



Gridlock!

California's new effort to break the legal jam

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A primary cause of delay in California courts has been accommodation. By 1986 many of California's courts had come to accept delay as inevitable. The common assumption was that nothing could be done to change this condition short of adding several hundred judges. Judges and lawyers accepted the idea that control of the pace of litigation was the responsibility of the litigators. The system was so inflexible that the prescribed method of calendaring for all courts with 10 or more judges was a master calendar. Educational programs for judges did not include the managerial aspects of courts controlling their own affairs.

State statistical reports used the filing of an "at issue" memorandum, which might occur 15–24 months after the filing of the complaint, as the starting point for measuring the time to disposition. Measuring the age of cases from initial filing to termination was not an element of trial court reports to the state office. While data did not exist in 1987 giving a clear and comprehensive picture of civil delay in California from initiation of proceedings, there was little doubt that delay existed and was severe in many courts. Many people believed that the nature and extent of the problem made delay intractable in California.

THE START OF DELAY REDUCTION

Over the years California's judiciary had intermittently evidenced concern about delay. Activities in other

jurisdictions regarding delay were generally unknown within the state. In this environment, the attorney general of the state, who attended a national symposium on court delay reduction, was struck by the progress other states had made in confronting delay. He formed a coalition of lawyers and judges to discuss initiating a delay reduction program in California. The speaker of the Assembly agreed to carry enabling legislation; it passed in 1986 as the Trial Court Delay Reduction Act of 1986 (TCDRA)(Cal. Gov. Code, §§ 68600 et seq.).

The TCDRA created two requirements relevant to this article: (1) the Judicial Council was directed to establish case processing time standards for general civil cases, and (2) nine superior courts, selected because of the high number of trial-ready cases pending per judge, had to implement pilot programs for a three-year period to reduce civil case delay. The nine courts mandated to operate delay reduction programs were the courts in Alameda, Contra Costa, Kern, Los Angeles, Orange, Riverside, Sacramento, San Diego, and San Francisco counties. The delay programs were to assume control over the pace of litigation and manage cases from filing to disposition.

In the meantime, the San Diego Superior Court, with the encouragement and assistance of Ernest Friesen, a nationally known expert in case management, voluntarily initiated a delay reduction program. This pro-



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gram would serve as a key reference for several other mandated programs. The most remarkable aspect of the San Diego program was the commitment of the judiciary to address the central question of control of the pace of litigation. The court's initial efforts met with skepticism and hostility from some members of the bench and the bar, but close cooperation of the bar's leadership with the bench enabled the court to adapt a program that met the court's goals.

San Diego's willingness to be the proving ground documented what was latent in most courts of the state. Much of the judiciary had grown tired and frustrated with the assumption that nothing could be done to change the pace of litigation. At virtually all levels in the system, judges and lawyers came forward who were keenly interested in making significant, and lasting, improvements.

When Malcolm Lucas, a federal district court judge for 13 years and a state trial judge for 7, became chief justice in early 1987, he immediately embraced the Trial Court Delay Reduction Act as an appropriate and advisable response to delay in California.

Under the direction of the chief justice, the California Judicial Council adopted trial court delay reduction as its highest priority. To evidence that priority and respond to the mandate of the TCDRA, the Judicial Council adopted the American Bar Association's case processing time standards as the goals for the state, although the Council decided to phase them in over a four-year period. These acts were the first of their kind for the California Judicial Council, a historically passive organization. To effectuate the process, the Administrative Office of the Courts (AOC), staff agency to the council, was charged with conducting delay reduction workshops throughout the state. It was this effort that yielded one of the most unique aspects of the delay reduction project, namely courts that volunteered to undertake delay reduction activities.

The workshops were designed to encourage courts voluntarily to take the initiative in implementing delay reduction programs. Even though nine courts had been mandated to undertake them on an experimental basis, it was deemed preferable by state judicial leaders for courts to initiate programs voluntarily than to await some further legislative action. The legislation permitted voluntary experimental programs and allowed for local court rules to deviate from statute or statewide court rules in setting up the delay reduction programs. (Cal-

ifornia was the only state where delay reduction had been mandated by the legislature rather than initiated by the judiciary.)

The regional workshops focused on the history of delay reduction, successes in other jurisdictions, benefits of undertaking such a program, and implementation techniques. In contrast to the nine mandated pilot courts that had about six months to plan their programs by January 1, 1988, the volunteer courts were allowed to take more time to identify and resolve issues. Ten additional courts opted into the program. Nineteen courts in all, which conduct 80 percent of the judicial business in the state, joined the program. The voluntary counties became an integral part of the overall strategy to have the judiciary, in ever-increasing numbers, institute management over the courts. An exciting and encouraging aspect of this corollary program is to witness the judges and staffs in the voluntary courts vying with the mandatory pilot program courts for the most significant progress in reducing delay.

Granted, many of these volunteer courts did not have the same delay problems as the mandatory courts. But in an effort led by Chief Justice Lucas to create a climate for change and improvement, these volunteers extended the spirit.

To reinforce all these messages, the chief justice paid visits to many of the delay reduction courts to hear firsthand accounts about the progress of their efforts. His attention to the program and constant encouragement was a source of continuous support to the judges and court personnel and emphasized the importance of the effort.

In 1988 the president of the state bar, responding to concerns expressed by attorneys, met with the chief justice to identify a way to incorporate the practicing bar as an active participant in the program. As a result of this meeting, there emerged a "consortium" of lawyers appointed by the state bar, who then joined the regular meetings of the delay reduction courts. These expanded meetings were intended to provide an opportunity for the bench and the bar to focus on systemic problems and to develop recommendations to resolve them.

The consortium was slow in developing but began to take a more active role in addressing issues of concern to lawyers and judges. As the meetings became better organized, there was a sharper focus on issues of concern, such as maintaining firm trial dates, the impact of criminal cases, integration of preprogram cases, and the like. The meetings served the purpose of having all the courts in the program

Delay reduction programs in California added to stress, particularly with individual calendar courts

discuss common problems and share successes.

By the beginning of 1989, a shift in attitude among judges and some lawyers began to appear, which led to greater acceptance of judicial control over case progress from filing. This shift reflected the second stage of the project's progress. Later, as procedures and rules stabilized and experience practicing under the program increased, there was even greater acceptance; the level of increasing enthusiasm among the judges was quite discernible at the consortium meetings. This stimulated an ever-increasing scrutiny of the information being reported.

A principal concern to pilot courts and the AOC at the outset of the project was how to obtain information on the age of pending cases from the date of filing on a case-by-case basis. The statistical reporting system used in California had remained largely unchanged since its inception 30 years ago and was based on reporting of aggregate filing and disposition numbers and age at disposition from the filing of the at-issue memorandum.

Fortuitously, the Judicial Council was testing a new electronic method of reporting statistics. This method, known as STATSCAN, uses bar coding and a software system that maintains case-by-case data. Although STATSCAN was still a pilot project that had not been thoroughly evaluated, it offered a means to gather information on the age of cases from filing. Not all of the nine pilot courts chose to use STATSCAN technology; some chose to use their existing computer programs and submitted separate reports to the AOC. The STATSCAN courts transmitted information to the AOC by electronic means from which reports were produced.

In addition to STATSCAN, the Judicial Council approved a \$1 million grant for four of the mandated delay reduction courts to obtain PCs and a calendar management software package to facilitate the management of cases in the mandatory pilot program courts. Two courts maximized use of the equipment and software, Orange and Sacramento. The others used the equipment and the software without extensive modification. The AOC was unable to provide extensive support to all the courts using the equipment. Nonetheless the automation did permit the courts to monitor cases and generate management information.

In late 1989, the most noticeable changes in attitude toward the program began appearing. These changes in attitude among the judiciary became increasingly apparent at the consortium meetings

where judges reported they were working harder than ever before yet enjoying it more. The role of the judge in California had undergone a profound change. Judges were assuming both the responsibility and authority to manage the court process. This transition toward court control of the pace of litigation reflected a departure from earlier court management policies.

The initial effort started by the legislation was limited to superior courts, the general jurisdiction trial courts. In November 1987, AOC staff was directed by the Judicial Council to design and conduct a study on the pace of civil litigation in the municipal courts. The goal of the study was to provide a basis for making recommendations on realistic and attainable case processing time standards for those courts, the limited jurisdiction courts. The Judicial Council adopted in late 1989 Section 2.3 of the Standards of Judicial Administration, effective January 1, 1991, which applied to all trial courts and was modeled after the American Bar Association's case processing standards. By completing the involvement of all California trial courts in civil delay reduction efforts, the council signaled it would retain the leadership on these matters in the future.

The chief justice also appointed a special criminal delay reduction committee to focus attention on the criminal justice system. This system, impacted by the various criminal law initiatives and by the "drug war," has had a profound effect on all court operations—criminal and civil. The committee is expected to serve as the focal point for improving criminal court procedures as a complement to the civil delay reduction effort.

THE SECOND PHASE

The legislation mandating the California program contained a hiatus between the time the experimental phase ended and an evaluation report was due. Further, the pilot mandatory delay reduction program was scheduled to end just as the new procedures were beginning to take hold and show results. Consequently, the Judicial Council sought legislation to extend the program for two years to permit an evaluation report to be written about the first three years' results, which would include statewide recommendations and changes to be considered by the Council without interrupting the program.

This legislative proposal, simple on its face, became the vehicle for the trial bar, which had other agendas, to attach unacceptable conditions to the program. First, the trial lawyers were concerned

with pressing their control over voir dire, which judges had begun to erode under the aegis of the delay reduction programs. Second, there also were efforts to legislate procedural changes that would significantly reduce judicial discretion and that might result in extending disposition times again.

Some of the attorney frustration with the program derived from the experimental nature of the nine pilot projects. Each court was given the authority to promulgate rules that contravened statutes and permitted experimental divergence from normal court practices and procedures.

In spite of the delay reduction advantages, the negative impact on the tradition-bound California bar was underestimated. Frequent meetings with the bar, legal secretaries, etc., to explain what was being done and how it was being done became obligatory.

The speaker of the assembly, who carried the original legislation, also agreed to carry the extension legislation. His position was sympathetic to the extension of the delay reduction programs. However, the trial lawyers and defense counsel, who have considerable influence in the legislature, opposed this.

The chief justice requested that the speaker agree to the appointment of a working group to find a common ground, which he did. The group met four times, producing a tentative draft of proposed legislation. The essential components were to institutionalize parts of the delay program but reduce judicial discretion in other areas.

The legislation, eliminating the experimental nature of the program, was passed in August 1990, a full year earlier than anticipated and well before the legislatively mandated evaluation concluded. The legislation responded to some of the primary concerns of the bar, namely, identifying standard time frames for accomplishing certain civil procedure steps. But it also clearly provided for judicial control over the pace of litigation and the conduct of the courtroom. The latter point had been a main source of significant contention in California.

In taking this second step the Judicial Council asserted its role in the governance of the courts. While the original delay program had been statutorily mandated, the current prevailing view is that the courts should assume this mantle.

PRELIMINARY RESULTS

At the time this article was written, the available data were only preliminary, but what they indicate is striking. In Los Angeles, prior to delay reduction, virtually no case requiring a jury trial started trial sooner than five years from filing. By 1989, some of the 25 Los Angeles judges within the delay reduction program tried jury cases within 12-15 months of filing, while placing *primary* emphasis on disposing of cases three years old and more. By the end of 1990, most of the 25 judges had no or very few pre-1988 cases in their inventories.

In Orange County during the first year of the program, where one-third of the non-negligence cases had been subjected to delay reduction management and the other two-thirds handled in the traditional manner, 80 percent or more of the delay reduction cases had been disposed within 12 months of filing while only 26 percent of the non-delay reduction control group had been disposed within a year.

In Sacramento County, 64 percent of its January 1988 filings were disposed within 13 months of filing. A year later, 60 percent of the January 1989 cases had been disposed of within 13 months. These figures, according to case samples, contrast with 41 percent of the 1987 dispositions and 48 percent of the 1986 dispositions occurring within 12 months of filing. The final evaluation report confirms progress toward a substantially faster pace of litigation in each of the nine pilot courts.

Many tests and struggles lie ahead as the program is extended throughout the state; efforts continue to institutionalize the concept of judicial control of the pace of litigation and the techniques of calendar management. But the successes to date and the acceptance by judges and lawyers of judicial control over the courts are very encouraging.

In California, progress has been made in the face of the common problems found in many urban courts today. For example, the rash of crack cocaine drug cases filed since 1987 has dramatically altered civil dockets. Drug and drug-related criminal arrests in the nine pilot courts have increased 22 percent over 1987, to a total of 126,800 arrests in 1989.

Kern County deferred trials of its civil delay reduction cases for 18 months in order to bring its criminal calendar more under control. Alameda County is confronting profound challenges to its docket reduction efforts because of the large number of first-degree murder trials, often associated with drug dealing, and because of asbestos cases with statutory priority for trial because of plaintiffs' ages. That puts substantial pressure on the court's promise to reduce civil delay and to have the trial actually occur on the first-scheduled trial date. In spite of these problems, Alameda reduced its average trial settings per case tried from 3.3 to 1.5 between 1987 and the third quarter of 1990.

In 1987, the California legislature enacted state funding of the trial courts on a local-option basis. The legislation included 109 new judgeships, 39 of which went to the nine pilot courts, if their counties opted for state funding. The governor now has filled these positions but it took almost two years to do so in some counties. Meanwhile, these courts experienced retirements and elevations. Because San Diego did not receive its new judgeships as soon as expected, and its vacant positions were not filled as needed, cases already in the system and ready for trial when its delay reduction effort started in

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1987 were deferred for trial up to three years. The new cases (1987 on) stayed on the fast track; the old cases were held until the court had its full complement of judges. Similar approaches to the pre-program cases were taken in other counties; the pending inventory now is "older" than before the delay reduction program because the older cases have not vanished.

No new judgeships have been created in California since 1987 and none is expected before 1991 at

the earliest. The courts have seen total filing increase 8 percent overall since 1987, but during this period, civil cases have decreased although 12 percent. Further overall increases can be expected. Without question, improved pretrial case management and new trial management techniques are improving judges' productivity. The courts will be able to handle more cases, more quickly it is hoped, and with existing resources.

The experience of courts in other states¹ indicates case-management benefits can be overwhelmed by caseload increases. With California's population growing at an average rate of 2.4 per-

cent per year over the last ten years, the cocaine problem not yet abating, and total caseload growing at about 3.8 percent per year over the same ten-year period, the four-year hiatus in creating new trial-level judgeships jeopardizes whatever gains firm case management has brought California to date.

OVERLOOKED NEEDS

The delay-reduction literature for the past 13 years has focused on case-management techniques. This was necessary and appropriate in the late 1970s and early 1980s. Still missing from this literature is a full exploration of the human aspects and consequences of delay reduction programs. We cannot fully explore these issues in this article, but we can identify appropriate areas for further study, based on California's experience.

Several of California's courts shifted from master to individual calendar systems as part of their delay reduction program. The staff in these courts experienced significant shifts in, or additions to, their jobs. Even in courts that retained master calendars,² staff often took on new responsibilities. In the rush by each court in the last half of 1987 to develop its program and adopt new rules and forms by January 1, 1988, staff orientation and training often were not given the attention they deserved. These aspects of implementation were later provided as the programs proceeded. Training staff is now a key element in national court delay reduction literature. Although many courts recognize the need for and value of training staff, California still lacks a standardized general curriculum, suggestions for court-specific training modules and procedures, and a proposed timeline over which training should occur.

One of the foremost problems facing all California courts that undertook delay reduction programs was the need to develop a baseline of information on current case processing. None of the courts in California had this information at the beginning of the program. In fact, several courts disputed the Judicial Council's findings that they were among the most backlogged in the state. The primary reason for this problem arose from the practice of counting cases only at the time an at-issue memorandum was filed—and not when the case was filed, as is done in many other jurisdictions. This long-standing practice characterizes the historical approach in California to delay reduction: don't worry about the case until the attorneys say they are ready to go to trial. The absence of these data compounded problems in early implementation.

Insufficient attention has been paid in California, and perhaps in other states as well, to training judges in why statistical information about their caseloads is important, how to use the statistics they are provided, and then how to respond to the message found in the statistics. Too many judges still ignore available data or see statistical reports as

swords that others can use, somehow, to attack and hurt them. A good statistical information system is very important to sound case management; so far that message and how to use statistics have not been conveyed sufficiently to judges.

The work and profession of judging has changed. If being a judge ever were a tranquil, low-pressure job, those days are long since past in large urban courts. The number of stress-reduction programs offered to judges across the country in recent years is testimony to the pressures many judges experience today. The introduction of delay reduction programs in California added to that stress, particularly for those judges who started to manage individual calendars. The 25 Los Angeles judges assigned to the program assumed the heaviest burden of the nine pilot courts. They took half of all the currently pending cases in their branch of the court as of January 1, 1988, plus half of all the new cases as they were filed. This amounted to 1,000 to 1,200 civil cases per judge.

Since this program started, three judges have left it for medical reasons; the stress associated with the delay reduction effort is seen as contributing to the departure of two of them. Even Los Angeles judges who are good case managers and are delighted to be managing their own caseloads acknowledge that the job is much harder now. Reports of burnout surface among the judges. The AOC arranged for a nationally recognized expert in stress management, Dr. Isaiah Zimmerman, to conduct classes on stress and time management in the courts that requested his services. His classes proved to be quite helpful to the judges and court staff.

Staff in several courts also have experienced added stress.³ Most of the stress felt by staff is attributable to four factors: (1) a general concern about change not fully addressed during the preimplementation period; (2) lack of information about new procedures, forms, and work flow; (3) longer hours, a faster pace of work (running faster to stay in place), or both; and (4) watching and responding to the stress of the judges. Hard work is not unique to judges and court staff. Many people work hard; many business people and attorneys work 50-to-60 hours a week, week in and week out and juggle very busy schedules. These people normally are able to spread these hours over six or seven days, however. And they often can create breaks in their schedules for recovery. Courts, in contrast, are open five days a week and have defined hours to serve the public; there is less flexibility in scheduling. Judges can and do take some paperwork home, but court staff must process mountains of documents and forms in 8-hour days and 40-hour weeks. Delay reduction programs often create new forms and new procedures for both staff and judges to master. Perhaps the status of the court calendars at the start of the programs led staff to not being fully prepared for the amount of additional work involved when case

management was introduced. Whatever the cause, stress has been a significant by-product of delay reduction in California.

ANSWERS FROM CALIFORNIA

The delay reduction experience in California has provided several lessons to date. First, conscientious application of the delay reduction principles articulated by the American Bar Association and others can produce dramatic results, especially in courts with major delays. Second, even when a large proportion of the bar initially opposes courts' assuming responsibility for case progress, the practices of the bar are malleable and accommodating when judges express a firm conviction. Whether the courts over time can sustain their efforts and continue to achieve positive results and overcome significant opposition from the bar remains to be seen, but so far there is substantial attorney compliance with the delay reduction procedures.

Many in California, and perhaps elsewhere, blamed California's judges for the pace of litigation, indicating that if the judges cared about how long cases took to be resolved, they could reduce case processing time. Surely, some of this perception has merit. What was not as clear before the Trial Court Delay Reduction Act (TCDRA) took effect was the extent of frustration that California's judges felt and the fact that some of California's statutes and rules made case management difficult. The TCDRA gave the judges the tools as well as the incentive to change. These were reinforced by the chief justice, who made delay reduction the highest priority of the judicial branch. The trial judges eagerly seized the principles and tools, not only in the nine mandatory courts but in 10 volunteer courts. Case management by the courts is becoming institutionalized in California, even though much remains to be done before institutionalization is accomplished.

Several courts found that it was as important to manage trials as to manage the pretrial stage. The AOC, in conjunction with the National Judicial College and the National Center for State Courts, conducted a special program for training judges on managing trials. Thirty judges were selected to participate in this very successful program. Each participant reported this to be the most significant judicial education programs they had ever attended. As a result, six of the mandatory courts have given the program to all of their judges. Another eight superior courts are currently planning programs for the near future. Preliminary data suggest significant reductions in trial length. For example, San Diego reduced its typical trial lengths by half.

QUESTIONS RAISED BY THE CALIFORNIA EXPERIENCE

California certainly is not the first jurisdiction to attack delay on a broad scale. Yet its experience to date has surfaced or resurfaced some questions that

still have not been answered in the delay reduction research.

The usual answer regarding which calendar system is "best" is the same answer Maureen Solomon gave 18 years ago: the best calendar system is the one that a court wants to use, since any system can be made to work.⁴ While this may be so, there is growing interest among California's judges in individual calendars. The data from the mandatory courts do not inform this debate in California.

Much has been written lately about differentiated case management (DCM). Perhaps it is time to consider differentiated *judicial* management (DJM). Some judges appear to be able to handle individual calendars, while others work better when they are assigned cases from a master calendar. Large courts often use DJM without labeling it as such, but the decision to use a master calendar or individual calendar arrangement for some cases or case types usually is based on the cases rather than the skills of the judges. It may not be sufficient to say a judge should be able to manage his or her individual calendar or get off the bench (as some in California have suggested). Perhaps more attention should be given to matching judicial skills to a calendar system (DJM), rather than matching cases to tracks within that system (DCM).

There are obvious concerns and problems with DJM:

1. administratively allocating and tracking cases and records among several systems;
2. the perception that some judges are being labeled as "good" while others are being labeled as "bad";
3. the possible need for two or more sets of rules for similar cases, thus compounding attorneys' problems; and
4. possibly having to decide if a specific case should be assigned to one calendar system or another.

Despite these questions, DJM merits further consideration and study.

A constant problem when judges or courts have different rates or degrees of success is how to reward high performers while continuing to allocate resources to cases or courts that still are delayed or overburdened. Once in a while, a court that has done a particularly good job with its calendar will get more judgeships. More likely, new judgeships go to the courts that still are struggling. The presiding judge of the high-performing court may get to go to a conference or two, perhaps even out of state, or the court may get some equipment or staff it needs. By and large, however, the reward system is very limited. Sometimes we promote a trial judge to an appellate court, thereby rewarding that judge, but also losing an excellent trial judge. Sabbaticals are one response receiving a lot of attention recently, but allowing one or more judges on a good court to take a sabbatical may jeopardize that court's record

unless the sabbatical program includes "extra" judgeships that can be used to cover the departed judges' calendar while they are away. Again, we do not have any ready or easy answers, but note a problem that California's experience has highlighted.

A related issue: How can courts continue to emphasize delay reduction and good case management in an environment of rising and shifting caseloads without burning out its best and most productive judges? Short of sabbaticals, are there administrative safety valves that will provide a sufficient break, mentally and physically, to renew a judge? Training programs and conferences out-of-town or out-of-state have been used, but their availability is limited and not everyone can find appropriate training or conferences. Once again, more thought is required.

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Despite its reputation as one of the slowest states in the country for resolving civil disputes, California is on the way to getting on top of its delay problem. One of the noticeable aspects of the program has been the attitude of the judiciary. On numerous occasions at conferences, in visits to courts, or by telephone, judges have expressed their pleasure at being a part of a system that is making progress on what had seemed to be an intractable problem. Also, they are delighted to be encouraged to take an ever-increasing role in the management of their courts.

Have California courts turned the corner? Have the courts overcome their "accommodation" to delay? Can progress to date continue into the future? Who will lead the changes in the future? Will courts be content to take "fast" out of the program at its conclusion? Are all judges equipped to conduct a fast-track project? These questions and many more remain unanswered for the time being. The answers will depend upon the number of attorneys, judges, court officers, and members of the public who remain committed to enhancement of the system. In the last resort, it is individuals who have brought us to this point and individuals who will make the lasting difference.



1. See B. Mahoney, *Changing Times* (Williamsburg, Va., National Center for State Courts, 1988).

2. Prior to 1989, all of California's superior courts with five or more judges used master calendars pursuant to California Rules of Court, Rule 224. It was amended effective January 1, 1989, to provide:

Each court shall adopt for civil cases a calendaring system that it determines will advance the goals of caseload management and delay reduction, as set forth in section 2 of the Standards of Judicial Administration.

3. In focusing on the stress of judges and staff we do not mean to imply that they were the only ones who experienced stress as a result of the delay reduction programs. Attorneys and their staffs, too, have experienced stress. Their stress is beyond the scope of this article, however.

4. M. Solomon and D. Somerlot *Caseload Management in the Trial Courts* (Chicago, Ill. American Bar Association, 1987).