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AN ATTORNEY'S VIEW: CALENDAR PRACTICE — WHAT A WASTE

by Neil T. Shayne*

*Introduction: "Archaic and [I]nefficient"*¹

In 1971, then Governor Rockefeller appointed a temporary commission on the state court system that was led by Senator Clinton Dominick. The commission studied the present system relating to court administration, court financing and selection of judges. Among its conclusions were the following: the state court system should be administered more rigidly, structured more effectively, and financed fully by the state. Some judges should be selected differently, and the procedure for disciplining judges should be improved sharply. Bail should be abolished and the indictment process should be shortened. These are the major conclusions of the commission and are the framework for 180 recommendations.

We do not know how many of these recommendations will be implemented. We do know, however, that the present calendar system is a hardship upon attorneys, clients, and the court itself. This article, based on the experience of the author as an attorney in the metropolitan New York City area, will discuss how the practicing bar, with the help of the court, can reduce the time it spends in court, thereby increasing net fees for attorneys, and hopefully, reducing the cost of delivering legal services.²

The Calendar System: The Problem of Adjournments

The present calendar system is costly to run, and this cost is

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1. Such were the words used by the Temporary Commission on the State Court System to describe the court structure within the state. Temporary Commission on the State Court System, Press Release 2 (Jan. 2, 1973).

2. The current trend toward prepaid legal services, it should be noted, makes the reduction of the cost of such services more important than ever. Employees covered by these plans may be permitted to choose from an open or closed panel. The open panel is a panel which permits the covered employee to select a lawyer of his own choosing. The closed panel requires the covered employee to select either one attorney or a group of attorneys which has been prechosen by the sponsors or administrators of the program. He may not select an attorney of his own choosing.

The legal services covered can be extensive or restricted depending upon the amount each employee or employer contributes to these programs. They can offer legal services for business or personal legal problems. They can, and in the author's opinion should, include wills, criminal or domestic matters as well as business advice.

passed on to the taxpayers. A more efficient system would reduce the hours spent by attorneys processing cases in court, and thus necessarily would lower the cost of these services to their clients. The factor of speedier justice should be considered as well, for "justice delayed is justice denied."

A major problem in our present system is the indiscriminate use of adjournments by some attorneys and the submissive attitude of many judges towards them. An attorney's time is worth between thirty-five and sixty dollars an hour.³ Despite this fact, an attorney answering a calendar call will say to the court, "Your honor, I need an adjournment," and will proceed to give any one of a number of excuses: his client may not be available; a witness may not be available; he may have another case to try. The number of other allegedly valid excuses is limited only by the attorney's imagination. The attorney or attorneys representing one or more parties on the other side will have prepared the case for trial, subpoenaed records, and kept witnesses on call. Many of them have the witnesses in court. They have allotted this time and are ready to proceed with the case, and now they are met with another attorney's request for an adjournment. These dilatory tactics also result in an inconvenience to the court, for when courtrooms and judges are available, the calendars should be moving.

It is not unreasonable to require an attorney who desires an adjournment to give notice to the attorneys on the other side at least 48 hours in advance. If he fails to do so, except under extraordinary circumstances,⁴ he should pay costs to the court or even be required to pay the other attorney some fixed sum. My recommendation is fifty dollars per attorney. This sum will not completely compensate the other attorneys for the time they have expended, but it will serve as a deterrent to future adjournments.⁵ If proper notice is given to the attorneys for the other side, they will be able to prepare another case and the court's calendar will

3. See N. SHAYNE, MAKING A PERSONAL INJURY PRACTICE PROFITABLE 17 (1972) (the amount is based on the expansion of a table initially presented in the Minimum Fee Schedule, State Bar Association of North Dakota).

4. The extraordinary circumstance could be the death of a party involved in the lawsuit or some unforeseen occurrence which could not have been contemplated.

5. The fifty dollar fine is in the nature of a penalty to be paid on each occasion that the attorney is not ready for calendar call. While the amount is not prohibitive for a person with a claim, when it must be paid with any regularity, it, like a traffic ticket, can be quite disturbing. It also can serve as some benefit to the attorney or attorneys who have been wronged by the delaying tactics which contribute to the present calendar congestion.

proceed in a more orderly fashion. It also will obviate the necessity of calling in and paying witnesses when there is no possibility that the case will be tried on that date.

Calling the Calendar

If the calendar were called on a more stringent basis than is presently done, the court would have a better idea of the number of cases to be held in the trial part, and judges could be held available for these trials. If there are not enough trials to fill these parts, the judges can participate in conferencing cases or assisting in the selection of a jury in order to speed that slow and tedious process.

Under the present system, a judge calls a calendar and the attorneys for each side discuss their reasons for an adjournment. It is my feeling that the actual calling of a calendar, which can take two or three hours, should be conducted by an experienced clerk rather than the judge. If there is some dispute requiring a judicial decision, that case can be reserved for the second call of the calendar, and the judge's time can be expended sitting in a trial part and presiding over a trial term.

Many courts assign cases to the first day of each week. The result is that many attorneys will have conflicting trials scheduled for the same day. A more useful practice would be to conduct calendar calls every other day, or, at the very least, have some conferences near the end of the week. If a case cannot be settled, it should be set down for a day certain and should not be adjourned without an extraordinary reason. Each judge should keep his own calendar and make assignments by postal card instead of the calendar call. If an attorney is unable to appear on that date, he should be able to arrange for a day when he can be present by calling both the court and the attorney for the other side. Thus the necessity of appearing in court will be eliminated.

Pretrial Conferences

Pretrial conferences have been called the saviour of the calendar system, and an abject waste of time. The fact is that in every court there are some judges who excel in the pretrial part; their percentage of settled cases is extremely high. There are many judges who have no interest in this barter system, and their percentage of settlements is notoriously low. Even the simplest score keeping indicates which judges should be sitting in pretrial

parts. Despite the ability of some judges in the pretrial part, most courts require them to rotate on some regular basis.

There are recommendations which can be made in order to improve the present pretrial system. The plaintiffs and defendants should be required to submit briefs to the court which include the law on the particular subject and some statement as to damages. Compelling the plaintiff and defendant to do a little legal research may be time consuming at the outset, but surely will result in a great saving of time for them in the long run.

Plaintiffs should be required to attend all pretrial sessions. It has been my experience that, for example, in a majority of automobile accident cases, the plaintiff's attorney and the defendant's attorney present different facts relating to the happening of the accident. If the plaintiff were present, it would be easier to elicit exactly what happened. In a recent case in Nassau County, for example, plaintiff's attorney informed the judge that his client was stopping at an intersection when his car was struck in the rear. The defendant's attorney agreed that his client struck the plaintiff in the rear, but claimed that the plaintiff was exiting from a gas station at the time and had not completed the turn when his client, unable to stop, struck him. The plaintiff's attorney had required the plaintiff to be present and asked him outside whether he had indeed been exiting from a gas station at the time of the accident. The plaintiff said, "Well, I did exit. However, I had completed my turn." Nevertheless, the liability had changed, and the case was disposed of.

Very often the medical information relating to the plaintiff describes a deformity or scar. The defendant's physical examination will minimize the injuries, while the plaintiff's will tend to exaggerate their severity. An actual inspection of the scar or the deformity will often lead both the parties and the court to make a more reasonable evaluation of the injuries.

It is especially important to have the infant plaintiff present. When an infant's case is settled on a pretrial, as in all other cases, the facts and injuries are discussed in detail. Following the settlement, it is necessary for the attorney to produce the infant in court on another day and to "compromise the action."⁶ At this time, the attorney for the plaintiff must discuss the facts and the

6. N.Y.C.P.L.R. §§ 1207-08 (McKinney 1963) requires an appearance of the infant before the court following the settlement. In addition, affidavits, including the affidavit of the infant's attorney and the physician, are required.

injuries all over again with the judge who is sitting in the infant's compromise part. If the infant plaintiff were available at the pretrial and was present before the judge, it would not be necessary for another conference to be held. There would be a tremendous saving of both the court's and the plaintiff's attorney's time.

Many pretrial conference calendars in New York are called at 10:00 a.m. or at 2:00 p.m.⁷ There are anywhere from four to twenty cases listed on these parts. Any attorney who has waited an hour or two or more to be called on a pretrial part is not enthusiastic about returning, for often he or she will only experience further delay. When a law firm knows that there is going to be an extensive wait, the firm sends the lowest person on the totem pole. By not sending a lawyer who is capable of settling the case or discussing it in detail, the purpose of the pretrial is defeated. If there were a specific meeting time, there would be a greater likelihood that an attorney who is in a position to settle the case will be sent to the conference.

The attorneys for the defendant also have an obligation to request that a claims manager or a claims supervisor with authority to settle be present with the attorney at the pretrial. Many insurance carriers send adjusters to the pretrial conference who are not given authority to make some payment. This is not only a waste of the plaintiff's attorney's time, but is also an affront to the court. It must be very distressing to a judge who has patiently listened while plaintiff's attorney outlines the facts of his case, explains why there is liability, and describes in detail the plaintiff's injuries, to hear the defendant's representative say: "Your Honor, I have no authority on this file." I have no dispute with the attorney for the carrier who states that he feels there is no liability or that he feels a case is worth a specified amount. The problem is with the many defendants who permit adjusters who are not attorneys to conduct these pretrial conferences.⁸ The courts should enforce the requirement of an attorney appearing at a pretrial conference together with a claims manager of the defendant insurance company.

7. This is the practice in New York's Nassau County, and is preferable to the single morning calendar which is relied on by most of the state's courts.

8. Local law journals clearly state that each pretrial and classification term is a regularly scheduled part of the court, and motions can be made to this part. Since it would be improvident and improper for a non-lawyer to argue in opposition to such motions, an attorney might discourage his opponent's tendency to send adjusters to conduct the pretrial merely by making a motion before the judge.

Disputes Between Defendants

Many cases are not settled or otherwise disposed of because of a dispute which is not between plaintiff and defendant, but between the defendants themselves. For example, in an action arising out of an automobile accident where the plaintiff is a passenger, the following colloquy is very often heard:

Plaintiff's attorney

Your Honor, I represent a plaintiff who was injured in a collision, and he was a passenger in defendant Brown's car. This accident occurred at an intersection when Brown's car came in contact with Blue's car. My client sustained injuries in the nature of a fracture to the leg, and I feel that perhaps we can make some settlement without going to the expense and cost of litigation.

Defendant Brown

Your Honor, it is our feeling that the responsibility for this accident is not ours, but is a result of the negligence of the other vehicle's driver who was traveling at an excessive rate of speed and struck our car. We feel that if there is any payment, it should be offered by the other defendant.

Co-defendant Blue

Your Honor, our investigation reveals that it is true that the plaintiff was a passenger; however, the responsibility for this accident lies directly with the co-defendant who was traveling at an excessive rate of speed and who did not see our motor vehicle.

The Court

Gentlemen, I am sorry that you are unable to get together, and if I cannot receive an offer we will have to remand this case for trial.

This is the type of action which often should not be remanded for trial, but rather should be settled. The plaintiff, perhaps, is reasonable with respect to his demand and is unable to settle his case solely because of a dispute among the defendants. A possible solution for this problem would be the passage of a legislative provision which would permit a judge to direct the defendants to arbitrate the liability among themselves.⁹

9. One might question the constitutionality of such a provision. While the seventh

The Futile Pretrial

Many pretrial discussions are met with the defendant stating to the judge and the attorney for the plaintiff, "Your Honor, this file is marked no pay."

The fact that a defendant marks a case "no payment" should be communicated by letter or by affidavit prior to the actual conducting of the pretrial conference. It is unreasonable in many instances for a defendant to refuse to make any payment, and if he is adamant in this refusal, this fact should be brought to the attention of the court and the plaintiff's attorney. It is a disturbing experience for a plaintiff's attorney to relate the facts of his action, perhaps even produce his plaintiff at the pretrial and have a defendant refuse to make any offer. If this is to be the insurance carrier's position, it should notify the plaintiff's attorney and the court so that a determination may be made whether it will serve any useful function to conduct a pretrial.

Administration of Pretrial

In most cases, the first discussion between the attorney for the plaintiff and the attorney for the defendant takes place in the presence of the judge. It is my feeling that the judge's law secretary or some of the court personnel could be helpful in discussing this case with both attorneys prior to entering the judge's chambers. A trained parajudicial person could certainly aid in reducing the issues that have to be discussed and perhaps could even help settle some of the cases. The plaintiff's attorney can relate his story to the clerk, then the defendant can give his position to the clerk and the plaintiff's attorney. It would be a time-saving device if the clerk could come into the judge before the attorneys have appeared and say, for example: "Your Honor, this is an intersection accident; one defendant has a stop sign against his assured, and he agrees that he will offer two-thirds of the settlement. The other defendant refuses to make any payment or at best, indicates he would pay a couple of hundred dollars, which in this case is somewhere in the neighborhood of 10 percent. The plaintiff is looking for \$5,000 but indicates that he would take a little bit less. I think this case can be settled with your assis-

amendment guarantees a trial by jury in a civil case where the amount is in excess of \$20.00, the amendment only applies to trials in the federal courts. "Trial by jury in civil actions in state courts may be modified by a state or abolished altogether." *Olesen v. Trust Co. of Chicago*, 245 F.2d 522, 524 (7th Cir.), cert. denied, 355 U.S. 896 (1957).

tance." This kind of introduction to the judge certainly will save a great deal of time in a great many cases, and will have the additional beneficial effect of allowing the judge to handle substantially more pretrials each court day.

Efficient Use of the Judge's Background

When judges are first elected or appointed they generally rotate and take turns with respect to the many cases that come before them. There apparently is no procedure for giving due credit for the time that the judge spent or devoted in any given field during his practice of law. Many lawyers have had the experience of trying a negligence case before a judge that specialized in corporate law, or of trying a matrimonial case before a judge that specialized in criminal law. The problem with this is not that the judge is unqualified to hear a case or pass on evidence, but that he is not experienced enough to get to the root of the matter in order to quickly and judiciously dispose of the case. A judge who is competent in one field of law should be the one used in both the pretrial negotiation and the trial of actions involving that field.

The Small Claims Court

A useful tool to divert some of the flow of litigation currently clogging the calendar part is the small claims court. The small claims court was designed to permit the individual to appear in court without the necessity of retaining an attorney. The idea of the small claims court is excellent, and it has been a contribution in relieving court congestion and promoting justice. There are, however, certain obvious flaws in the small claims system, and these should be eliminated.

The law requires that a corporation be represented by an attorney. The rationale for this is that a corporation is not an individual, and therefore, cannot appear on its own behalf. In practice, this is patently ridiculous. Requiring a corporation to appear by an attorney has two adverse effects. In the first place, many small business people are incorporated and are therefore required to retain an attorney to defend or prosecute their cases. Secondly, if it is an action of a corporation against an individual, then the individual is required to pit himself against an experienced attorney, and the result is often a mismatch. The legislature should amend the law and permit a corporation to appear by its president, vice-president, secretary or treasurer.

In addition, the small claims court should have its jurisdictional amount increased periodically to keep it in line with the inflationary trend that is enveloping the country. This would help assure that the number of persons who presently have access to small claims court will not be reduced.

The small claims court is generally part of the lower trial court in most jurisdictions, and is usually held at a time of the day prior to the call of the regular daytime calendar. In the five boroughs of New York City there are small claims night courts. This is an idea that should be adopted elsewhere. If the small claims court is to service the working person and not the attorney, then these cases should be processed in the evenings. In the New York City small claims courts, attorneys serve as referees, and if both parties so stipulate, the case can be decided by a referee rather than by a judge. If one party refuses, then a judge hears the case. There is no reason why each judge cannot sit one night a month and make use of the available legal talent to streamline the small claims court and eliminate this time wasting procedure from the regular court day.

