"Fast Track": Its Evolution and Future

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I. Introduction and Background

This comment is not about rules and policies governing the court delay reduction ("fast track") program in place in Maricopa County,[1] Arizona. It concerns the history and future of the delay reduction efforts of the Superior Court of Arizona in Maricopa County; how and why one jurisdiction reacted to the old but true adage, "justice delayed is justice denied."

Delay in the litigation process was once viewed as an inevitable problem; the product of court size, judicial caseload, complexity of cases and jury trial rate. We believed that the only way to ameliorate the problem was to add judges and implement diversionary and settlement programs.

In 1979, the Arizona Superior Court in Maricopa County was one of eight urban trial courts that participated in a nationwide research project to determine the causes and cures of pretrial delay in civil litigation. We learned from this project that court delay is not inevitable; it is primarily the result of "local legal culture"—the attitudes, expectations and practices of attorneys and judges regarding court delay. To reform the system, attorneys and judges had to change the way they customarily conducted their business. More than fifty percent of today's membership in the Maricopa County Bar Association were not practicing

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1. Maricopa County encompasses the Phoenix metropolitan area, among other cities.

law in the county ten years ago. For them and the lawyers who may have forgotten how the legal system used to function, we will revisit the local legal culture that existed before our conversion to "fast track," and examine how changes evolved.

II. The Local Legal Culture Before "Fast Track"

In early 1979, the civil department of the Superior Court in Maricopa County functioned with an individual calendar system; each of its seventeen divisions handled an inventory of approximately 1,200 cases. It was a long-standing practice for attorneys to file a Certificate of Readiness for trial soon after they filed an answer. The rationale was to "get in line" for a trial date two to three years in the future, because trials were almost always continued a number of times. Because attorneys filed these Certificates of Readiness prematurely, nearly one-third of the total inventory of civil cases, or 400 per division, were set for trial.

In some instances, judges set up to eight trials per day, four days per week, as late as fifteen months from the filing of a motion to set the case for trial. Knowing that judges could handle only one trial at a time, and that trials were often continued or "bumped," attorneys usually prepared for a continuance rather than trial. This lack of preparation and readiness for trial increased continuances, undermined meaningful settlement discussions, and recycled the daily trial calendar.

Many in the legal community viewed judges as umpires, having little or no role in expediting the pace of litigation. When attorneys presented a stipulation for continuance without a supporting reason, they expected judges to continue the trial. It was common for trials to be continued four, five, or six times. Attorneys effectively controlled the courts' civil calendars, determining when and if cases went to trial.

As the numbers of continuances increased, judges were in trial even less frequently, and there was a great deal of "down time" for the court. It seemed at times that a judge's primary function was to sign orders granting stipulations and motions to continue. In an effort to stay productive, judges further overset the number of trials on their calendars. They believed that the greater the number of trial settings, the more productive the division would be, and that at least one of the six or eight trials set on a particular day would actually commence. The intended result did not occur. It is obvious to us now that the manner in which the bench and bar did business prior to "fast track" was inefficient, counterproductive and illogical. Yet, in 1979 many judges and attorneys believed that efforts at change would be futile.

III. Reversing the Cycle of Delay

Changes in the legal culture reversed the cycle of delay. Fewer cases were set for trial, all with reliable trial dates. This became possible because the court used *pro tem* judges to try cases if a sitting judge was in trial. There was credibility in the court's limited continuance policy and its ability to deliver firm trial dates. Attorneys now complete their investigation and discovery, and usually are prepared for trial. Settlements have dramatically increased because of the imminence and certainty of trial; the trial date is not repeatedly postponed as before. This improved the overall pace of litigation and reduced trial calendars to a more manageable level. Too many judges and lawyers, however, suggest that the delay cycle has been reversed by the foregoing changes. The recipe for success is not so simple.

A. The Essence of "Fast Track": People

Local legal culture is the primary cause of delay. *People* are the key to delay reduction. When we lose sight of these facts, we revert to the pre-1979 mind-set of attempting to solve these problems by adding judges and diversionary programs. The system's success can best be understood by reviewing the transformation of the legal culture, and the human factors that motivated the players to regroup and change.

B. The Transformation

Before the "fast track" program commenced, the Superior Court's civil divisions[2] functioned essentially autonomously. Each division focused on its own calendar, cases, and productivity. Divisions rarely assisted each other; to help another division translated into time away from an increasing caseload and burgeoning calendar. Cooperation, in some instances, meant taking a long, complex, or distasteful trial that was "dumped" by a judge who might not reciprocate. There were no rewards or incentives for cooperation.

It was recognized early in the planning stages that the success of a delay reduction program depended upon a commitment to a concerted effort among the judges. The system would have to take priority over a judge's own cases. What caused judges to leave the comfort of their fiefdom, and abandon long-established habits and practices?

Crucial to the program's success was the involvement and strong support from the organized local bar. Its leadership participated in the

2. The word "divisions" is intended to include the judges, their staffs, and, in particular, their secretaries.

planning of the program and challenged the bar's membership to join the effort. With leadership's endorsement came the message that the bar was committed to the change. Judges agreed to control the pace of litigation and lawyers agreed to comply with court rules (albeit, often reluctantly), particularly on the issue of continuances. This gave judges the primary responsibility for making the court system work effectively and efficiently.

Initially, the court took up the challenge with four of its seventeen civil divisions participating in the project, using new rules, procedures and policies. Although the non-participating judges were skeptical at first, they soon realized that the experimental divisions were disposing of more cases faster. As the program gained credibility, the outsiders wanted in, and gradually all of the civil divisions made the transition. As settlements increased and the number of cases set for trial decreased, the rewards and incentives for cooperation became evident. This engendered an "esprit de corps" among the civil divisions, and with it came even more cooperation and productivity. Justice actually was delivered with relatively minimal delay.[3]

An important factor in the ultimate success of "fast track" in the Phoenix legal community was the strong leadership and vision of then-Chief Presiding Judge Robert C. Broomfield, now a judge of the U.S. District Court, District of Arizona. He truly understood the value of "fast track" and what the system needed to keep working effectively. Foremost among his strengths as an administrator was his ability to see the "big picture," and act in accordance with it. Everyone in the court system had to be personally involved with, and committed to, reducing court delay by delivering firm trial dates and trials.

Aware that people have a natural tendency to revert to their old habits, and aware that those old habits were detrimental to the program's continued success, Judge Broomfield mandated continual, yet subtle, reinforcement of the program's precepts. Newly-appointed judges beginning their civil assignments were indoctrinated in the program and its procedures. This training undoubtedly carried forward to later court assignments in the criminal and domestic relations divisions. The orientation program for newly-appointed judges was also offered to the veteran judges, who joined "fast track" for the first time; and a refresher program was offered to the more experienced judges returning to a civil assignment. Civil division judges and judicial

3. Today, the median time from filing to disposition of civil cases involving jury trials is twenty months; prior to the delay reduction program the median time was 32.7 months.

support personnel held monthly group meetings. The agendas for both groups covered the program's procedures, problems and benefits. Judge Broomfield frequently attended these orientation sessions and monthly meetings to demonstrate his commitment to and support of "fast track."

Today the role of a Superior Court judge in Maricopa County is appreciably different than it was in 1979. Although most civil judges are now in trial more frequently and have at least as much, if not more, work, the judges know that their effort and cooperation benefits litigants and the entire court system.

C. The Bar

Hesitant to speak for the entire trial bar, we canvassed a number of experienced trial lawyers for their input. Several threads run through lawyers' opinions and beliefs about the system. Whether these perceived drawbacks justify changes in the system remains to be seen. Although lawyers had input in the planning, organization and operation of the "fast track" system, they frequently complain that the system does not give enough priority and attention to their "problems." Whether they represent plaintiffs or defendants, trial lawyers' major complaint is that judges too often resist postponing the process, even if lawyers on both sides submit what they believe to be valid and compelling reasons.

To remedy judges' reluctance to postpone deadlines, lawyers made the following suggestions:

(a) If all the *parties*, as distinguished from lawyers, consent, postponement should be assured.

(b) Judges need to take a more "realistic" view in excluding cases from the rigors of the delay reduction system.

(c) The system should extend the nine-month inactive calendar period. This would give every case an additional calendar life. Many lawyers believe that nine months is not enough time to identify witnesses and exhibits, and if counsel want to shorten the time limits and proceed to trial quicker, they may request it.

(d) Judges lack uniformity in applying the rules. Perhaps an answer lies in additional judicial attention to and education about these issues.

(e) In personal injury actions, judges routinely should grant motions to remain on the inactive calendar if the plaintiff's physical condition has not stabilized. Lawyers cited this issue frequently, which suggests that many judges do not believe this reason is "good cause" for postponements.

Lawyers also allege that many *pro tem* judges are not adequately qualified or trained to perform the duties associated with applying and

enforcing the rules governing civil litigation. The National Center for State Courts, sponsored by the National Institute of Justice, studied the use of volunteer lawyers to supplement judicial resources. It published a 225-page report of its study and recommendations on this subject in 1987.[4] Perhaps the courts need to reexamine the methods of the selection, appointment, training, and orientation of *pro tems*.

Not to belabor the point, less-than-perfect lawyering in adhering to the system's rules can be terminal for both clients and lawyers. The rules are complex, and busy trial lawyers need to establish and maintain accurate and "foolproof" calendar systems. The Maricopa County Superior Court judges developed and approved "Rule V, Uniform Rules of Practice and Continuance Policies" in 1985. Lawyers had little input in developing these policies, which might account for the "harshness" and "inflexibility" lawyers perceive in their application.

Arizona appellate courts have ruled on some of the issues arising from trial judges' refusals to exempt cases from the rules.[5] In *Gorman v. City of Phoenix*, the Arizona Supreme Court held:

> Lawyers who fail to comply with Uniform Rule V(e) do so at their peril. . . . However, trial courts should consider carefully a Rule 60 motion to set aside a Uniform Rule V(e) dismissal when, as here, there is evidence that (1) the parties were vigorously pursuing the case, (2) the parties were taking reasonable steps to inform the court of the case's status, and (3) the moving party will be substantially prejudiced by, for example, the running of the limitations period if the dismissal is not set aside. If all these factors are present, even doubtful cases should be resolved in favor of the party moving to set aside the dismissal.[6]

In *Flynn v. Cornoyer-Hedrick*, the Court of Appeals, after quoting the Guidelines' provisions regarding the meaning of "good cause," said:

> The record in this case demonstrates no unforeseeable circumstances or unusual discovery or procedural problems. The delay was primarily caused by Flynn's voluntary decision to postpone serving the defendants. We find that the trial court did not abuse its discretion by concluding that Flynn failed to show good cause to continue this case on the inactive calendar.[7]

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4. *See* A. AIKMAN, FRIENDS OF THE COURT: LAWYERS AS SUPPLEMENTAL JUDICIAL RESOURCES (1987).

5. *See, e.g.*, Gorman v. City of Phoenix, 152 Ariz. 179, 731 P.2d 74 (1987); Flynn v. Cornoyer-Hedrick Architects & Planners, Inc., 23 Ariz. Adv. Rep. 66 (Ct. App., Dec. 15, 1988).

6. *Gorman*, 152 Ariz. at 183-84, 731 P.2d at 78-79 (citations omitted).

7. *Flynn*, 23 Ariz. Adv. Rep. at 68.

Of course, courts must decide each case on its own facts, and determine on a case by case basis whether "good cause" has been shown or whether judicial discretion has been "abused."

Clearly, a substantial number of local lawyers believe that there should be some "liberalization" or easing of the bench's "nose to the grindstone" attitude. Many of the issues that concern trial lawyers are not new. The same concerns existed in 1984.[8] Lawyers made the following points:

(a) Many cases would settle if lawyers were given more time, but they are forced to trial instead.

(b) Lawyers try to take advantage of the complex rules in order to disadvantage their opponents, and this frequently leads to "pit bull" litigation.

(c) Time limitations should begin to run upon service of the complaint, rather than filing.

(d) More attention is paid to form than substance in the application of the rules.

(e) Judges need to take a more realistic view of cases that do not fit the mold. They need to show more consideration for attorneys' trial calendars and be more flexible on deadlines.

(f) The system has created constant problems for lawyers in meeting deadlines, and judges have had to spend inordinate amounts of time ruling on motions because of nonsensical time requirements.

(g) Many judges receive their civil trial experience on the bench and have no practical experience from which to draw. This disables them in their understanding of problems lawyers face in handling a heavy civil calendar.

The local legal culture generally approves of the system. Our unscientific survey discloses that, despite the criticism, most of the lawyers surveyed believe that the civil delay reduction system is effective: clients benefit from the system and judges are able to handle cases more expeditiously; however, the rules and requirements imposed are too complex and they impede the lawyers' practice. In summary, the system has substantially reduced delay but some changes may be necessary.

IV. CONCLUSION

The change in the Maricopa County legal culture did not come easily or quickly. It evolved primarily because of leadership in both the judiciary and the bar; a commitment by *people* in the court system to

8. *See* Myers, *What's in It for Lawyers*, 23 THE JUDGES' JOURNAL No. 1 at 6 (1984).

deliver firm trial dates; and continuing communication within the court, as well as between the court and lawyers, about the system's procedures, problems and benefits. Because judges "control" the management of the system, they may not feel the "pressure" of lawyer complaints. They may fail to recognize the seriousness of lawyer malcontent, or they simply may be unwilling to believe that lawyers can evaluate objectively the benefits of the system.

There must be continual reinforcement of the program's precepts and the human factors that initially motivated the change in our legal culture. Otherwise, the players (lawyers, judges and staffs) revert to their old habits and delay will again become prevalent. If we return to the idea that adding judges is a panacea for problems that arise, we should question whether we have lost sight of the reasons that enabled us to change our legal culture. These changes occurred because *people* were motivated by their desire to improve the administration of our justice system and their respect for the public the system serves.