they do not try cases in the inferior city or municipal courts but only in the courts of unlimited jurisdiction.

6 Mimeographed memorandum, dated December 29, 1955, prepared by Chief Justice Reardon of the Superior Court of Massachusetts, p. 10.
its ability to attract and hold busy trial attorneys, and it appears that the New York court here has the advantage over other courts with which it competes. It is less generous in granting last-minute adjournments and lawyers with conflicting trial dates prefer as a rule the more substantial cases in this court. Also, it has been the practice of the court to assign two or three cases simultaneously to each trial part, thus providing counsel with proof of conflicting trial dates, acceptable as an excuse in the other courts.

Available Remedies

In so far then as concentration of the bar is a factor contributing to delay, what remedies are available for it? A court might of course attempt to limit by direct rule the number of cases a given lawyer or law firm is permitted to handle. But this would seem a clumsy and impolitic solution. In any event two alternatives deserve serious consideration. First changes in scheduling procedures might considerably reduce the chance of a gap. Although the practical details might prove troublesome, the essential point is simply that the court in scheduling recognize the concentration as a fact of life and seek to accommodate it. The court has recently taken a major step in this direction by arranging for cases to be tried by the same lawyers to be assigned to the same trial part.

Ultimately the court has the power to compel lawyers to go to trial and thus to force them, if necessary, to turn some of their cases over to other lawyers or to add additional trial personnel to their own firm. In Gray v. Gray, the Illinois Appellate Court squarely faced the trial court's power to deny a continuance when counsel for one of the parties is engaged elsewhere. The plaintiff had filed a complaint for divorce and the case was originally assigned for trial on October 29, 1954. Then, over the objection of opposing counsel, the case was continued four times on account of engagements of plaintiff's counsel and finally set down for trial on November 22. On that day the trial judge denied a motion for further continuance, sought on the ground that plaintiff counsel was still active elsewhere, and ordered the case to go to trial. Counsel who had appeared on behalf of plaintiff's counsel to request the continuance refused to proceed on the ground that he was not prepared to try the case and the court thereupon dismissed the plaintiff's complaint for lack of prosecution. On appeal, the Illinois Appellate Court vigorously affirmed the power of the trial judge to take such action, saying it was the duty of the trial judge to do precisely what he had done. To the plaintiff's argument that she had a constitutional right to select her own attorney and be represented by him in the trial of her case, the court observed:

It is wrong in theory, in its premise, and in its conclusion. There is no constitutional, statutory or other provision which gives a party the right to choose a particular law-

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7The District of Columbia requires that no trial lawyer without consent of his opponent may postpone a case on the ground of an engagement of another case if he is counsel of record in more than twenty-five cases in the court. Rule 14, Rules of the District Court of the District of Columbia. See the remarks of Judge Laws, Attorney General's Conference, 1956, pp. 37, 140.

The Los Angeles courts are considering, at the other extreme, a rule by which attorneys who have only one case pending can ask for advancement of their case. Although the rule is primarily designed to fill gaps in the trial calendar, it may also become a reason for clients to choose for their case counsel other than the busiest in the community. The Recorder, San Francisco, Sept. 10, 1958, col. 6.

8N.Y.L.J., Feb. 17, 1958, p. 1, col. 12. See also the interesting scheme reported by Judge Evans of the Bronx City Court: Calendar Congestion—A New Approach, 26 N.Y.S.B. Bull. 368 (1954). With a backlog of approximately 4000 cases, the cases are called for trial at the rate of 100 per day with the result that the entire backlog is polled every two months. Continuances are granted liberally and the 100 case per day call thus results, Judge Evans reports, in just enough trials to keep busy the 3½ judge bench. In brief this is a scheme which concentrates on avoiding gaps in the trial schedule and which gives a preference to cases where both parties are ready for trial. "Our problem," says Judge Evans, "as well as that of other crowded courts is to get cases ready for trial so as to fully occupy the bench. It is on the humorous side to observe that with the crowded litigation every crowded court still finds its difficult to get enough cases to fully occupy the bench."
yer, without regard to whether that lawyer has the time to try the case or not. Such a doctrine would have results that would be disastrous. We cannot assume that there is only one lawyer who can properly represent the plaintiff in this divorce case. There are 11,000 lawyers in Cook County. The attorney for plaintiff is an able lawyer, well-known to the members of this court. His ability has attracted a large clientele. However, in times like these when litigation swamps the courts, it is the duty of lawyers to cooperate in the transaction of the business of the court. Therefore, as suggested by Mr. Justice Jackson, where business is tendered a lawyer to which he does not have time to attend, he should let it go to some other lawyer.

It is the duty of our profession to train younger men to take care of the legal needs of the community. This is done on a large scale in the medical profession. It is a matter to which trial lawyers in particular should give attention. We consider a baneful practice the custom which has grown in past years of a trial lawyer appearing alone, no matter how important the case may be, on the assumption that court or jury may be impressed by the lone advocate struggling to represent his client. The lawyer who represented plaintiff is a member of a large firm. We do not know the nature of his arrangement with his associates but the trial court had the right to assume that one of them would have come to his rescue in the emergency. If he has no such arrangement and has trained no one to assist him, the responsibility is his for his client's dilemma.

The opinion is a striking statement of how much power the court has in the end.

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9The court here refers to the following passage, quoted earlier in its own opinion at 578: "When more business becomes concentrated in one firm than it can handle, it has two obvious remedies: to put on more legal help, or let some of the business go to offices which have time to attend to it. I doubt if any court should be a party to encouraging the accumulation of more business in one law office than it can attend to in due time." Justice Jackson in Knickerbocker Printing Corp v. United States, 75 Sup. Ct. 212 (1954).

10 Ill. App. 2d 571, 580-81, 128 N.E. 2d 602, 606-07 (1955)

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**What Is Your Special Field of Interest?**

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<thead>
<tr>
<th>Court organization?</th>
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</thead>
<tbody>
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<td>Minor courts?</td>
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<td>Lawyer referral service?</td>
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<td>Selection of judges?</td>
<td>Family courts?</td>
<td>Pre-trial procedure?</td>
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<tr>
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<tr>
<td>Unauthorized practice?</td>
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<td>Civil procedure?</td>
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<td>Criminal procedure?</td>
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<td>Legal aid?</td>
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