Les Levin's paper

NOTES ON THE RELATIONSHIP BETWEEN DELAY AND COST OF LITIGATION, ON THE ROLE OF LITIGANTS AND LITIGANTS' ATTORNEYS AND A ROSTER OF CHOICES

1. The Statutory Mandate: Sweep and Scope

The statute requires the advisory group to "ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts." 28 U.S.C. § 472 (c) (3).

This section defines the task of the advisory group in two important respects. First, it speaks to both cost and delay and charges the advisory group to be concerned with each. Second, it mandates that the advisory group's recommendations not be limited to actions that might be taken by the court, but that they include contributions to be made by the litigants and, separately, by the litignts' attorneys.

The latter point bears some emphasis because although the advisory group is appointed by the chief judge after consultation with the other judges on the court and is charged with developing a plan to be presented to the court, it may not confine its concerns to the contributions to be made by the court. The statute is specific: the court is the first, but only the first, among the participants in the system who are expected to contribute to the reduction of both cost and delay.

With respect to each of these two points the quoted section is consistent with a number of other sections in the statute, each of which speaks to both cost and delay and each of which focuses on the role of non-judicial participants in the system. The Congressional findings in the very first section of the Act identify the litigants and the litigants' attorneys, as well as the courts, among those who share responsibility for cost and delay in civil litigation and who must contribute to the solutions to the problem. CJRA of 1990, §102 (2) and (3). Similarly, in developing its recommendations the advisory group must identify the principal causes of cost and delay in civil litigation and, in doing so, must consider not only court procedures but "the ways in which litigants and their attorneys approach and conduct litigation." §472 (c) (1) (C).

It can hardly be expected that the recommendations applicable to litigants, or to the ways attorneys "approach ... litigation," can be reduced to, or have the crisp clarity or impact of a local rule designed to change procedures of the court. Nor should all recommendations addressed to the judges be expecxted to be uniform in tone or in impact. Faithful to the

mandate of the statute, we will attempt to address the full range of Congressional concerns, each in a manner appropriate to the particular issue.

2. Cost as a Function of Elapsed Time

(a) How delay can increase the cost of litigation

The common assumption has been that the cost of litigation to the litigants increases as total elapsed time increases. A commonly assumed corollary has been that expediting disposition will reduce the cost of litigation. The Act itself, the Harris survey which played an important role in shaping it, as well as the Brookings Report that preceded it, appear to reflect these assumptions. These propositions, however, are far from self-evident and require careful analysis.

We begin with the fact that significant delay in the disposition of a civil case increases the number of hours spent by the attorneys, and hence the cost to the litigants, in many, if not most cases. It does so in two principal ways. First, if many months elapse between steps in the litigation, between the making of a motion for summary judgment and argument on that motion, for example, there is almost certain to be a number of additional hours spent by the attorneys in re-familiarizing themselves with the case. If the file needs to be reviewed and re-reviewed a significant number of times in the course of extended litigation, this can have an impact on total hours and total fees.

Second, to the extent that additional time is available, many lawyers will take depositions that otherwise would not have been taken, thus increasing the cost of the litigation.

The above analysis rests on the premise that the cost to the client is a function of the number of hours expended by the lawyer. This is true, by and large, where billing is based on the number of hours expended multiplied by the appropriate hourly rates. It is not true with respect to lawyers who are working on a contingent fee. The available evidence, sparse as it is, indicates that just as there is no extra charge to the client if the number of hours spent by the attorney increases, so there will be no benefit to the client if those hours are decreased.

Two caveats are appropriate. First, there is evidence that the percentage fixed in contingent fee cases can be affected by market forces. Thus, the percentage typically charged in airplane accident cases is lower than that set for personal injury cases that follow automobile accidents. Whether more efficient procedures leading to accelerated dispositions will operate similarly is, at this juncture, a matter of speculation.

Second, it is not unusual for the percentage of recovery earned by the lawyer to depend on whether the case is settled or tried. Thus, settlement before trial can be expected to yield a lower percentage to the attorney than recovery of a judgment after verdict. We need not explore all the variations and permutations. The important point is that an increase in the number of settlements disposing of cases at an early stage of the litigation may reduce not only the number of hours for which an attorney for the defense will bill, but also the fee collected by the plaintiff's attorney.

(b) Dispatch may not reduce the cost of litigation

The fact that delay has the potential, and probably the propensity to increase the cost of litigation does not mean that dispatch will automaticlly reduce it. On the contrary, compressing the time available for trial preparation may, in some circumstances -- as in the case of a party brought into the litigation at a late stage -- result in a more intensive schedule which will not reduce the total number of hours expended and may even result in premium billing.

It is useful to apply and to extend this analysis to a common situation -- arguing a discovery motion or participating in a status conference -- in which it is possible by various techniques, such as telephone conferencing, to reduce the amount of time spent by the lawyer. Whether this will result in savings passed on to the client depends in large measure on the method of billing, as we have seen. Where billing is entirely on an hourly rate basis, it is likely to be passed on. Per contra, in contingent fee cases. These are not, however, the only alternatives. If a lawyer bills on an hourly basis with fixed rate minima for certain activities, so long as the argument on the motion involves less than the fixed rate, there will be no savings to the client.

In short, reducing total elapsed time from the commencement of litigation until its termination may have a salutary impact on cost to the litigant (1) by avoiding non-productive hours spent in review of a file that could have been avoided; (3) by discouraging excessive discovery or discovery of marginal utility; (3) by fostering earlier settlements that reduce transaction costs. In many cases the savings to the client can be quite considerable and such empirical evidence as is available supports this conclusion.

It is worth emphasing, however, that a direct relationship between time and cost has not been established; speeding up cases will not automatically result in reduced cost to the client. This is certainly true in contingent fee cases; moreover, even in cases where billing is by the hour, incremental efficiencies in disposition, important in themselves, are unlikely to result in

demonstrable, significant savings to the litigants.

We need to learn more of the relationship between elapsed time and transaction costs, particularly in federal litigation. Given the legislative mandate embodied in the Civil Justice Reform Act of 1990, and the need for a better understanding of how proposed changes in litigation management and techniques are likely to impact on cost as well as delay, it would appear appropriate for the Advisory Group and the court itself to encourage research in this area by the Federal Judicial Center and by other appropriate organizations.

3. Of Causes and Cures

At almost any stage of the litigation, it is possible to increase costs needlessly: an excessive number of unproductive face-to-face conferences, a proliferation of paper that is of little utility, long delays in deciding motions which serve to stall the litigation and to require unproductive reviews of the files all will have such adverse effects. As has often been pointed out, a single status conference or argument on a motion can add literally thousands of dollars in attorney fees. Many, probably most of the judges of the Eastern District have evidenced a sensitivity to this risk and have, by and large, fashioned their procedures with a view to avoiding unnecessary burdens on the lawyers and unnecessary cost to the litigants.

This sensitivity, however, is not shared by all of the judges, certainly not in all its dimensions. Proliferation of paper and conferences of marginal utility are familiar examples. Delay in deciding dispositive motions and crucial discovery motions is a factor in increasing cost, quite aside from its impact on ultimate disposition of the case. This has been of concern to many lawyers but it is a factor to which many judges, otherwise concerned about efficiency in the management of cases, appear oblivious.

We recognize, of course, that delay in rulings often results from the pressure of higher priorities rather than from insensitivity. We have made no effort to quantify the extent of whatever problem exists with respect to this or any other aspect of judicial practices and procedures. We are satisfied that it is not de minimis and hence that the situation could be improved.

Before considering remedies, or even recommendations, it is useful to consider the other side of the same coin: lawyers' conduct. One is struck by the number of judges who immediately point to the perceived need for, or at least desire for more billable hours as a driving force in attorney conduct and a major cause of the increased cost of litigation. This is usually evidenced by more and more complex discovery, but can be reflected in other ways including the making of motions, often

presented in monograph form, by requests for oral argument and multiple conferences.

We do not recommend any hard and fast rules to deal with these problems. In our judgment such an approach would be both ineffective and inappropriate. Conferences, for example, are often necessary; early involvement of a judicial officer is mandated by the statute and recommends itself to us on its merits. Sometimes conferences are desirable only because of the possibility that they will be productive. It would be wrong to introduce a regimen of penny-wise and pound-foolish procedures.

Moreover, we recognize that in these days of crowded dockets judges frequently do not have the luxury of choice; they are obligated to attend to whatever is most important or most pressing. We can ask only that judges be aware of and sensitive to the implications of their procedures on cost and delay and that lawyers be aware of their professional obligations to their clients and that they meet those obligations.

It is useful to make these points explicitly by way of recommendation not only to fulfill our statutory mandate, but also because focusing on these questions, and elaborating and elucidating the implications of particular procedures, will, hopefully, serve a useful purpose.

Discussion of the professional responsibility dimensions of lawyer conduct has occurred and no doubt will occur at various continuing education functions. Similarly, bench-bar programs in which the various participants in the system explore the practical ramifications of certain procedures as distinguished from others can be provide a useful educational dimension.

Accordingly, the Advisory Group recommends:

RECOMMENDATION 1:

Judges should be sensitive to the impact on cost of litigation of their practices and procedures, including delay in deciding motions, utilization of face-to-face conferences, and filing requirements.

RECOMMENDATION 2:

Lawyers should be sensitive to their professional obligation to be mindful of the impact on cost to the client of the lawyer's litigation practices and procedures, including those relating to discovery.

RECOMMENDATION 3:

Both Bench and Bar have an interest in the

mutual exploration of existing practices and their implications. This is an appropriate subject for copnsideration by utilizing such existing mechansims as coordinating committees and Bench-Bar programs.

We turn to the role of the client and what the statute describes as the "ways in which litigants and their attorneys approach and conduct litigation." This brings us back to a familiar theme. The literature, national surveys and the impressions reported to us by participants in the system within this district all point to discovery as the primary locus of excessive costs. To deal with one aspect of this problem some litigants, particularly large corporate offices with in-house counsel, have undertaken cost control measures with respect to the attorneys they retain.

Where the lawyer's desire to increase billable hours coalesces with the desire to leave no stone unturned in the preparation of a case, "excessive" or economically counterproductive discovery is a common result. In such cases client involvement, often through in-house counsel, can be helpful and litigant involvement, referred to above, has been reported effective.

In addition, policy statements such as that issued by the Xerox Corporation, intended to guide outside as well as in-house counsel, have gone beyond discovery to other aspects of litigation tactics and control. Similarly, under the leadership of the Council for Public Resources many corporations have adopted policy statements concerning utilization of alternative dispute resolution.

RECOMMENDATION 4:

Litigants, particularly institutional litigants, should assume the responsibility of exploring with counsel the development of litigation policies intended to achieve efficient, economical and professionally responsible practices.

____ Is there a role the courts can usefully play in making litigants aware of the cost of litigation as a factor in settlement? Courts are understandably and properly reluctant to interfere or even to appear to interfere with the relationship of a lawyer and her client. Yet, there are situations in which judges are of the view that a more realistic view of the costs and the risks of litigation on the part of the litigant might facilitate settlement.

In this connection it is useful to remeber that the CJRA emphasizes the authority of the court to have the litigant, or someone with authority to settle, present at specified

conferences. There is, nevertheless, evidence of judicial reluctance to do so, particularly if insisting on the presence of a principal is read as a reflection on a particular lawyer.

It has been suggested to the Advisory Group that although a judge would be hesitant to pick and choose among litigants ordered to be present at such conferences, if the practice were a general one, or at least a common one, the net effect would be salutary. We do not address here in such conferences, a general policy of requiring litigant participation, nor do we address other details of optimum utilization of this mechanism, such as timing, for example. We do believe, however, that judges have a role to play in assuring that the litigants themselves are made aware of transaction costs and their implications for settlement and for the appropriate conduct of litigation.

RECOMMENDATION 5

In appropriate circumstances and through appropriate means, judges should assure that the litigants are aware of the significance of cost and delay on decisions relating to the conduct or the settlement of the litigation.

4. Conclusion

In concluding this section of the report it is useful to provide a sense of perespective. None of our preliminary recommendations is offered as a panacea. If, for example, a litigant with deep pockets desires to use disovery as an economic weapon against an adversary who is less fortunately situated, and her lawyer finds the conduct acceptable, client participation in planning of litigation policy will surely not cure the problem. There are, of course, other mechanisms for dealing with the egregious case, but we do not deal with these problems here.

Indeed, it is well to emphasize that this section of the report is of limited scope. Discovery, the role of the judge in litigation management, and procedures to facilitate settlement are all the subject of independent treatment elsewhere in this report.

We do not harbor the illusion that we, or the court, can fashion a set of rules and practices that will extirpate every last vestige of unnecessary discovery, all "excessive" costs of litigation in every case, not to mention achieving optimum dispatch at the same time. We are, however, unanimous in the view that improvement is possible. Encouraged by the Chief Judge and each of the other judges, we have set out to seek such improvement and this report is designed to further that goal.