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THE PRINCIPAL CAUSES OF COST AND DELAY

The statute requires us to "identify the principal causes of cost and delay in civil litigation" in this district and suggests that we consider court procedures and the conduct of both litigants and their attorneys as likely contributors. (28 U.S.C.s 472 (c) (1) (C)).

1. The Context

It is useful to remember that this effort to identify principal causes is mandated as part of the Advisory Group's assessment of the state of the court's docket. The legislation safely assumes that in every district there will in fact be excessive cost and delay, together with causes to identify, but the context is important. The process is to be part of the assessment of the over-all situation. We are invited to maintain a sense of perspective.

Over-all, the record of the court in this district is exemplary and we think it appropriate to say so. The statute is replete with provisions that reflect the judgment that public accountability is important in achieving the goals of civil justice reform: our reports are to be made public, the names of judges who delay matters excessively are to be announced publicly, with details of their putative offenses.

We subscribe to the view that the public is entitled to know and to be involved in the operation of their courts. But it serves no useful purpose to give a skewed view, to cast blame while

avoiding praise. To do so would contribute to a false view that the justice system is bogged down with interminable delays and concomitant costs; this is certainly not true with respect to the Eastern District of Pennsylvania.

To put the matter another way, public accountability is most useful when the public is knowledgeable; public input based on an erroneous view of the facts is counter-productive. There are other reasons that make it important to present a balanced view of the present situation. To disparage important institutions of government and to erode public trust is harmful when it is unwarranted. Public confidence in the federal judicial system has practical consequences of enormous proportions. Finally, it is only fair and equitable to recognize effective public service on the part of public officials, judges as well as others.

The facts are that the weighted caseload per judgeship in this district is among the highest in the country --well within the top 5% of all districts -- that the court nevertheless continues a record of filing to disposition in civil cases that places it well within the top 10% of all federal district courts, and it has done so, and continues to do so, while bearing the enormous burden of a heavy vacancy rate -- empty judicial chairs which remain unfilled despite authorizations.

In terms that are more meaningful to the ordinary litigant: 70% of all civil cases that go to trial are tried within 18 months from filing, only about 2% of civil cases that have gone through the court's expeditious and potentially economical

arbitration program have required trial de novo (531 of 21,110 over a period of 161 months), and the innovative and still-experimental mediation program is producing more favorable results than might have been hoped for. And the median time from filing to disposition of all civil cases in this district was seven months during the last statistical year for which data are available -- 1990. As a matter of fact, this figure understates the record because it excludes such cases as student loan defaults; it is estimated that to include them would further reduce the median, at least nationally, by another month.

This is not to suggest that there are no deficiencies; indeed there are and some are quite serious. Moreover, threats to the well-being of the system, and of this court, are constant.[1] What may appear to be relatively simple changes in administrative policy can cause enormous shifts in caseload. We do not suggest that conditions warrant one to be sanguine. We mean only to suggest that in focusing on causes of cost and delay, as the statute requires us to do, we should not be read as ignoring the successes that have been achieved.

2. Lack of Resources as a Cause of Delay

If we total the number of vacant judgeship months over

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[1]. In statistical year 1985, 6.6.% of civil cases in the entire federal judicial system were over three years old. By 1990 that figure had climbed to 10.4%. In absolute terms, the number of civil cases over three years old increased during that period from 16,726 to 25,207. It is doubtful that this reflects a concomitant increase in complex litigation. The more likely explanation is to be found in the cumulative effect of judicial vacancies and in an increase of over 30% in criminal felony cases.

the last five years (1986 - 1990), the figure is almost exactly the equivalent of nine United States District Judges sitting for one full year!

The primary harm done by inadequate judge-power is to render trial dates less than firm and less than credible. The Civil Justice Reform Act recognizes the importance of firm, credible trial dates in reducing both cost and delay. Without adequate judge-power and with a burgeoning criminal caseload, measured in the number of defendants even more than in the number of cases, trial dates inevitably carry the unspoken but clearly understood caveat "unless circumstances...."

Elsewhere this report speaks to mechanisms of making trial dates less vulnerable to exception and hence more credible. The first alternative, trial by consent before a magistrate judge, posits the availability of such a judicial officer and here, too, we see the impact of scarce resources: currently, they are simply not available. We detail the situation and make recommendations for change in section below.

The statute underscores the desirability of "early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials and other litigation events." Moreover, it mandates the pilot courts to include within their respective plans provision for "ongoing control of the pretrial process through involvement of a judicial officer in... assessing and planning the progress of a case." To a great extent, judges of this district are doing so

now, particularly with the more complex cases. Yet, without adequate judicial resources it is simply not possible to fulfill these requirements in optimal fashion, and judges have told us as much.

Again, as developed elsewhere in this report, delay in deciding dispositive motions and important discovery motions is likely to result in added cost to the litigants as well as in a longer period to disposition. But, as we have there recognized, pressing priorities often deny the judges the luxury of dealing with civil matters when they would like to.

This report has already catalogued the resources required by the court, in connection with the provisions of §472 (c) (2). We do not repeat all that was said in that section, but we would be derelict if we did state our view that the lack of resources described in this section constitutes the single most serious cause of cost and delay.

Judicial vacancies invite a lot of finger pointing. The sheer number of participants in the process invites the attempt to shift blame. Both houses of Congress are involved in authorizing additional judgeships. (We note, parenthetically, that the figures set forth above do not speak to delay in recognizing unmet <u>needs</u> by authorizing new positions; they speak only to delays in filling needs which have been formally recognized. Hence they understate the absence of adequate resources.) The executive branch is involved in the selection process, with both the Department of Justice and senior White House staff as active participants. The

American Bar Association is involved in evaluation of prospects or nominees. The Senate is involved in the confirmation process, and individual Senators are frequently participants in the initial selection process. Often enough, when vacancies persist there is blame enough to go around and finger pointing follows.

We have no desire to point fingers, but we do think that it is time that the process was examined in a formal way, from the criteria utilized in determining the need for new positions[2] to means of assuring a more prompt response once vacancies occur.

3. Abusive and Excessive Discovery

There is widespread agreement among judges as well as

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[2]. The Judicial Conference of the United States will not recommend additional judgeships for any court whose weighted caseload does not exceed 400 per judgeship. The basic idea of "weighting" the caseload is to distinguish between the burden imposed by a complicated anti-trust class action and a relatively simple "fender bender" tort claim in which jurisdiction is based on diversity.

Weighted case loads are expressed per judgeship. No attempt is made to include vacancies in the computation nor the availability of senior judges. In addition, the Eastern District of Pennsylvania has been a "lending" court; judges sit by designation in other districts where the workload has reached emergency proportions, sometimes due to prolonged vacancies. No attempt has been made to include these factors.

Sometimes one hears that the vacancy rate is not so serious because of the service performed by the senior judges. Indeed, in terms of the federal judicial system as a whole it has often been said that without the service of senior judges the system simply could not have functioned.

It is important to remember, however, that 400 filings per year, adjusted for difficulty, is a very high number; it posits disposition of more than three cases every two working days. This includes not only hearings and rulings, not only criminal trials but sentencing and the writing of such opinions, memoranda and orders that the judge chooses to hand down. It is fair to say that the standard posits the availability of some relief.

practitioners that excessive discovery contributes significantly to the cost of litigation and, perhaps to a lesser extent, to delay in the disposition of cases. The comments we have heard in this district mirror the results of national surveys and fully support the concerns reflected in the statute.

There is no similar agreement as to what constitutes "abusive" discovery as distinguished from merely excessive discovery. Some might say that discovery is merely excessive rather than abusive when the motivation is primarily to gain benefit for the party (or lawyer) seeking the discovery, by increasing the number of billable hours, for example, or "by leaving no stone unturned" in the effort to assure victory. Abusive discovery, on the other hand, is said to be motivated by the desire to do harm, economic or psychological, to one's adversary. It is doubtful that it is useful to pursue these semantic distinctions.

It is more fruitful to attempt to explore the underlying causes of what we may term improper discovery, for an understanding of these causes may help point the way to acceptable remedies. Moreover, we are mandated to attempt to discern and to report on principal causes of cost and delay.

With respect to such matters meaningful consensus is more difficult to achieve. True, references to discovery run like a thread through our entire report, as they do through the entire statute. A wide variety of underlying causes have been assserted, but we cannot claim a high level of confidence with respect to their relative importance or, indeed, in identifying those which

should be viewed as "principal."

Most often mentioned is the desire, if not the need, to increase billable hours. Management practices in large firms has also been suggested as a significant problem: assigning discovery to the junior lawyers results in excessive zeal and excessive caution; it takes greater experience and skill as well as more confidence to limit discovery, to forego finding another defect in the opponent's case, regardless of the strength of one's own cause.

The role of the billable hour is, of course, not limited to the problem of discovery or associated motion practice. Billable hours, one judge suggested to us, has become the standard of merit, of compensation, of promotion. Its major impact in litigtion, however, is probably in discovery and motions for summary judgment.

The failure to implement proposed solutions is sometimes categorized as a problem. For example, a judge's reluctance or excessive delay in granting meritorious motions to compel can encourge tactical roadblocks and strategic obstinacy. This is particularly true where the judge's failure to deal with obvious problems is coupled with a refusal seriously to consider sanctions.

True, the conduct of the stone-walling lawyer may be characterized as unprofessional, but the need for a higher level and greater measure of professionalism on the part of the bar has itself been referred to as a significant cause of excessive costs and delay.

A sense of proportion, however, is essential. If a judge set out to extirpate every bit of excessive discovery the cost to

the litigants, let alone to the court, would soon exceed the savings that could be achieved. Conferences in chambers and the motion practice that would inevitably result also involve billable hours, hours that may or may not move the litigation forward.

The willingness of large corporate litigants to manage the conduct of litigtion as conducted by outside counsel does appear to be a significant factor in reducing transaction costs. Whether stated negatively as a problem, i.e. the failure to manage, or affirmatively as a solution, this does give promise for making a genuine contribution to achieving the goals of the statute.

4. What We Choose to Omit; What We Do Not Know

As the report itself makes clear, there are many other impediments to achieving "the just, speedy, and inexpensive determination of every action." Inordinate delays in ruling on motions for summary judgment, or even what appears to be the refusal of some judges to take such motions seriously, failure of firm trial dates to remain firm, cases languishing in a judge's trial pool for well over a year are some examples. We have been asked to identify only the principal causes and we have attempted to do so.

In assessing the significance of this section, however, it is important to recognize and to acknowledge how few of our conclusions are based on hard empirical evidence. In an earlier section of this report we elaborated on how little is really known about the relationship of total elpsed time and the cost of litigation to the parties. That analysis and the resulting caveat

is no less applicable to the discussion in this section.

It is also true, however, that the conclusions concerning litigation practices described above are based on anecdotal evidence, on opinion of participants, on impressions and inferences. We have attempted surveys of litigants and of lawyers, have had the benefit of input from almost every single judge on the court, both active and senior, and the Advisory Group itself is both diverse and broadly representative of the bar of the Eastern District of Pennsylvania. In addition, we have learned much from witnesses and communications received in connection with a public hearing.

None of this substitutes for the kind of hard data generated by a random experiment such as is being conducted in connection with the court's mediation program, or the painstaking accumulation of data over more than a dozen years, as is true of the court's arbitration program. And there is little enough available nationally. The District Court Studies of the Federal Judicial Center focused, for example, on strong judicial controls and case management. But, while we have no reason to question the major conclusions, these data were gathered in the mid-1970's and this court, one of those studied, has certainly changed since that time.

There is empirical work being conducted, for example by the Rand Corporation's Institute for Civil Justice which has an enviable record of exceedingly valuable empirical research. The Federal Judicial Center's current studies on weighted caseloads

should, in due course, provide new insights into the processes of civil as well as criminal litigation. Meanwhile, the important thing is to acknowledge both the need to know and how little we do know. This we willingly do.