

# 1998 Better Government Competition

*Winner*

## **JUSTICE DELAYED: Improving the Administration of Civil Justice in the Massachusetts District and Superior Courts The Honorable Daniel B. Winslow**

### **FOREWORD**

America and litigation. Unfortunately, these two words have become synonymous. Americans are taking an increasing number and variety of disputes to court, encouraged by the proliferation of laws that entitle them to do so. The result is that many courts-local, state, and federal-have been deluged with lawsuits. In some jurisdictions, dockets are so crowded that cases cannot be heard for years. The adage "justice delayed is justice denied" accurately describes the result for too many Americans caught up in the time-consuming and increasingly expensive civil justice system.

Those who don't want to put up with these consequences-and can afford to do so-accordingly are turning with greater frequency to "private justice," hired judges to resolve disputes that the public judicial system seems incapable of resolving in a timely and efficient manner. If not stopped, this trend will lead to a two-tier system of justice in America, a streamlined but expensive one for large corporations and wealthy individuals, and the crowded and inefficient public system for the rest of us.

These are not new problems. Nearly 10 years ago, the organization with which I have long been affiliated, the Brookings Institution, convened a group of leading attorneys, representatives of public interest organizations, former judges, and corporate officials to discuss ways to reduce delays and expense in civil suits. The result was a report delivered to Congress, which shortly thereafter enacted the Civil Justice Reform Act of 1990. Among other things, the CJRA singled out 10 federal district courts for various experiments, including the setting of early trial dates, adoption of case management techniques, and publication of average times to disposition of judges in the districts-all designed with the hope of improving the administration of justice.

For all its good intentions, the CJRA has proved to be somewhat disappointing. Of all the reforms it promoted, only the publication requirement seems to have resulted in the clearest reduction in case delays. The other reforms have had mixed results.

The time is ripe, therefore, for states and localities to lead the way with bolder and even more innovative ideas. Enter this important, and potentially pathbreaking, paper by Judge Daniel Winslow, "Justice Delayed: Improving the Administration of Civil Justice in the Massachusetts District and Superior Courts."

After reviewing several of the more interesting justice reform experiments around the country,

Judge Winslow outlines an innovative and bold plan for streamlining civil justice in Massachusetts. The Economical Litigation Alternative, or ELA, is straightforward and appeals to common sense: set up simplified procedures for small to moderate-sized claims, such as those under \$100,000. This is not "small claims court" justice, but more complete yet streamlined justice for many of the cases that now fill the Massachusetts courts.

Several other states are already using ELA-type procedures. Judge Winslow deserves much credit for developing an ELA plan for Massachusetts. It deserves a try. If it works-and the plan should be monitored to determine if that is the outcome-Massachusetts can then help lead the nation toward a more effective civil justice system that delivers to citizens what they rightfully expect from the courts: prompt and cost-effective resolution of their disputes.

--**Robert E. Litan**, Director  
Economic Studies Program  
The Brookings Institution  
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# **JUSTICE DELAYED: Improving the Administration of Civil Justice in the Massachusetts District and Superior Courts**

*The Honorable Daniel B. Winslow*

*"[Every person] ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; comfortably to the laws."Part One, Article 11,*

--Declaration of Rights  
Constitution of the Commonwealth of Massachusetts  
Adopted 1780

"Alice," from "Cityville," Massachusetts, was a 70-year-old retired school teacher who, together with her best friend and fellow retired school teacher, "Margaret," took an annual road trip to various points on the North American continent. The trips involved much planning, with close consultation with AAA regarding best routes, accommodations, and worthwhile sights. The results of the trips were hundreds of photographs and countless stories that generously were shared with nieces, nephews, and friends. One year, Alice and Margaret's trip involved a drive to Alaska via the Alaska-Canada Highway through Yukon Territory. They left in July with a planned arrival in Alaska by August. The Al-Can Highway in Yukon Territory is little more than a two-lane winding gravel road with beautiful views from Canadian peaks. While Alice and Margaret were driving on the Al-Can Highway en route to Alaska, the cruise control of Alice's car self-activated and propelled the car toward a cliff at 50 miles per hour. Alice desperately applied the brakes to deactivate the cruise control, but the cruise control did not de-activate and the car drove off the cliff.

The car rolled end-over-end down the cliff, crushing both Alice and Margaret, who had been thrown through the car windows. The car came to rest on its roof at the bottom of the cliff, pinning both women beneath it. Virtually every bone that could break in Alice's body was broken: her skull, shoulders, both arms, ribs, pelvis, and both legs; she was alive and conscious. Margaret's face had been smashed beyond recognition, she was pinned next to Alice, and she was dead. Alice could hear cars driving along the Al-Can Highway at the top of the cliff, but she could not move and no one could see her car from the road above. As darkness fell, it began to rain and Alice could hear the sounds of the wild animals of the Yukon. Although in unspeakable pain, Alice was afraid she would be eaten by animals and never lost consciousness through the night. The next morning, a long-haul trucker with a cab tall enough to offer a view down the cliff saw Alice's car and called the Royal Canadian Mounted Police for assistance. Alice was airlifted to a Canadian hospital where she was hospitalized approximately four months until she was well enough to be transported to a hospital near her home.

While she was hospitalized in Massachusetts, mail that had accumulated during Alice's trip was delivered to her. In the mail was a recall notice from her car's manufacturer warning that her car's cruise control could self-activate at its last speed setting and not deactivate when the brakes were applied. After Alice filed suit against the car manufacturer, pretrial discovery revealed that the

defective part was a plastic component of the cruise control that had a tendency to bind after repeated use. Had the manufacturer used a metal component, which was used during the recall as a replacement part, the risk of self-activation would not have existed. Alice's medical bills exceeded \$65,000, she endured horrific pain and injuries, and she forever would suffer chronic pain as a consequence of the accident.

Alice's case was assigned for jury trial in a Massachusetts court. The trial preparation necessarily involved Alice revisiting the experience. When Alice's lawyers appeared for trial at the appointed hour, having checked with the clerk in the days leading to the trial date to confirm that the case would actually be reached, they were joined by counsel for about 10 other cases, all of whom had been called for trial on the same date. Alice's case was continued by the Court and during the next year was called for jury trial, "ready to impanel with witnesses present," six more times. Each time, her lawyers had checked with the clerk to gauge the likelihood of being reached and had been assured that this was a "real" trial call. Each time, Alice's lawyers appeared ready for trial together with counsel for several other cases who also had been told to report ready for trial. Because Alice's case was not as old as the other cases in the trial session (her lawyers had moved for speedy trial because of her age), her case was not reached for trial during any of these seven trial calls. After the seventh false trial date, Alice could not take it anymore. She called her lawyers and told them to drop the case. Her lawyers attempted to convince Alice to forge on. Alice was adamant. Her lawyers convinced her to at least demand the amount of her medical bills in settlement. She agreed, but insisted that the case be dropped regardless of the defense's offer. Defense counsel immediately agreed to settle for the amount of Alice's medical bills, and the case was dismissed by agreement.<sup>1</sup>

The Trial Court does not measure the number of continuances as part of the quality control process for civil litigation. Nor does the Trial Court routinely measure the length of time from trial assignment to actual trial or the number of trial calls per case until reached for trial.<sup>2</sup> Instead, the predominant measure of the judicial system's performance is the number of pretrial dispositions. By this measure, Alice's case was a shining success for case management-the case resolved without trial. By any other measure, the case is a damning indictment of the administration of justice in Massachusetts. Any experienced trial lawyer in the Commonwealth knows that Alice's experience is far from unique. Civil trials rarely occur on the first scheduled date and often involve numerous false starts. The consequence of this culture of case management is excessive costs and delays for litigation. People and businesses cannot get their day in court in Massachusetts, and the price of getting to trial-measured in dollars and human consequences-is often too high.<sup>3</sup> Litigants who can afford to avoid our system of justice will do so, with a decrease in civil filings and an increase in alternative dispute resolution the result. As Alice's case demonstrates, people's lives are affected by how well-or how poorly-our system of civil justice functions in providing a fair, timely, and cost-effective forum to address disputes. By implementing basic improvements in procedures and management, many already working successfully in other states, Massachusetts can significantly improve its system of civil justice.

## **PROCEDURAL IMPEDIMENTS TO JUSTICE**

*"The ordinary administration of criminal and civil justice...contributes, more than*

*any other circumstance, to impressing upon the minds of the people affection, esteem, and reverence towards the government."*

--Alexander Hamilton, *The Federalist* No. 17 (1787)

"The high costs of litigation burden everyone. Our businesses spend too much on legal expenses at a time when they are confronted with increasingly intense international competition. They pass those costs on to consumers, who then pay unnecessarily high prices for the products and services they buy. People who take their cases to court or who must defend themselves against legal actions often face staggering legal bills and years of delay."<sup>4</sup> Tort reform efforts nationally reflect frustration with the civil justice system. "It is ironic that so much of the reform effort has focused on substantive reform-about which substantial disagreement exists-while the perception that delay in the courts is increasing, reaching crisis proportions in the most congested courts, continues to spread."<sup>5</sup> In Massachusetts, for example, considerable effort has gone into substantive civil justice reform in Senate Bill 896 (the "Civil Justice Reform Act"), which wallowed without enactment in the latest legislative session.<sup>6</sup> Meanwhile, the Supreme Judicial Court's rule-making ability would enable significant procedural innovation without need for additional legislation.<sup>7</sup> "While all participants in the civil justice system-judges, attorneys, and their clients-clearly can and should make contributions to reducing delay and transaction costs, there is no substitute for structuring the procedural rules themselves to ensure that litigants have the proper incentives to achieve these objectives."<sup>8</sup>

## **THE MASSACHUSETTS STANDARD**

In 1986, embracing national standards established by the American Bar Foundation and the National Conference of State Trial Judges,<sup>9</sup> the Massachusetts Supreme Judicial Court called for all civil cases to have a trial, settlement, or other disposition within two years of filing.<sup>10</sup> In 1988, the District and Superior Courts adopted their respective versions of Standing Order 1-88 to meet the call by the SJC. The Superior Court Standing Order noted that the court recognizes that the litigation process is memory dependent. To the extent that memory dims or becomes unreliable over time, a just determination may be jeopardized.<sup>11</sup>

### **Table 1: Civil Caseload Disposition and Growth Rates for Selected States,\* 1994-96, in percent**

State	Disposition Rates (%)	Caseload Growth (%)
Missouri	102	9
Connecticut	100	4
District of Columbia	99	na
Kansas	98	8
Iowa	98	2
Minnesota	98	-1
Idaho	96	4
Illinois	96	6
South Dakota	91	8
Massachusetts	85	-2

Note: The Superior Court reports disposition rates in excess of 100% for these years as well as a declining caseload. \*States selected are those with unified courts. Massachusetts fares little better when compared with a group of 42 states, ranking above only four states in disposition rate for the 1994-96 period.

High transaction costs-manifested in high out-of-pocket legal fees and the time consumed by delay-are the enemies of justice.<sup>12</sup> The Superior Court Standing Order established three case processing tracks for reaching trial within six months, 14 months, or two years from the date of filing.<sup>13</sup> The District Court Standing Order established a time to trial of approximately one year. In November 1989, as it became clear that Massachusetts courts would be unable to complete civil business within two years from filing, the Supreme Judicial Court announced that the two-year time standard was being extended to three years. In announcing the extension, Chief Justice Liacos emphasized that the change was temporary:

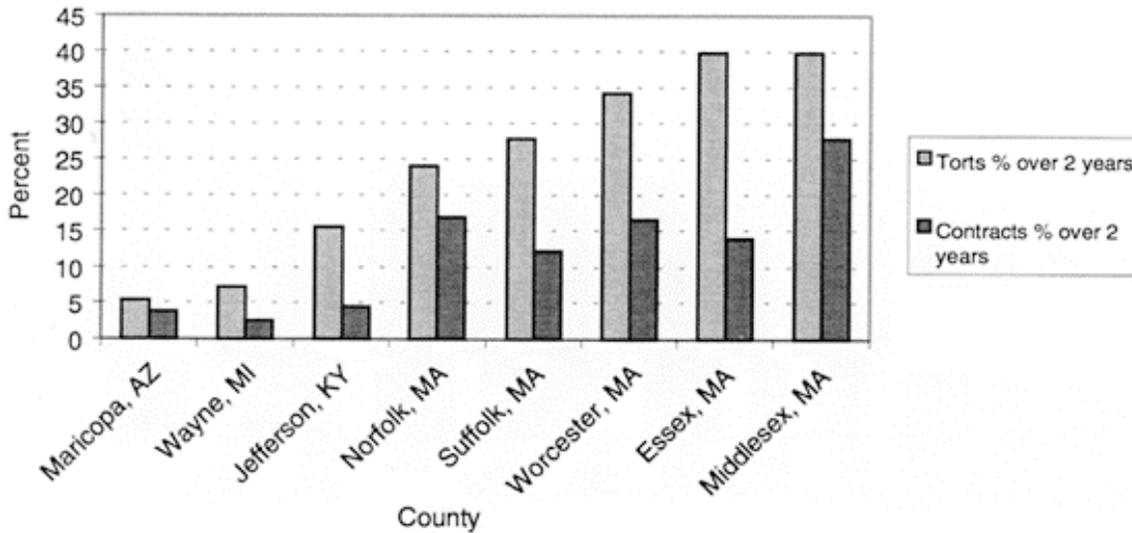
It is our firm intent to return to the two-year concept as soon as the resources to do the job are in place.<sup>14</sup>

This "temporary" extension of the civil standard in Massachusetts from two years to three years still is in effect. Indeed, the temporary three-year Massachusetts standard has been in effect four times longer than was the original two-year national standard.

In a management study of the Trial Court commissioned by the Massachusetts Bar Association, Harbridge House noted that "the Trial Court of the Commonwealth is...facing a major crisis.... In many respects, it is a system in name only, operating on automatic pilot and carried forward more by past momentum than by any compelling vision of the future."<sup>15</sup> The study cautioned that "the Court must either improve its productivity or increase the delays experienced by litigants using the system."<sup>16</sup> After reviewing the operation of the Trial Court and interviewing lawyers, litigants, and court personnel, the Harbridge House study concluded "significant improvements could be made in the operation of the Trial Court in the area of case-flow management." The study continues, "the establishment of time standards for processing cases has been particularly successful. Nonetheless, the Trial Court still falls well short of recognized standards for effective caseload management." These failings, including continued tolerance of the "cult of the continuance," impose "significant costs on the Trial Court as well as on taxpayers, litigants, and

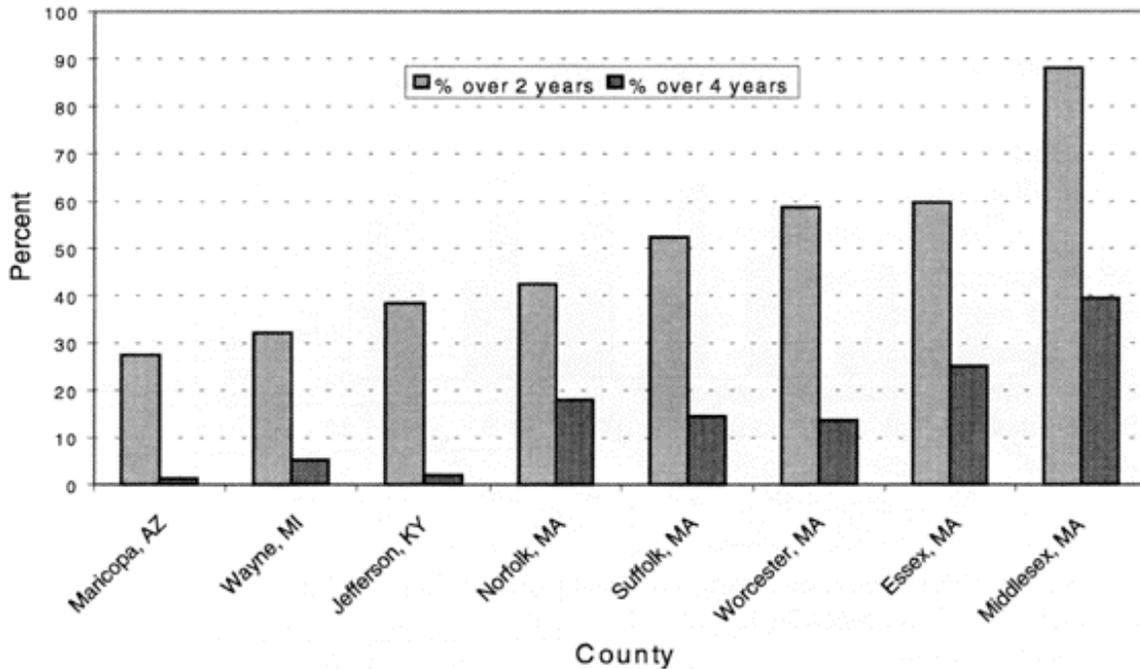
lawyers." Moreover, the Harbridge study found that "poorly managed scheduling of cases and judges is also a major source of waste and inefficiency in the Trial Court."<sup>17</sup> "The costs of failing to manage and control the use of continuances include both the direct costs incurred by all parties for multiple court appearances plus the indirect costs of frustration, delay, and diminished public confidence in the judicial system."<sup>18</sup>

**Figure 1. Time to Disposition for Tort and Contract Cases, Percent over Two Years**



The Massachusetts standard, establishing a goal for civil case completion that is 50 percent longer than the national two-year standard, creates a modest target for civil case management in the Commonwealth. But even aiming at this modest target of its own making, the Massachusetts judicial branch often hits wide of the mark.<sup>19</sup> Massachusetts civil cases, on average, take longer than two years to resolve. One of every eight cases takes longer than four years, according to the Bureau of Justice Statistics Special Report on State Courts. Among the nation's largest counties, Essex, Middlesex, and Worcester counties ranked third-, fourth- and sixth-worst, respectively, for the length of time it takes to resolve litigation.<sup>20</sup> Despite a decrease in caseload growth in recent years, from 1994 to 1996 Massachusetts' courts consistently ranked among the worst in the nation for their ability to dispose of civil cases.<sup>21</sup> While the adoption of time standards improved the ability of the Superior and District Courts to reach civil trials sooner than in past years, time standards today too often represent an elusive goal rather than a level of actual performance. In May 1998, for example, between 29 and 49 percent of all civil cases, depending on the county, were up to a year or longer "off track" in Massachusetts Superior Courts.<sup>22</sup> The vast majority of civil cases "off track" in the Superior Court were those assigned to the so-called "Fast Track"; Fast Track cases constitute the bulk of cases filed in the Superior Court.<sup>23</sup> Approximately 17 percent of pending cases in Superior Court are three to five years old or older.<sup>24</sup> Similar data are not available in the District Court, as the District Court only measures its performance by cases disposed and not cases still pending.<sup>25</sup> The existence of a comparatively slow Massachusetts standard, and the failure of the judicial system to achieve even the modest goals it has set for itself, demands that judges, lawyers, legislators, and the public rethink how civil justice is delivered in the Commonwealth of Massachusetts.

**Figure 2. Time to Disposition for Jury Trial Cases, Percent over Two and Four Years**



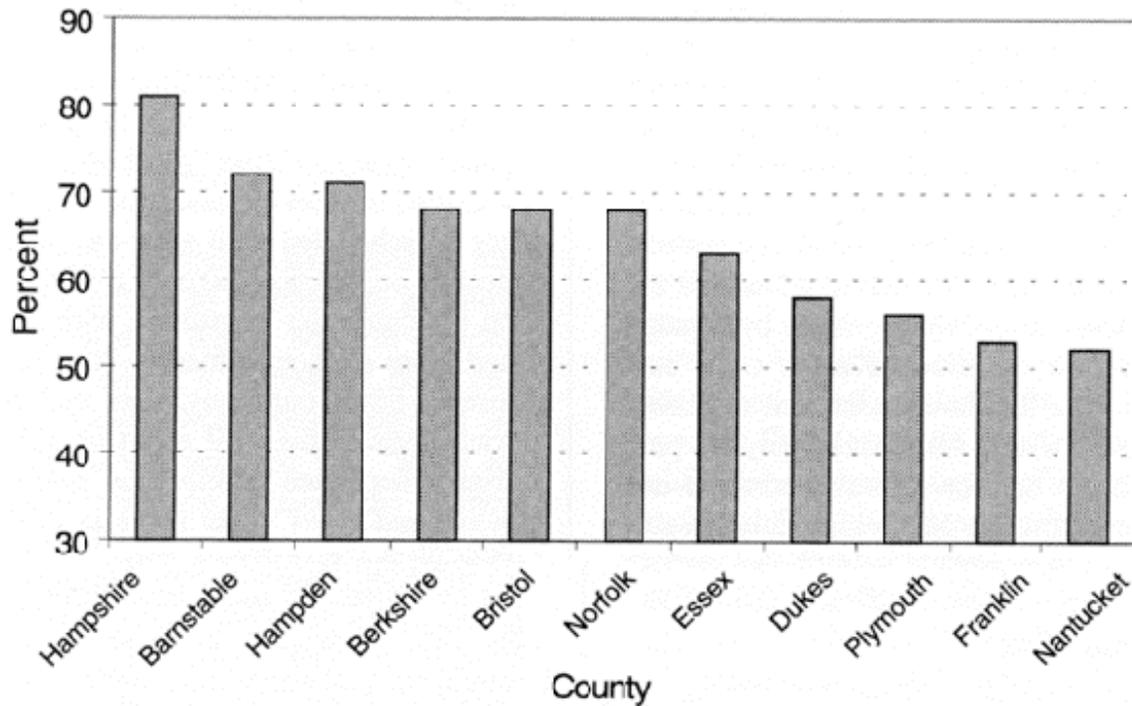
## BEYOND TIME STANDARDS

It cannot be denied that time standards have improved the administration of civil justice in the Commonwealth.<sup>26</sup> While Massachusetts' last serious look at civil justice administration resulted in time standards, other states have moved beyond time standards by embracing principles of caseload management. A study by the National Center for State Courts identified the following elements of an effective caseload management system:

- judicial commitment to the concept of court control
- explicit case processing goals
- effective communication with the bar
- early and continuous court supervision of case progress
- trial-date certainty
- a functional case management information system
- a plan for attacking the case inventory.<sup>27</sup>

Many of these principles are reflected in case processing approaches taken by courts that have successfully managed to decrease costs and delays of civil litigation.

**Figure 3. Percent of Fast Track Cases "Off Track" in Superior Court, by County, May 1998**



### ***Wayne County Circuit Court, Michigan***

Wayne County Circuit Court has attracted national attention with its approach to civil case management.<sup>28</sup> According to the judges and administrators of the Wayne County Circuit Court, there are five key principles for effective case management:

1) Individual Responsibility: Caseload management is the responsibility of judges, not lawyers. Although some commentary has expressed concern about preserving the judicial function when judges get involved in the administration of justice<sup>29</sup>, most judges are comfortable with the observations of Judge Learned Hand, who wrote, "a judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert."<sup>30</sup>

2) Early Court Intervention: An early status conference with the judge, or sometimes with the court clerk instead of a judge, and attorneys for all parties is essential to court-controlled caseload. By applying principles of differential management to cases, a judge can set a schedule for the exchange of witness lists, discovery cut-off, mediation, and settlement conference that fits the needs of the case. Early management by a judge leads to earlier disposition of most cases and frees judicial time for those cases that need further attention or a trial. Approximately 25 percent of the cases set for status conference are resolved at or before the conference, through settlement reached by the parties themselves, entry of default judgment, or dismissal for failure to appear at the conference.<sup>31</sup>

3) Continuous Judicial Control: For every case, there must always be a next event scheduled, and

the time between events should be as short as reasonably possible. Whenever an event is imminent, a significant percentage of cases gets resolved.

4) Trial Date Certainty: Judges must create expectations that trials and other events will occur when scheduled. To facilitate trial date certainty, judges should adhere to a strict no continuance policy except for true "good cause" and schedule a limited number of cases for trial. Trials should not be scheduled until after an unsuccessful settlement conference and only if both lawyers agree on the date after consulting with their schedules and those of their witnesses. The settlement conference filters out many cases that will not go to trial, because the joint effort of preparing a pretrial order often precipitates settlement discussions, and many cases settle at this stage rather than on the courthouse steps. Trial dates should not be scheduled more than three months beyond the date of setting, because the pressure of an imminent trial encourages settlement.

5) Information to Support Case Management: An adequate information system is necessary to monitor and manage a caseload properly.

Significantly, Wayne County Circuit Court has, by court rule, established mandatory mediation of civil cases before scheduling cases on the trial calendar. Mediation is a short summary hearing before three attorneys who determine a settlement value on the case. Each party has 28 days to accept or reject the settlement value. If all sides accept, the case is resolved at that figure, but if either the plaintiff or defendant rejects, then whichever party ultimately does better than the mediation evaluation figure by 10 percent is entitled to an award of costs and attorney's fees from the mediation to the conclusion of the trial.<sup>32</sup> The Wayne County Circuit Court also has created several staff positions with direct responsibility for docket and calendar management: 1) The Director of Docket Management oversees the caseload systems on an organization-wide basis and staff caseload training, and has responsibility to assure that all hearings and case events occur as ordered during the initial Status Conference and that statistical reports and data are prepared and reviewed by judges, clerks, and staff. 2) Individual Calendar (IC) Clerks oversee the calendars in each of the sessions and serve as a link between the Director of Docket Management and the judges and staff.<sup>33</sup>

### ***California Delay Pilot Program Superior Courts***

The California Legislature, frustrated by the judicial branch's failure to address the inability of citizens to have their day in court at reasonable expense and within a reasonable time, enacted the Trial Court Delay Reduction Act of 1986.<sup>34</sup> The legislature declared that "delay in the resolution of litigation...reduces the chance that justice will in fact be done, and often imposes severe emotional and financial hardship on litigants" and that "various methods for reducing delay in the litigation of cases in trial courts have been identified and tested, and have been effective in reducing the time necessary for the resolution of...civil...litigation. It is in the public interest for certain trial courts to utilize these methods on a pilot program basis, in order to demonstrate their effectiveness in California."<sup>35</sup> The California Administrative Office of the Courts then adopted "Delay Reduction Rules for Volunteer Trial Courts," which included case processing time goals:

- Within 12 months, dispose of 90 percent.
- Within 18 months, dispose of 98 percent.

- Within 24 months, dispose of 100 percent.<sup>36</sup>

The California Delay Reduction Rules spelled out detailed procedural steps to achieve these disposition goals, including an early case management conference, continuous scheduling of the next event, and a pretrial conference to address settlement seriously before scheduling a case for trial.<sup>37</sup> Interestingly, some courts that volunteered for the pilot project implemented the "early judicial intervention" model of case management, while other courts used the "time standards" model. Thus, California permits direct comparison of "early intervention" and "time standards" approaches.

The Superior Courts in Contra Costa, Los Angeles, Riverside, Orange, and San Francisco counties implemented the early judicial intervention, or "status conference," approach. The courts in Alameda, Kern, Sacramento, and San Diego used the time standards, or "rule-based," approach. In its report to the state legislature, the California Administrative Office of the Courts concluded that "the status-conference courts outperform[ed] the rule-based courts, whether one examines months to disposition...or the percentage by which disposition time declined." There are several reasons for this difference. The most obvious and important are as follows.<sup>38</sup>

- Lawyers must review the file before going to a status conference. The conference requires travel time in addition to the time spent in the conference. To avoid this, some lawyers will settle a case in advance of the conference.
- A lawyer may become informed about a case by studying the file and may be led to settle it at that point, rather than to delay the settlement.
- If the possibility of settlement is part of the conference discussion, parties may decide to settle at that point or reduce their differences, thus facilitating settlement later. In either instance, settlement occurs earlier than it might have without a face-to-face meeting early in the case's life.
- Because schedules can be customized, cases capable of early resolution of trial are put on a shorter schedule than they might be on a rule-based schedule. A rule-based schedule can slow down some cases to the pace set by the rule.
- A judge's reaction to a case at a status conference may introduce a note of rationality for a litigant about the merits of a claim, that will lead to an earlier settlement.
- During a status conference a judge can indicate basic ground rules regarding discovery that will limit or eliminate bickering about discovery that might occur in a rule-based system. Discovery wars can prolong disposition and raise costs.

All the pilot program courts, whether operating under early intervention or time standards approaches, markedly improved the pace to disposition in California. Courts using the early intervention approach generally improved more than the time standards courts.<sup>39</sup>

## **ADR: LESSONS FROM THE END OF MONOPOLY**

Civil case filings have continued to decline in the Massachusetts District and Superior Courts.<sup>40</sup> This phenomenon is attributable, according to some judges, bar leaders, and editorial page writers, to the booming Massachusetts economy: civil filings are down because when people are

doing better economically, they get along better.<sup>41</sup> When this nicety is tested against the facts, however, another picture develops. In 1987, the peak of the last booming Massachusetts economy, civil case filings in District and Superior Courts exceeded case filings for 1997.<sup>42</sup> The true reason for declining use of the judicial branch to resolve civil disputes becomes clear when one examines the use of private sector alternatives for dispute resolution, specifically arbitration and mediation: In the last 10 years, the number of persons and companies resorting to private sector justice has increased in proportion to the decline in civil filings. Many cases brought to ADR would otherwise have been filed in the public sector judicial branch.

**Table 2. ADR Providers Listed in Boston Yellow Pages, by Year**

Year	Arbitration Services	Mediation Services
1983	3	5
1988	2	15
1993	13	43
1994	14	47
1995	17	61
1996	14	60
1997	15	63
1998	13	66

People and companies who can afford to escape the infirmities of public judicial administration in Massachusetts are voting with their feet and choosing private sector justice. Corporate litigants' growing use of private-sector substitutes for the public court system may signal the emergence of a two-tiered justice system, with a fast-track private system for those who can afford it and a slow-track public system for those who cannot.<sup>43</sup> The Massachusetts judiciary needs to reflect on its shortcomings, consider what elements of ADR appeal to civil litigants, and implement improvements. Justice demands nothing less.

Some of the biggest attractions of ADR are the certainty of the hearing date and speed of result. Litigants readily give up substantial appellate rights for the right to be heard when scheduled.<sup>44</sup> Unlike trial dates, which typically involve numerous false starts in Massachusetts, arbitration and mediation generally occur when scheduled. While fewer than 5 percent of cases in courts ultimately are tried, nearly 60 percent of cases filed in the American Arbitration Association were heard by an arbitrator.<sup>45</sup> This disparity may suggest that more litigants would pursue their day in court if a day in court actually were available in a timely and predictable manner. In most cases where comparisons have been made, arbitration proceeds faster than litigation to a final result.<sup>46</sup> The public system of justice should take note.

**Table 3: Comparison of Case Processing Times of ELP and Baseline Dockets at Major Intervals (Average in Days)**

	Campbell County		Louisville	
	ELP	Baseline	ELP	Baseline
Pleadings <sup>a</sup>	30	54	26	63
Discovery <sup>b</sup>	80	346	62	245
Pretrial <sup>c</sup>	83	115	70	359
Total Elapsed Time <sup>d</sup>	184 N=146	482 N=93	118 N=96	369 N=369

N = no. of cases in sample

a = From filing to first answer.

b = From first discovery event to last discovery event

c = From pretrial conference or trial scheduling to first trial day

d = From filing to disposition

Source: Michael D. Planet, "Reducing Case Delay and the Costs of Civil Litigation: The Kentucky Economical Litigation Project", *Rutgers Law Review* Vol. 37 (1985), p.285, table 1.

### **ADR MEET ELA: ECONOMICAL LITIGATION ALTERNATIVE FOR MASSACHUSETTS**

Economical Litigation Alternative (ELA) is a subset of procedural rules that govern civil actions. ELA may apply to all actions for which the plaintiff waives claims over a stated amount, e.g., \$100,000, or may apply to all actions by agreement of the parties. Unlike ADR, ELA is litigation within the judicial branch subject to caselaw and all appellate rights. Like ADR, ELA is a procedure for fast-tracked, uncomplicated, and relatively inexpensive litigation, customized to the needs of the case with schedules determined with the active involvement of the parties and with certainty of events. The Massachusetts Supreme Judicial Court has the power to implement ELA rules in Massachusetts with little or no need for legislation.

Several other states have adopted ELA-type procedures.<sup>47</sup> In the Kentucky Economical Litigation Project (ELP), for example, which was implemented on a pilot basis in Campbell and Louisville counties, the rules on case processing produced the following results:<sup>48</sup>

- Total case processing time from filing to disposition and elapsed time at major litigation phases were significantly reduced in ELP cases.
- The number of procedural events (e.g., motions, discovery, hearings) was also reduced.
- These reductions were achieved without apparent impact on the case outcome.
- Attorneys reported that reductions in case processing times and procedural activity resulted in savings in the amount of time spent on ELP cases by most attorneys, with no adverse effect on their ability to prepare. Many attorneys noted that their preparation and conduct of discovery actually benefited by the ELP procedures.<sup>49</sup>

These savings in attorney time resulted in reduced fees to clients in hourly fee billing, although contingent fee billings are not reduced by lower costs to attorneys.

Sixty percent of Campbell County ELP cases were disposed of within six months, 90 percent within one year, and none were older than 24 months at the time of disposition. Louisville ELP cases showed even greater reductions. Seventy-nine percent of the Louisville ELP cases were disposed within six months, 99 percent within one year, and none was older than 18 months at the time of disposition.<sup>50</sup>

Much as it has done with other initiatives, the Supreme Judicial Court could appoint an ELA Task Force of Superior and District Court judges, bar leaders, business and public interest representatives, clerks, and administrators to prepare a draft of proposed rules changes, in conjunction with the state legislature and the Standing Committee on Rules. The ELA rules could be implemented on a pilot project basis in one or more counties, such as the District and Superior Courts in Norfolk and Middlesex counties.

A working draft of possible rules changes is included as an Appendix to this paper to focus the Task Force's efforts, but it is important that final proposals reflect the collective work of the Task Force. "Prior research on implementation indicates that change is not something 'done to' members of an organization; rather, it is something they participate in, experience, and shape."<sup>51</sup> The participation and support of the organized bar also is critically important. "Beginning in the mid-1970s, almost every major study of delay, regardless of its methodology, scope, or specific recommendations, has stressed the importance of a firm and formal commitment by the court and the local bar to reducing delay through cooperative effort."<sup>52</sup> The draft in the Appendix, which includes many of the features of the Kentucky ELP procedures, includes the following suggestions:

Parties Volunteer for ELA to Apply, with Incentives to Volunteer, or Applies in All Cases Below \$100,000: In many cases, all parties will share a common interest in reducing expense and delay, and procedural rules that reduce expense and delay may provide incentive enough for all parties to submit to the ELA procedure. Sometimes, particularly in cases involving parties of disproportionate resources, one party may seek to "bury" the other side with an avalanche of motions and discovery to force a settlement in the face of unaffordable litigation costs. In these "scorched earth" cases, the additional incentive of including attorney's fees in Rule 68 Offers of Judgment-and then exempting any party who agrees to submit to ELA-may be a way to level the playing field among litigants of diverse means. Many costs of litigation are included in the ELA as costs recoverable by the prevailing party after judgment.<sup>53</sup> The ELA provides a "safety valve" for additional discovery "for good cause" in cases that merit more discovery and to ease malpractice concerns by counsel who encourage their clients to elect ELA. Finally, the ELA introduces the concept of an annual filing fee rather than a single fee paid at the outset of the litigation. An annual filing fee invests the plaintiff, much like a medical "co-pay," in the prompt disposition of the case. The annual fee, which is one-half the amount of the conventional filing fee, also reduces the economic barriers to legal redress. Significantly, all money paid for filing fees must be refunded by the court if the case is not reached for trial within three attempts; as reimbursements come out of the court's budget, there will be a strong institutional incentive to reach cases for trial when scheduled.

As an alternative to voluntary participation, ELA rules also could apply to all civil actions in which the plaintiff waives any recovery in excess of \$100,000. Cases worth less than \$100,000, which constitute the great bulk of civil business in Massachusetts, have particular need for cost-

and time-effective procedures to avoid the circumstance in which all parties spend more to litigate than the amount in dispute.

**Early and Continuous Judicial Control of Case:** ELA rejects the time standards-only approach in favor of early judicial intervention and then specific, certain events scheduled for the remainder of the case. This approach, modeled after Standing Order 1-98 in the District Court and the programs in Michigan and California, has a proven track record of resolving civil cases sooner and less expensively than other approaches. Cases do not have an unlimited number of pretrial events, such as "status" dates. Instead, proceeding at a pace appropriate for the needs of the case as determined with counsel's participation, the case has three basic events: Case Management Conference three months after an answer is filed; Pretrial Conference when the case is expected to be ready for trial; and Trial. The level of preparation required for each event is commensurate to the event and to the needs of the case. Continuous judicial control simply recognizes the reality that "what judges do to manage cases matters."<sup>54</sup>

**Use of Technology to Reduce Costs:** The ELA authorizes use of technology to reduce the transaction costs of litigation. In civil litigation, much of what a lawyer must do is reactive to actions taken by the opposing party. Even a simple motion that requires a trip to the courthouse may cost hundreds or even thousands of dollars just for counsel to be prepared, show up, wait to be heard, argue, and return to the office. The ELA permits counsel to appear by telephone or, in courts properly equipped, video-conference, to file and serve documents electronically, to obtain forms and make payments electronically.<sup>55</sup> Private vendors exist who are ready and willing to provide these services on a fee basis without any public appropriation.<sup>56</sup> These changes will not render the practice of law antiseptic, as personal attendance of counsel is required for the scheduled, controllable events of Case Management Conference, Pretrial Conference, and Trial. Counsel also have the option to attend any courthouse event in person if they wish. Indeed, the early intervention Case Management Conference will serve as a collegial event for lawyers to minimize the temptation to file needless motions and instead encourage them to just pick up the phone and resolve any problems that may arise.

**Initial Disclosure and Limited Discovery:** The federal courts and some states have embraced mandatory disclosure of documents and information as a prerequisite to discovery.<sup>57</sup> Other states have created "form discovery," which may be served without limit and supplemented by limited custom discovery.<sup>58</sup> The draft ELA incorporates initial disclosure of basic known or easily knowable information (rather than the troublesome "any relevant information" standard that has resulted in disclosure litigation in other jurisdictions) rather than requiring parties to serve form discovery seeking essentially the same information. No party may undertake discovery until filing a certificate of compliance with the disclosure requirement. Disclosure usually must be complete by the Case Management Conference, although the parties can stipulate to an extension after the Case Management Conference, particularly for low-dollar cases that may settle at or before the Case Management Conference.

Parties are limited to 20 single-question interrogatories and 10 document requests, unless a judge finds "good cause" to permit more discovery. All written discovery must be answered within 30 days. The ELA encourages use of requests for admission by permitting interrogatories and document requests to be conditionally posed with a request for admission; if the opposing party admits the request, the interrogatory and document request are automatically withdrawn and do not count to the limit of 20 interrogatories or 10 requests for production.

**Limited Depositions:** The ELA proposes that parties be limited to depositions of other parties, one non-party witness and any expert witness, unless a judge permits additional discovery for

"good cause." <sup>59</sup> Moreover, depositions are limited to four hours of examination, unless all parties agree to extend the length of the deposition. <sup>60</sup>

Another change, although permitted under the conventional rules by agreement of all parties, is the right to have depositions recorded on audio tape or disc rather than stenographically recorded. The cost for a court stenographer to attend a deposition and provide a transcript can be prohibitive for individual litigants. Since transcripts usually are not necessary when cases settle, and since most cases settle, the right to record depositions can save hundreds per deposition. In the event a transcript is needed, the tape or disc recording easily can be transcribed by an authorized transcriptionist or stenographer. Any party that wishes to have a stenographic record may provide a stenographer at their own expense.

By agreement of the parties, without leave of court, depositions may be conducted by telephone, videoconference, and internet.

Motion Practice: The ELA abolishes the current Superior Court Rule 9A approach as well as the District Court convention of requiring the moving party to appear for uncontested motions. Counsel need not appear on uncontested motions, and contested motions can be heard by telephone if the parties wish. Motion practice represents a potential gap in the calendar of next scheduled events. For this reason, it is critically important that cases not slip through the gap and that there be accountability for the manner in which motions are considered. In a "Judicial Activity Report" all judges currently report to the Trial Court civil business that has been under advisement longer than 30 days after the month in which the matter was heard. The ELA simply requires public disclosure of this information to advise the parties regarding the status of their motion and to encourage timely disposition of motions by judges. <sup>61</sup>

Another feature, designed to discourage a fusillade of motions as a litigation tactic, presumptively limits the number of motions to one dispositive motion, one non-dispositive motion, and "move until lose" for discovery motions, in which a party loses the right to file more discovery motions upon losing a discovery motion as determined by the judge.

Time Limits for Trial: One of the most challenging aspects of scheduling trials is the uncertainty of length of trial. Underestimating length of trial can cause a domino effect of slowing all cases scheduled for trial later in the calendar, while overestimating length of trial can leave valuable and costly trial sessions empty. Some courts use presumptive limits on the length of trial, subject to change as necessary to ensure a fair trial. <sup>62</sup> The ELA limits the length of direct and cross examination of witnesses by imposing a cumulative limit for all direct and all cross examination, with the parties free to use their allotted time as they wish. In addition to encouraging counsel to "get to the point" and to avoid the temptation to filibuster before an audience of captive jurors, the trial time limits also will assist the court in scheduling cases for trial and reaching cases for trial as scheduled.

Firm Policy Against Continuances Absent Good Cause: To defeat the "cult of continuance" so bemoaned in the Harbridge House report, the ELA provides a firm policy against continuance absent true "good cause." Trial sessions are a limited public asset, and last minute continuances have the effect of wasting the trial session that has been fully paid for by the taxpayers. Although judges conventionally have yielded to agreements of civil parties to continue trial for good reason or no reason at all, the ELA approach recognizes that the judge is the only actor responsible for preserving and properly administering the limited public asset of a trial session.

While the Massachusetts Rules of Criminal Procedure have long provided for the payment of

costs as a condition of continuance, the civil rules have not so provided.<sup>63</sup> The ELA rules permit a justice to impose costs, including reasonable attorney's fees, as a condition of granting a continuance. Moreover, the ELA provides for sanctions for causing delay and undue expense by failure to conform to the ELA rules. The federal courts have provided for such sanctions, while Massachusetts never has explicitly so provided.<sup>64</sup>

These draft ELA rules provide a starting point of discussion and collaboration between the members of any Task Force that the Supreme Judicial Court may appoint to meet the challenge of prompt and affordable justice in Massachusetts. "As with any major change process, there will be resistance and reluctance at first, followed by some chaos as people move along the learning curve.... There will be changes to the changes. In the end, there can be noticeable improvement in the pace of litigation as well as other, less tangible benefits to judges, court staff, lawyers, litigants and the judiciary as an institution."<sup>65</sup> Adoption of ELA rules in Massachusetts will improve the administration of civil justice, but even procedural reform likely will be hobbled by administrative conventions ripe for improvement. Some suggested administrative reforms, simple but necessary, are highlighted in the following section.

## **ADMINISTRATIVE IMPEDIMENTS TO JUSTICE**

No one has personal responsibility for civil case flow management in the Massachusetts civil justice system. Judges rotate on circuit, and cases generally are assigned on a Master Calendar basis, with no one person involved in the case from filing to disposition. Even if positions were to be created or reassigned to superintend civil case flow, there are a paucity of meaningful performance measures by which to gauge the performance of the civil justice system and the employees who administer it. This section proposes to reassign some existing positions in the judicial branch to create civil case managers and teams who, with designated judges, are responsible for civil case administration. The paper also will suggest meaningful performance standards and tie compensation of non-judicial personnel at least in part to performance. The power to effect administrative change is vested entirely within the judicial branch. The assignment of judges, allocation of staff responsibilities, measurement of performance, and establishment of pay scales for non-judicial personnel all are matters close to the core function of the judiciary. For this reason, the judicial branch can and should coordinate administrative changes with adoption of procedural reforms to have the greatest effect on civil case management.

### **PERFORMANCE MEASURES: COUNTING WHAT COUNTS**

The primary measure of performance at this time is disposition or "through put" rate for courts and sessions. As Alice's case reveals, disposition is a measure of performance of only limited worth. The Superior Court has detailed data on case aging and session activity, but these are limited to the three counties that are automated. The District Court currently measures only work it has completed, thus leaving unfinished work unmeasured and unknown. Performance measures for the Trial Court should include the following:

Case Processing Goals: The District and Superior Courts each should specify case processing goals, and then measure actual performance against those goals by court or session. The California goals should not be beyond the reach of the Massachusetts Trial Court:

- Within 12 months, dispose of 90 percent.

- Within 18 months, dispose of 98 percent.
- Within 24 months, dispose of 100 percent.<sup>66</sup>

Reach Rate: The "Reach Rate" is the percentage success in reaching a case for trial on first scheduled date, second scheduled date, third scheduled date, and more than three scheduled dates<sup>67</sup> If a court or session succeeds in reaching cases for trial 9 out of 10 times on the first assigned trial date, for example, the reach rate would be 90 percent. Any scheduled trial date would be the basis of measurement, so continuances (whether for good cause or otherwise) will adversely affect the reach rate. Including continuances, even proper continuances, in the reach rate is necessary to determine the culture or perception of the court by litigants and lawyers. Suggested Reach Rate goals are

- Reached First Trial Date: 80%
- Reached Second Trial Date: 90%
- Reached Third Trial Date: 100%.

A corollary measure of performance, easily determined once data for Reach Rates are collected, is the percentage of cases that have multiple trial dates.

Continuances: Continuances of each scheduled event should be collected for performance evaluation. Any continuance, even a continuance for good cause, generally indicates a wasted effort or resource on the part of the court and the parties. Continuances always indicate a delay from filing to disposition.<sup>68</sup> To keep the "cult of continuance" in check, these data should be gathered by name of judge or clerk-magistrate granting the continuance as well as for each event. Continuances should be counted for Case Management Conferences, Pretrial Conferences, and Trials. The closer the number is to zero, the better. Average and median numbers of continuances, by event and by judge or clerk, should be calculated and disseminated. The goal should be zero for each event to measure performance.

Lag Time: Lag Time consists of several measurements: 1) the length of time from the date a case is assigned for trial until the scheduled date of trial; 2) the length of time from the date a case is assigned for trial until the actual trial date; and 3) the difference, or "slippage," between the scheduled lag time at 1) and the actual lag time at 2). Trial dates should not be scheduled more than three months beyond the date of setting, because the pressure of an imminent trial encourages settlement.<sup>69</sup> The goal for scheduled lag time should be from 30 to 90 days, with the lower number (not less than 30) the indicator of better performance. The goal for the difference between scheduled and actual lag time should be zero.

Case Aging and Disposition Rates: The current practice of measuring the age of pending cases, as well as the disposition rate, should continue. The age data will assist the courts or sessions to determine which cases should be the emphasis of trial session efforts, to reduce the number of old cases pending trial.

There are other measures of performance that might merit further study, but these measures would permit court administrators, clerks, and judges to see the big picture in their daily efforts. By these measures, Alice's case would have been counted as the failure of justice that it was. By knowing its failures, the judicial branch can dispatch resources and assets to courts and sessions to minimize the delay and expense of civil litigation.

## **WHO'S IN CHARGE? CASE MANAGEMENT TEAM APPROACH**

Some states have designated employees to be responsible for case management and calendar control.<sup>70</sup> While clerical staff in Massachusetts have assumed de facto responsibility for calendar coordination and caseload management, the level of responsibility, duties, and procedures vary considerably from court to court. Judges in Superior Court and many District Courts rotate on a circuit assignment, never presiding over a civil case from filing to trial. There is, then, no "ownership" or personal responsibility for the processing of any particular case pending in the Trial Court. Massachusetts courts generally use a "Master Calendar" approach to trial assignments, assigning trials to a session to be staffed by whichever judge is available that day, rather than an "Individual Calendar," like the federal system where a judge presides over the case from filing to trial. Courts with individual judge calendars for civil cases usually have substantially less delay than courts using the master calendar system.<sup>71</sup> Given the strong tradition of judges, particularly Superior Court judges, riding circuit, the individual calendar system is unlikely to be implemented in Massachusetts. One option is to use a "Team Calendar" approach to civil scheduling. As one caseload expert has noted,

assigning cases to a small team of judges rather than to an individual judge or a master calendar appears to combine the best features of both the master and individual calendar systems. The team calendar system appears to have the advantages of judicial responsibility and accountability that can exist in the individual calendar system while avoiding the scheduling problems inherent in the individual calendar system.<sup>72</sup>

Under a team calendar approach, certain Superior Court and District Court judges would be on a "civil circuit" between certain courts and share responsibility for civil case management. Judicial schedules generally are known several months in advance, so trial orders could assign by name the trial judge scheduled to preside in the session or court on the trial date; identifying the trial judge will permit that judge to handle all matters in advance of trial. Moreover, the clerical staff also can be assigned to the team, with certain employees responsible for civil case management in a particular session. This team approach, between judges and staff, will permit the performance of the teams to be measured and evaluated to determine how best to manage civil business and will invest the team members in the results of their performance.

## **LINKING PAY TO PERFORMANCE: REWARDING RESULTS**

The administration of justice, distinct from the substance of judicial decision on cases, lends itself to objective measures of performance. Cases are reached when scheduled or they are not. Trials are assigned within the 30- to 90-day window, or they are not. Cases are continuously calendared, leading to early dispositions and shorter times from filing to disposition, or they are not. While it probably would be inadvisable for judges to receive bonus pay for excelling at judicial administration,<sup>73</sup> support staff are a key component of the administrative team and should receive bonus pay for doing the job better than their colleagues do. Similarly, courts and sessions that outperform other courts and sessions should be qualified to receive preference in capital spending and other institutional incentives like funding for educational programs for court employees.

Several state courts, including Colorado, Illinois, and California, and the federal courts already have programs linking employee pay to performance.<sup>74</sup> "Beginning January 1, 1996, Maricopa County [Phoenix, Arizona] officials commissioned the [court] clerk's office to conduct a pilot project that redefined the way some government employees are compensated for their work. The QP3 project was designed to pay employees a base rate for standard output requirements, with added premium pay for greater output.... In addition to quantity, QP3 pay scales include quality indicators."<sup>75</sup> After six months of the pilot project, production levels among voluntarily

participating employees increased from 6.5 percent to 41 percent, while per-unit costs to produce were reduced. Work quality measurably improved in participating work teams, the average pay per employee increased, and employee satisfaction was significantly higher among participating employees than among employees who did not participate in the project. *"When asked which factors should be used to determine pay rates, employees in the QP3 program ranked productivity first and seniority last, while the response of those not participating in the program was the opposite"* (emphasis supplied).<sup>76</sup> In Massachusetts, by contrast, in keeping with traditional governmental pay practices, seniority rather than production is the primary basis for increasing workers' pay.<sup>77</sup> Some of the comparative effects of traditional pay versus performance-linked pay are listed in table 4.

Although linking pay to performance will require amendment and renegotiation of union contracts, one possible approach may be to reduce the base pay of team members by 25 percent, with current court performance levels bringing pay to current levels, with increases above current pay for up to 100 percent performance. Any failure to reach cases for trial after three assigned dates, which requires reimbursement of the filing fees for ELA cases, could be paid from the bonus salary account.

**Table 4: Comparison of QP<sup>3</sup> with traditional pay practices.**

<b>Traditional Pay Practices</b>	<b>QP<sup>3</sup> Program</b>
<b>Work Environment</b>	
Focus is diffused. Some activities may not produce end results. No overriding urgency to achieve results.	Focus is on the end result. Activities are aligned with quality production. Motivation to achieve results.
<b>Continuous Improvement</b>	
Methods are traditional. Continuous improvement not a priority. "Why change? We've done it this way for as long as anyone can remember."	Streamlined processes, continuous improvement sought by employees. Every task contributes to the end result and adds value or is eliminated.
<b>Performance Standards and Pay</b>	
Softer measures are typically used and are qualitative in nature. Payment of salary is for achieving minimum standards or better.	Quantitative measures of production and quality drive premium pay. Minimum standard is the base pay rate.
<b>Increases in Pay</b>	
Occasional across-the-board pay increases which build the base. More seniority equals higher pay. More production does not directly yield higher pay.	Does not participate in across-the-board increases. Base is set according to analysis, including market factors, and higher pay is tied to production.
<b>Frequency of Pay Changes</b>	
Pay is typically not changed more often than once per year. All pay increases generally build the base and last for the career of the employee regardless of future satisfactory performance.	Biweekly premium adjustments are made according to quality production. Premium pay is not permanently added into the base pay of the employee. Current pay is determined by current performance. Future biweekly increases are dependent upon future biweekly performance.

Source: Gary B. Huish, "Piece-rate Pay Plan in Clerk's Office Motivates Quantum Leap in Quality Production," *The Court Manager*, Vol. 12, No. 2 (Spring 1997), p. 11, chart 1.

## **SMART CALENDAR TRIAL SCHEDULING SYSTEM**

Another administrative improvement, which is simple and well suited to automation, is the Smart Calendar Trial Scheduling System. This system, developed during the civil jury pilot project in Norfolk County and the subject of much interest among court administrators nationally,<sup>78</sup> works as follows: At the pretrial conference, the person conducting the event completes a Pretrial Conference Report form, which includes a Trial Rating percentage from 10 percent to 100 percent. Depending on the parties' attitudes and progress toward settlement, as well as experience with the type of case involved, a case thought definitely to settle should be rated in the 10 to 30 percent range; a case thought probably likely to settle should be rated in the 40 to 60 percent range; and a case thought probably to try should be rated in the 70 to 90 percent range. The 100

percent rating should be assigned sparingly, such as when a case absolutely is known not to be able to settle or if the case cannot be reached on the assigned trial date and needs to be rescheduled. The trial calendar coordinator then "builds" the trial calendar based on information and Trial Ratings contained in the PTC Report. The cumulative Trial Rating score for all assigned cases for a day's session should come as close as possible to, but not exceed, 150 percent. Bench trials are assigned for one day only, even if expected to be multiple-day trials, as the second day for trial can be scheduled for days that have opened up in the calendar on short notice. Jury trials should be scheduled for each expected day of trial, provided that the cumulative score for each day does not exceed 150 percent. From May 1997 to April 1998, while in experimental use, the Smart Calendar predicted the trial session business: cases that settle before trial averaged a 34 percent rating; cases that settle on the trial date averaged a 58 percent rating; and trials averaged a 75 percent rating. An additional advantage of the system is that it permits the trial judge to know, at a glance, which case is likely to settle in the trial session in the event multiple cases report for trial. During the experiment, nearly every civil bench or jury trial has been reached on the first date scheduled for trial. Using the Smart Calendar System, cases in the District and Superior Courts generally should be reached for trial on the first scheduled date.

## **CONCLUSION**

Alice moved from Cityville after dropping her case against the car manufacturer. She died in 1995. The civil dockets of Massachusetts' courts are filled with people like Alice, for whom civil justice is neither prompt nor affordable. Judge Irving R. Kaufman of the United States Court of Appeals once noted, "The judicial system is the most expensive machine ever invented for finding out what happened and what to do about it."<sup>79</sup> Significant improvements have been made in other states and can be made here as well. While it is difficult to estimate cost savings resulting from prompt justice,<sup>80</sup> the Kentucky ELP procedures were found to reduce attorneys' fees by 24 percent. Case processing times in other states have been reduced by more than one-half using procedures similar to the proposed ELA rules. Adoption of ELA rules in Massachusetts will make our judicial machine more efficient and effective in meeting the needs of individuals and businesses, at the same cost to taxpayers, than currently is the case.

It is never too soon to begin to provide prompt and affordable justice. Alice would have told you that.

*Daniel B. Winslow is First Justice, Wrentham District Court, Wrentham, Massachusetts.*

## **APPENDIX**

Note: Section numbers correspond to the Massachusetts Rules of Civil Procedure concerning the same topic.

### **RULE 1B: ECONOMICAL LITIGATION ALTERNATIVE**

[1B.1] Applicability. This rule shall govern the conduct of actions in which all parties agree in

writing that such rule shall apply and further shall govern the payment of filing fees where the plaintiff submits to this rule. Such agreement shall be indicated by filing and serving upon the other parties a written statement submitting to this rule simultaneously with the filing of a complaint, answer, third-party complaint, and third-party answer. Such a statement may be endorsed upon a pleading of the agreeing party.

A. Effect of Statement. Any party that has indicated its agreement with its complaint or answer to submit to this rule shall be deemed to have agreed to the applicability of this rule for all purposes, including but not limited to counterclaim and cross-claim, unless such agreement is specifically disclaimed upon the filing of additional pleadings.

B. Applicability of Standing Orders, Administrative Directives, Court Rules and Special Rules: All actions subject to this rule shall be governed by this rule and the Massachusetts Rules of Civil Procedure to the extent not in conflict with this rule. No other standing orders, administrative directives, court rules, special rules, or supplemental rules shall apply to these actions.

C. Liability for Attorney's Fees and Costs. Any party that has indicated its agreement to submit to this rule shall not be liable for attorney's fees and costs pursuant to Rule 68.

#### [1B.1B] Expense and Delay Reduction Special Provisions.

A. Annual Filing Fee. Any plaintiff(s) agreeing to submit to this rule shall pay a fee upon filing the complaint in an amount that is one-half the filing fee for civil cases not governed by this rule, and shall pay that amount on each annual anniversary of the filing date of the action until the case is reported settled or reached for trial. All monies paid by the plaintiff(s) for filing fees shall be reimbursed by the court to the plaintiff(s) upon failure without good cause of the court to reach the case for trial within three scheduled trial dates. This paragraph shall not apply to any plaintiff found by the court to be indigent.

B. Inmate Appearances. In any case involving a claim by or against or witnessed by a person currently incarcerated or detained in a state or federal prison or county house of correction, the court may conduct telephonic or video conferences with said inmate or detainee in lieu of personal appearance in court for all events except jury trial, unless a justice otherwise orders.

C. Telephone and Videoconference Appearance. Except as provided in C.1 below, counsel and pro se parties shall have the option of appearing by telephone or videoconference in any nonevidentiary hearing or appearance before the court. Said appearances may be subject to a flat fee, which shall be published by the court and assessed to any party requesting to so appear. All such assessments shall be subject to recovery by the prevailing party as costs after judgment.

1. Personal Appearance Required. Personal appearance by counsel and pro se parties is required at the Case Management Conference, Pretrial Conference, Trial and as ordered by a justice, except that inmate appearances are governed by B. above.

2. Request Form. Any counsel or pro se party that wishes to appear by telephone or, in courts so equipped, by videoconference, shall timely file and serve a "Request for Telephone/Videoconference Appearance" on a form provided by the Clerk-Magistrate. The form shall provide spaces for the date, time and court/session of the hearing, the type of hearing, and the name, address, telephone number, and fax number of the counsel or party requesting the

telephonic/videoconference appearance, and the name(s), address(es), telephone number(s), and fax number(s) of all other counsel or pro se parties, and credit card number for payment of any fee for such appearances. The Clerk-Magistrate shall ensure that information regarding credit card payments shall not be publicly available.

3. Filing and Service of Form. Not later than seven (7) days before the scheduled hearing, any counsel or pro se party wishing to appear by telephone or videoconference shall FAX or deliver to the Clerk-Magistrate a completed request form with payment and serve a copy of same (omitting credit card information) on all other parties. Failure to comply with this paragraph shall result in a denial of the request to appear by telephone/videoconference.

4. Scheduling. The Clerk-Magistrate, either directly or through a provider of telephonic/videoconferencing services, will contact all counsel and pro se parties a schedule a specific estimated time for each hearing in which any or all of the counsel or parties will be appearing by telephone or videoconference. Notwithstanding the specific estimated time established by the Clerk-Magistrate or authorized provider, each counsel or party wishing to appear by telephone/videoconference shall be available at the telephone number listed on the request form from the beginning of the specific estimated time until completion of the hearing. Failure to remain available as required shall be deemed a non-appearance at the hearing and shall be subject to sanctions. Nothing in this paragraph shall prevent any counsel or pro se party from appearing in person at the specific estimated time of the hearing.

5. Continuance. If a counsel or pro se party requests a continuance of a hearing scheduled for appearance by telephone or videoconference, the party requesting the continuance shall, as a condition of any continuance being granted, assume responsibility for contacting all other counsel or pro se parties and any authorized provider of telephone/videoconference services and rescheduling the hearing. Failure to comply with this condition may result in the requesting party being assessed telephonic/videoconference appearance user fees that otherwise would be paid by the appearing party.

6. Audibility and Recording. Each justice shall ensure that the statements of participants are audible to all other participants, that statements made by a participant are identified as being made by that participant, and that the proceeding is recorded to the same extent and in the same manner as if all the participants appeared in person.

#### D. Internet Access to Forms and Electronic Payment.

1. Internet Forms. All official forms of the Trial Court are available online at [home page address] without charge. The Clerk-Magistrate shall seal summons for use in any action upon payment of appropriate fees.

2. Electronic Payment. All payments to the court, as well as money paid into court by order of a justice, may be made by credit card in person, by telephone, or by Internet access at [home page address]. The Clerk-Magistrate shall not publicly disclose credit card information.

E. Sanctions for Causing Unnecessary Expense and Delay. The violation or failure to conform to any of these rules, whether by neglect or willful misconduct, shall subject the offending party and his or her attorney, at the discretion of the court, to appropriate sanctions, including the imposition of costs and such attorney's fees as the court may deem proper under the circumstances.

[1B.5] Service and Filing.

A. Electronic Filing and Service (EFILE). The following rules shall govern the electronic filing and service of pleadings and other documents in all cases designated by the Clerk-Magistrate as "EFILE" cases. Cases not designated as EFILE cases shall be subject to filing and service requirements specified by the Massachusetts Rules of Civil Procedure, except that filing and service by fax in lieu of mail or delivery is permitted when fax machines provide a contemporaneous printed record of completed transmissions.

1. System Specifications and Agreement of Parties. The Clerk-Magistrate shall publish the specifications necessary for counsel and pro se parties to use the court's EFILE system. Cases may be designated as EFILE cases only if all parties agree in writing and notify the Clerk-Magistrate, at or before the Case Management Conference, that the case shall be so designated. Upon the Clerk-Magistrate's designation of an EFILE case, counsel and pro se parties shall be permitted to access the EFILE system through subscription with a vendor authorized by the Clerk-Magistrate, the public-access terminal in the Clerk-Magistrate's Office, or by any other means reasonably assuring reliable access to the EFILE system. Use of the EFILE system may be subject to a fee, which shall be published by the court and assessed to any party accessing the system. All such assessments shall be subject to recovery by the prevailing party as costs after judgment.

2. Personal Identification Numbers for Subscribers. Upon receipt by any authorized vendor of a properly executed Subscriber Agreement, the Vendor shall assign to the party's designated representative a confidential Personal Identification Number ("PIN"), which may be used by such representative to obtain access to the EFILE system. The PIN will permit the attorney or pro se party to file, serve, receive, review and retrieve electronically filed pleadings, orders, and other documents filed in the designated case.

3. Electronic Filing. Except as provided in D.4 below or as otherwise ordered by a justice, all pleadings, motions, memoranda of law, orders, or other documents filed in any EFILE case shall be filed and served electronically through the system; the Clerk-Magistrate shall not accept for filing any pleadings or document in paper form.

4. Conventional Filing of Documents. The following documents may be filed conventionally and need not be filed electronically, unless otherwise ordered by a justice. Said documents shall be served in accordance with the Massachusetts Rules of Civil Procedure, with fax service permitted pursuant to D above:

a. all pleadings or other documents filed in the case before it was designated as an EFILE case by the Clerk-Magistrate

b. a motion to file documents under seal shall be filed and served electronically, but the documents to be filed under seal shall be filed conventionally

c. exhibits to motions, appendixes, and documents not readily available in electronic form may be filed conventionally.

5. Typographical Signature. Every pleading or document filed in the EFILE system shall bear a facsimile or typographical signature of at least one counsel of record, which shall be treated as the equivalent of a personal signature for purposes of Mass.R.Civ.P. 11.

6. Effect of Electronic Service and Filing. The electronic service and filing of a pleading or other document shall be deemed served and filed on the day of service and filing if no later than 5:00 p.m. Monday through Thursday or no later than 12:00 noon on Friday, excluding legal holidays. Service and filing after these deadlines shall be deemed served and filed on the next business day, unless otherwise ordered by a justice.

7. Electronic Filing of Affidavits and Other Sworn Documents. Unless otherwise ordered by a justice, original signature pages on affidavits, verifications or other sworn documents in EFILE cases shall not be filed in paper form, but shall be kept and made available upon request, upon reasonable notice and during business hours, to other counsel and the court. All such pages shall be available in court at any trial or evidentiary hearing. Filing and service of any such document in the EFILE system constitutes a representation by counsel of record to the court that the original signature page of the filed document is in counsel's actual possession.

8. Format of Electronically Filed Documents. All pleadings and other documents shall be formatted in accordance with the provisions of the Massachusetts Rules of Civil Procedure regarding paper pleadings and documents.

9. Electronic Filing and Service of Orders and Notices. In EFILE cases, the Court shall issue, file and serve orders, rulings, notices and other documents electronically, rather than by paper. Counsel and pro se parties who have not subscribed to the vendor's system, or whose rights to use the vendor's system have been suspended or terminated, are responsible for keeping timely apprised of any orders, rulings and notice from the court.

10. Public Access to Electronically Filed Documents. The Clerk-Magistrate shall make available to the public, without charge and during business hours, at least one computer screen capable of searching and reviewing documents of public record filed in the EFILE system. The Clerk-Magistrate shall make copies of any publicly filed document available in the EFILE system at a reasonable cost.

B. Non-Filing of Discovery Materials. Parties shall serve, but shall not file, the following discovery materials: interrogatories and answers to interrogatories; document requests and responses; notices of deposition; and any discovery stipulation or agreement between the parties that does not affect the case processing procedures set forth in 1B.16 below. [1B.16] Case Processing Procedures.

A. General Pretrial Procedure. It shall be the responsibility of counsel to complete the preparation of the case within ten months from the date it was filed unless the court otherwise orders. Discovery and pretrial motions, including motions pursuant to Rules 12, 15, 19, 20 and 56 of the Massachusetts Rules of Civil Procedure and such other motions as may be prescribed by the court, shall be filed, marked and caused to be heard by the end of said tenth month unless the court shall otherwise permit for good cause shown.

B. Case Management Conference.

1. Scheduling. Upon the filing of an answer by any defendant, the court immediately shall give notice to all parties of a Case Management Conference to be held on a date certain within three months after the date an answer was filed, or sooner if directed by the court or upon joint request of all parties. Counsel or pro se litigants, excluding prison or jail inmates, shall appear in person at the Case Management Conference. The court may impose sanctions, including dismissal, default and assessment of costs, for failure to attend the conference without good cause.

2. Purpose. The purpose of the Case Management Conference shall be to 1) assess the trial-readiness of the case; 2) assign a firm trial date for cases that are ready for trial; 3) discuss settlement progress and opportunities for settlement, and offer and conduct early intervention alternative dispute resolution; 4) consider case management orders proposed by any party, or by the court, regarding limitation or sequencing of discovery events consistent with this rule, schedule motion hearings, and other matters that would reduce the expense and delay of litigation, and enter appropriate orders; 5) enter judgment for relief or dismissal and conduct without further notice or schedule with notice a hearing for assessment of damages if necessary; and 6) assign a firm date for Pretrial Conference for all cases which are not yet ready for trial. Notice of the date of trial or Pretrial Conference shall be given to the parties at the Case Management Conference after consultation with counsel. In all cases scheduled for trial, the person conducting the Case Management Conference shall prepare a pretrial conference report. 3. Judicial Officer. The Case Management Conference shall be conducted by a Justice or, if a Justice is unavailable, by a Clerk-Magistrate or Assistant Clerk-Magistrate in accordance with G.L. c. 221, §62C. Only a Justice may issue or approve any orders arising from the Case Management Conference.

#### C. Pretrial Conference.

1. Scheduling and Pretrial Memorandum. All cases not disposed or assigned a trial date at the Case Management Conference shall be assigned a firm date for Pretrial Conference when they are expected to be ready for trial, said date to be not later than the end of the tenth month after the action was filed, or such later date as the court may order for good cause shown. Upon scheduling an action for Pretrial Conference, the court shall issue a Notice of Pretrial Conference requiring the parties to prepare a joint pretrial memorandum for use at the Pretrial Conference. Failure of any party to attend the Pretrial Conference or prepare a joint pretrial memorandum may result in sanctions including dismissal, default, and assessment of costs.

2. Agenda, Report and Trial Order. The purpose of the Pretrial Conference is settlement of the case or, for cases which do not settle, assignment of a firm trial date. The person conducting the Pretrial Conference shall thereafter prepare a Pretrial Conference Report. For actions requiring a trial date, notice of said date shall be given to all parties at the Pretrial Conference after consultation with counsel. Upon scheduling a case for trial, the court shall issue a Trial Order requiring the parties to prepare for trial. Failure of any party to prepare for trial as required by said order may result in preclusion of evidence or other sanctions in the discretion of the trial judge.

3. Judicial Officer. The pretrial conference may be conducted by a Justice, a Clerk-Magistrate or Assistant Clerk-Magistrate, a mediator or conciliator, or settlement master. Only a Justice may issue or approve any orders arising from the Pretrial Conference. At the direction of the trial judge, counsel may be directed to appear for an additional pretrial conference before the trial judge to reduce unnecessary delay at trial in complex or unusual cases.

D. Continuous Calendaring of Next Event. After an answer is filed, each case always shall have a next scheduled event, either Case Management Conference, Alternative Dispute Resolution, Pretrial Conference or Trial. No event shall be completed without the next event being scheduled with counsel's participation. Alternative dispute resolution events, such as mediation or summary trial, may be scheduled as interim events in conjunction with the next scheduled event.

[1B.26] General Scope and Conduct of Discovery.

A. Initial Disclosure in Tort and Contract Actions. No party may serve or conduct discovery in an action involving any claims based on tort or contract, until counsel or pro se party seeking discovery has filed and served a certificate of compliance with the disclosure requirements of this rule. Any discovery served in violation of this rule shall be deemed stayed until the certificate of compliance is filed and served.

1. Timing of Disclosure. Each party shall, without awaiting a request by the opposing party, provide the disclosure specified in this rule for actions involving claims based on tort or contract. Unless otherwise agreed between the parties or ordered by the court, disclosure shall be completed no later than the date of the Case Management Conference.

2. Content of Disclosure.

a. Actions Involving Any Tort Claim.

i. Plaintiff or Claimant. Any party asserting a claim based on tort shall disclose all medical bills and records in the possession, custody or control of counsel or the party or provide written authorizations signed by the patient to permit opposing counsel to obtain such documents; all accident reports, sketches and photographs of the accident scene, property damage or injuries; an itemized list of special damages then known to counsel or the party for non-medical damages; documents containing any admissions by the opposing party; all persons then known to counsel or the party who witnessed the event giving rise to the claim; all government agencies or officials then known to counsel or the party to have investigated the event giving rise to the claim; all PIP applications and documents submitted in support thereof; any documents that counsel agree to disclose without formal discovery.

ii. Defendant or Respondent. Any party defending against a claim based on tort shall disclose all primary and excess insurance policies that may be available to satisfy any judgment that may be obtained and, if the claim is being defended under a reservation of rights, copies of all documents reserving the insurer's right to deny coverage; all accident reports, sketches and photographs of the accident scene, property damage or injuries; documents containing any admissions by the opposing party; all persons then known to counsel or the party who witnessed the event giving rise to the claim; all government agencies or officials then known to counsel or the party to have investigated the event giving rise to the claim; any documents that counsel agree to disclose without formal discovery.

b. Actions Involving Any Contract Claim.

i. Plaintiff or Claimant. Any party asserting a claim based on contract shall disclose any contract or written agreement between the claimant and any other party that concerns the dispute, including any written warranties, notes and guaranties; identities of all persons then known to counsel or the party who witnessed or participated in the transaction or occurrence giving rise to the claim; an itemized list of special damages then known to counsel or the party; documents containing any admissions by the opposing party; all government agencies or officials then known to counsel or the party to have investigated the event giving rise to the claim; any documents that counsel agree to disclose without formal discovery.

ii. Defendant or Respondent. Any party defending against a claim based on contract shall disclose all primary and excess insurance policies that may be available to satisfy any judgment that may be obtained and, if the claim is being defended under a reservation of rights, copies of all

documents reserving the insurer's right to deny coverage; any contract or written agreement between the claimant and any other party that concerns the dispute, including any written warranties, notes and guaranties; identities of all persons then known to counsel or the party who witnessed or participated in the transaction or occurrence giving rise to the claim; documents containing any admissions by the opposing party; all government agencies or officials then known to counsel or the party to have investigated the event giving rise to the claim; any documents that counsel agree to disclose without formal discovery.

B. Conditional Discovery Requests. Interrogatories and requests for production may be conditionally posed in the same document in combination with requests for admission. If a request for admission is unequivocally admitted, the interrogatories and/or requests for production concerning the subject of that request for admission shall be deemed withdrawn and shall not be included in the limitation on the number of interrogatories and requests for production described in 1B.33 and 1B.34. Counsel or pro se parties shall indicate which interrogatories and requests for production relate to which requests for admission by numbering paragraphs numerically and alphabetically, i.e. 1A, 1B, 1C, 2A, 2B, 2C.

C. Expert Witnesses. Except as a justice may otherwise order for good cause, no party shall call at trial more than one expert witness per issue. Any party taking the deposition of an expert witness shall pay the reasonable costs of the expert's time for the deposition. "Reasonable costs" is presumed to be the hourly or daily charge by the expert to the party that retained him/her, with the deposing party responsible for the length of the deposition and one hour preparation time if a local expert, plus reasonable (not luxury or first-class) hotel and travel expenses if not a local expert. The costs of the expert witness shall be subject to recovery by the prevailing party as costs after judgment.

D. Discovery Disputes. Counsel and pro se parties shall confer to attempt resolution of discovery disputes before submitting disputes to the court; any motion for protective order or to compel discovery shall include certification of counsel or pro se parties that they have conferred as required by this rule. The court shall award reasonable attorney's fees to the party that prevails in any discovery dispute, based on affidavits of costs and fees submitted to the court, unless the court finds that the dispute was substantially justified or that other circumstances make an award of expenses unjust.

#### [1B.30] Depositions Upon Oral Examination.

A. Number and Length of Depositions. Each party shall be entitled (but not required) to take the deposition of any opposing party, one non-party witness and any expert witness identified by the opposing party. No further depositions shall be permitted, except as a justice may otherwise order for good cause. Depositions be of reasonable length and shall not exceed four hours of direct examination per examining party, excluding recesses, except as may otherwise be agreed by all counsel or pro se parties in attendance or ordered by a justice for good cause. For purposes of this rule, multiple parties represented by one lawyer or law firm shall be considered to be one examining party.

B. Objections and Colloquy. Objections shall be limited to the word "Objection" and the succinct legal ground of the objection, without colloquy by counsel. Failure to comply with this Order may result in sanctions against the offending counsel.

C. Tape Recording of Testimony. By agreement of all counsel and pro se parties, depositions may be tape recorded on equipment of sufficient quality to assure an accurate record of examination and testimony, with copies of the tape to be available to all counsel or pro se parties by request

upon payment of reasonable copying costs, with the witness' oath to be administered by a notary public at the commencement of the deposition. Any party may make a stenographic transcript of the tape recording at their own expense.

D. Telephone, Videoconference and Internet Depositions. By agreement of the parties, without leave of court, depositions may be conducted by telephone, videoconference and by internet written or oral examination, provided that an officer authorized to administer oaths is present with the witness and can verify the witness' identity to the satisfaction of counsel or pro se parties.

[1B.30A] Audio-Visual Depositions. An audio-visual deposition may be taken at any time that discovery is permitted or, for audio-visual depositions in lieu of personal appearance at trial, at any time after the pretrial conference.

[1B.33] Interrogatories. No party shall serve more than twenty (20) single-question interrogatories, unless a justice orders otherwise for good cause. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, within 30 days after the service of the interrogatories. Unless otherwise specified, further answers to interrogatories shall be filed within 15 days of the entry of the order to answer further.

[1B.34] Requests for Production. No party shall serve more than ten requests for production, unless a justice orders otherwise for good cause.

[1B.35] Physical Examinations of Persons. Whenever the physical condition of a party is in issue, without leave of court, any party may upon written request direct that party to submit to physical examination by a qualified physician at a reasonable location and time.

[1B.37] Motion to Compel Discovery. See Rule 1B.26(D).

[1B.40] Continuances. Continuances of Case Management Conferences, Pretrial Conferences and trials shall be disfavored in view of the advance notice to, and the participation of counsel in, the scheduling of these events. Continuance of these events may be allowed for good cause only, and any continuance shall be to a date and event certain. No action may be "continued generally" or taken off the schedule for any reason.

A. Form of Motion. Requests for continuance shall be made only by written motion, with an affidavit of counsel, and counsel shall send a copy of the continuance request to his or her client by first-class mail. All motions for continuance shall include a list of any days within the next 30 days that counsel for any party is unavailable for the continued event.

B. Joint Requests to Continue Case Management Conferences or Pretrial Conferences. The Clerk-Magistrate or an Assistant Clerk-Magistrate designated by the Clerk-Magistrate may allow joint requests to continue Case Management Conferences and Pretrial Conferences after review of the motion without hearing, provided that the event shall be continued not more than once and for not more than 30 days.

C. Trial Continuances, Opposed Continuances, and Repeat Continuances. Motions to continue trial, whether or not agreed to by the parties, may be allowed only by the trial judge or, in the absence or unavailability of the trial judge, by the Regional Administrative Justice in Superior Court or the Presiding Justice in District Court or other justice designated by them. Motions to continue Case Management Conferences or Pretrial Conferences which are opposed by any party, as well as motions to continue an event previously continued pursuant to B above, shall be

marked and heard as motions before a justice. Counsel and pro se litigants shall not be excused from attending the scheduled event unless notified by the court that the event has been continued. No employee or officer of the court shall be authorized to allow continuances of trials or conferences, except as provided by this rule.

D. Costs and Expenses of Continuance. A justice may permit continuance of a trial or conference upon condition that the moving party pay reasonable costs, including attorney's fees, in the discretion of the court.

[1B.41] Dismissal for Failure to Act on Default, Lack of Prosecution or Non-Payment of Annual Filing Fee. All actions in which there is no timely service of the complaint, no timely action upon default, or lack of prosecution shall be dismissed as follows:

A. Dismissal Nisi for Non-Joinder of Issues. Where an action has remained on the docket for six months without an answer or defensive motion having been filed by any defendant, the Clerk-Magistrate shall enter an Order of Dismissal Nisi advising the plaintiff(s) that the action will be dismissed 30 days from the date of the Order unless the plaintiff either (1) requests entry of default and moves for default judgment in accordance with Mass.R.Civ.P. 55, or (2) reports in writing that the case is active and requests that the matter not be dismissed.

B. Dismissal Nisi for Lack of Prosecution. In any action that is not scheduled for Case Management Conference, Pretrial Conference or Trial, and that has remained on the docket for one year, the Clerk-Magistrate shall enter an Order of Dismissal Nisi advising the plaintiff(s) that the action will be dismissed 30 days from the date of the Order unless the plaintiff requests a Case Management Conference to be scheduled to return the case to the active calendar.

C. Dismissal Nisi for Non-Payment of Annual Filing Fee. In any action where the plaintiff(s) has failed to pay the annual filing fee, the Clerk-Magistrate shall enter an Order of Dismissal Nisi advising the plaintiff(s) that the action will be dismissed 30 days from the date of the Order as to any non-paying plaintiffs unless the plaintiff(s) pay the annual filing fee plus \$50 to cover the cost of the notice. This rule shall not apply to any plaintiff found to be indigent by the court.

[1B.78] Motion Practice.

A. General. All motions shall be accompanied by an affidavit of notice setting forth the date and time of hearing on the motion. All motions shall be scheduled by counsel for the moving party, after consultation to determine the availability of other counsel or pro se parties, on the court's usual civil motion hearing day as published by the court, or on the date the case is scheduled for Case Management Conference or Pretrial Conference, or as otherwise ordered by the court.

B. Discovery and Summary Judgment Motions. All discovery motions filed pursuant to Mass.R.Civ.P. 26 or 37 shall include copies of the discovery requests and responses that are the subject of the motion. Motions for summary judgment that rely on any pleading or discovery shall include copies of such pleadings or discovery with the motion. Motions for summary judgment shall be accompanied by a Statement of Undisputed Facts which lists in numbered paragraphs and record references all facts on which the motion relies which the moving party asserts are not genuinely in dispute. Any discovery or summary judgment motions that do not comply with this paragraph may be denied without prejudice.

C. Opposition Procedure. Motions may be allowed by the court without the attendance of counsel or pro se parties at the motion hearing as follows: The moving party shall state on the caption of

the motion and on the affidavit of notice, "SUBJECT TO OPPOSITION PROCEDURE," and file and serve said motion at least 14 days (21 days for summary judgment motions) before the motion hearing date. In the non-moving party opposes the motion or otherwise seeks to be heard, said party shall file and serve a document captioned "OPPOSITION TO MOTION" at least five days before the motion hearing date, in which case all counsel shall be required to appear at the motion hearing. If the nonmoving party does not timely file and serve such "OPPOSITION TO MOTION," the motion will be considered by the court without a hearing or the appearance of any counsel.

1. Exempted Motions. Opposition procedure shall not apply to the following motions: motions to continue Case Management Conference, Pretrial Conference or Trial; ex parte motions; petitions for approval of settlement of a minor; motions for relief from judgment; motions for new trial; motions for reconsideration; and any motion ordered by a justice to be decided after hearing.

2. Notice of Decision. For motions considered under the opposition procedure, the court shall act upon, and send notice of said action to all parties, within 14 days after the hearing date.

## FOOTNOTES

1I was co-counsel for Alice. "An apparent increase in the proportion of litigants who settle their cases rather than endure the wait necessary to take their cases to trial signals a growing frustration with the current system." James S. Kakalik, Molly Selvin and Nicholas M. Pace, *Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court*, The Rand Corporation, The Institute for Civil Justice, Santa Monica, California, 1990, p. iv. Alice's case was filed in the mid-1980's and reflects my memory of the events. Although pretrial procedures in Massachusetts subsequently were changed with the adoption of time standards in 1988, trial scheduling practices remain essentially unchanged and her case is representative of other cases in my experience as a lawyer.

2Interviews with personnel from Superior Court Administrative Office and John Connors, Deputy District Court Administrator, regarding available measures of case management performance, July 31, 1998. Compare California Administrative Office of the Courts, "Prompt and Fair Justice in the Trial Courts: Report to the Legislature on Delay Reduction in the Trial Courts," Vol. I (July 1991), p. II-13 (chart of percent of cases assigned multiple trial dates and percent of cases started on first assigned trial date in California Superior Courts).

3 In early 1991, the Commission on the Future of the Courts retained Opinion Dynamics, a national public opinion firm, to survey 500 Massachusetts residents about their attitudes toward justice. The respondents who were more informed about the courts were more likely to rate court performance as "poor." One-third of respondents reported that they had a problem that they wanted to take to court but had decided not to. A majority of respondents agreed that "court procedures are hard to understand," "people have to spend too much money to use the court system," and "court proceedings aren't handled fast enough." *Reinventing Justice, 2022*, Report of the Chief Justice's Commission on the Future of the Courts, Supreme Judicial Court, Commonwealth of Massachusetts, 1992, pp. 12, 105-114.

4Justice for All: Reducing the Costs and Delay in Civil Litigation, The Brookings Institution, Washington, D.C., 1989, p. 1.

5James S. Kakalik, Molly Selvin and Nicholas M. Pace, *Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court*, p. iii.

6See, e.g., Beacon Hill Institute, "Taxation by Litigation: The Economics of Civil Justice Reform in Massachusetts," Beacon Hill Institute, Boston, 1998 (discussing the estimated economic impacts of substantive civil justice changes).

7"Courts tend to implement policy by issuance of an order, directive or rule of court. Judicial rulemaking is an essential and controversial aspect of the independence of the judiciary.... In this century courts have had some success in getting legislatures to accept a distinction between substantive law, clearly a legislative prerogative, and court procedures, rules of evidence, and court administration, which are arguably better handled by courts through rules...many procedural

rules have effects on substantive matters and individual rights." Robert W. Tobin, *An Overview of Court Administration in the United States*, National Center for State Courts, Williamsburg, Virginia, 1997, pp. 26-27.

8Justice for All: Reducing the Costs and Delay in Civil Litigation, p. 9.

9National Conference of State Trial Judges, Committee on Court Delay Reduction, "Standards Relating to Court Delay Reduction," American Bar Association, Chicago, Ill., 1984, p. 11. And see James S. Kakalik, Molly Selvin and Nicholas M. Pace, *Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court*, p. 82.

10Barry Mahoney, Holly C. Bakke and Antoinette Bonacci-Miller, *Civil Caseflow Management Improvement in the Superior Court, Suffolk County (Boston, MA), 1987-1991*, National Center for State Courts/Institute for Court Management, Williamsburg, Virginia, 1992, p. 4.

11Ibid., p. 5.

12Justice for All: Reducing the Costs and Delay in Civil Litigation, p. 6.

13Barry Mahoney, Holly C. Bakke and Antoinette Bonacci-Miller, *Civil Caseflow Management Improvement in the Superior Court, Suffolk County (Boston, MA), 1987-1991*, p. 5.

14Ibid., pp. 8-9.

15"Justice Endangered: A Management Study of the Massachusetts Trial Court," Harbridge House, Inc.: Boston, 1991, p. iv. As indicated, this discussion draws extensively from the Harbridge House management study.

16Ibid., p. vii.

17Ibid., p. xiii.

18Ibid., p. 16.

19This criticism of civil delay is not a criticism of the judges, clerks, and staff who labor daily to deliver justice in Massachusetts. To the contrary, Massachusetts citizens are fortunate to have a judiciary staffed by the finest judges, clerks, and staff in the country. It is all the more important, then, that judicial branch employees not be hobbled by cumbersome case processing, antiquated organization, and outdated approaches to civil justice.

20John J. O'Connor, "We're all tied up in the courts," *Boston Globe*, May 19, 1998, D4. And see John A. Goerdt et al., "Litigation Dimensions: Torts and Contracts in Large Urban Courts," *State Court Journal*, 19:1 (1995), pp. 44-45.

21Brian J. Ostrom and Neal B. Kauder (eds.), "Examining the Work of State Courts, 1996: A National Perspective from the Court Statistics Project," National Center for State Courts and State Justice Institute, Williamsburg, Virginia, 1997, p. 23.

22Superior Court Department of the Trial Court, Monthly Statistics for "Time Standard Cases 'Off Track'," May 4-29, 1998.

23Barry Mahoney, Holly C. Bakke and Antoinette Bonacci-Miller, *Civil Caseflow Management Improvement in the Superior Court, Suffolk County (Boston, MA), 1987-1991*, p. 9, noting that Average Track cases make up only about 15 percent of the court's caseload, Accelerated or "X" Track cases make up about 17 percent, and Fast Track cases make up about 68 percent of cases in Suffolk Superior Court.

24Superior Court Department of the Trial Court, Monthly Case Aging Statistics for May 1998.

25See District Court Department of the Trial Court, Norfolk and Middlesex County One-Trial Pilot Project Statistics, Civil Actions Filed 9/30/96 through 4/30/98, Report Date 5/16/98, table 10.

26In Suffolk Superior Court, for example, after the implementation of time standards, the number of cases pending over two years since filing decreased by 68 percent. See Barry Mahoney, Holly C. Bakke and Antoinette Bonacci-Miller, *Civil Caseflow Management Improvement in the Superior Court, Suffolk County (Boston, MA), 1987-1991*. Evaluations of the pace of litigation in states with and without time standards have found, first, that instituting time standards has increased the efficiency of those courts, and second, that courts with such standards more expeditiously process their civil caseloads than do courts without such standards. See Howard P. Schwartz and Lelie Ratliff, "Delay in State Courts: Are Time Standards an Answer?" *Judicature*, Vol. 70, No. 2 (August-September 1986), pp. 124-126.

27"Justice Endangered: A Management Study of the Massachusetts Trial Court," pp. 15-16, citing David C. Steelman, Samuel D. Conti, Maureen Solomon, and David W. Orrick, *Elements of Effective Caseflow Management*, National Center for State Courts, Williamsburg, Virginia, January 7, 1987.

28K. Kent Batty et al., *Toward Excellence in Caseflow Management: The Experience of the Circuit Court in Wayne County, Michigan: A Guide by and for Practitioners*, National Center for State Courts, Williamsburg, Virginia, 1991, pp. 31 et seq.

29See, e.g., Judith Resnick, "Managerial Judges," The Rand Corporation, The Institute for Civil Justice, 1982, pp. 70-71.

30Justice for All: Reducing the Costs and Delay in Civil Litigation, p. 25.

31K. Kent Batty et al., *Toward Excellence in Caseflow Management: The Experience of the Circuit Court in Wayne County, Michigan: A Guide by and for Practitioners*, p. 39. The concept of early judicial intervention is a featured aspect of the federal Civil Justice Reform Act. The Rand Corporation, in a study commissioned to evaluate the effectiveness of the CJRA, concluded that early intervention speeded disposition by 30 percent but had no beneficial and even a detrimental effect on cost of litigation, as lawyers simply did the same amount of work faster. See James S. Kakalik et al., "Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act," The Rand Corporation, Santa Monica, California, 1996. However, the Brookings Institution Task Force noted that Rand's findings resulted from an evaluation of the civil reforms "as implemented" and that "most pilot [court] districts did not implement major changes in case management principles as a result of the Act." See News Release, "Brookings Task Force Urges Continued Attention to Civil Justice Reform," Brookings Institution, March 20, 1997. Moreover, federal delay reduction plans such as that adopted in the District of Massachusetts required a considerable amount of preparation for the early judicial intervention event, thus precluding a level of preparation proportionate to the needs of the particular case. See Rule 1.02, Expense and Delay Reduction, United States District Court for District of Massachusetts.

32K. Kent Batty et al., *Toward Excellence in Caseflow Management: The Experience of the Circuit Court in Wayne County, Michigan: A Guide by and for Practitioners*, p. 39.

33Ibid., pp.50-51.

34California Administrative Office of the Courts, "Prompt and Fair Justice in the Trial Courts: Report to the Legislature on Delay Reduction in the Trial Courts," Vol. I (July 1991), p. 1 and appendix A.

35Section 1, California Trial Court Delay Reduction Act of 1986.

36Title 4, Division V, Rule 1902. Delay Reduction Goals. Adopted by Judicial Council of California, effective January 1, 1990.

37Title 4, Division V, Rules 1901-1915. Delay Reduction Rules. Adopted by Judicial Council of California, effective January 1, 1990.

38California Administrative Office of the Courts, "Prompt and Fair Justice in the Trial Courts: Report to the Legislature on Delay Reduction in the Trial Courts," Vol. I (July 1991), p. II-31.

39This finding is consistent with an evolving experiment in Massachusetts. The state District Courts in Middlesex and Norfolk counties switched from a time standards approach to an early intervention approach beginning January 1, 1998. In the first five months of 1998 compared to 1997, 11 of 17 courts increased their disposition rates and the rate of settlement increased. Administrative Office of the District Court, "Middlesex/Norfolk Counties Civil One-Trial Project, By Type of Disposition by Court," Report date: July 21, 1998 for period 1/2/98-5/29/98 and 1/2/97-5/30/97.

40District Court and Superior Court Annual Reports, 1987-1997.

41Alison Gibbs, "Civil suits hit lowest level in more than 10 years," Boston Herald, February 24, 1998, p. 36; "Massachusetts lawsuits drop for third year in a row: Litigation at lowest point in at least 11 years," Massachusetts Bar Association, Lawyers Journal (March 1998), p. 1 ("In good times we see fewer lawsuits...").

42Tort filings in the Massachusetts Trial Court, for example, declined from 76,806 in 1990 to 54,143 in 1996. National Center for State Courts, State Court Caseload Statistics, 1996, Court Statistics Project, 1997, p. 198.

43See James S. Kakalik, Molly Selvin, Nicholas M. Pace, Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court, p. iii.

44This observation is not a criticism of arbitration or alternative dispute resolution generally. Litigants should, however, participate in ADR freely and not because the system of civil justice gives them no other time- or cost-effective choice. Arbitration awards may be appealed only as follows: "the court shall confirm an award, unless...grounds are urged for vacating or modifying or correcting the award...[pursuant to] sections twelve and thirteen" G.L. c. 251, §§11-13.

45Jane W. Adler et al. (eds.), The Pace of Litigation: Conference Proceedings, The Rand Corporation, The Institute for Civil Justice, Santa Monica, California, 1982, p. 35.

46See, e.g., Jane W. Adler et al. (eds.), The Pace of Litigation: Conference Proceedings, p. 35.

47States that have adopted ELA procedures, also known as ELP for Economical Litigation Projects or Programs, include California (See John T. McDermott, "Equal Justice at Reduced Rates: A Critical Look at the California Economic Litigation Project," Judges' Journal 20:2 (Spring 1981)), Kentucky (See Hon. Paul R. Connolly and Michael D. Planet, "Controlling the Caseload-Kentucky Style: How to Speed Up Litigation Without Slowing Down Justice," Judges' Journal 21:4 (Fall 1982)), and Colorado (See Joy A. Chapper. "Limiting Discovery: When

Looking Under Every Stone Produces Sand Instead of Sense," *Judges' Journal* 20:2 (Spring 1981)).

48Michael D. Planet, "Reducing Case Delay and the Costs of Civil Litigation: The Kentucky Economical Litigation Project," *Rutgers Law Review*, Vol. 37 (1985), pp. 284-285.

49Ibid., p. 292.

50Ibid., p. 286.

51James S. Kakalik, "Just, Speedy, and Inexpensive? Judicial Case Management Under the Civil Justice Reform Act," *Judicature* 80:4 (January-February 1997), p. 189.

52James S. Kakalik, Molly Selvin and Nicholas M. Pace, *Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court*, p. 59. And see California Administrative Office of the Courts, "Prompt and Fair Justice in the Trial Courts: Report to the Legislature on Delay Reduction in the Trial Courts," Vol. I (July 1991), p. I-24 ("it is advantageous to involve the participants, judges, court support staff and attorneys, in the planning process as early as possible").

53Costs recoverable after judgment, and possibly the inclusion of attorney's fees in Rule 68 Offers of Judgment, will require legislative amendment, see GL c. 261, §1 et seq.

54James S. Kakalik et al., "Just Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act," p. 3 [[www.rand.org/publications/MR/MR800sec7.html](http://www.rand.org/publications/MR/MR800sec7.html)].

55See Jefferson County, Texas, Rule 7-Electronic Filing and Service of Pleadings (June 9, 1997); and see California Rule of Court 298-Telephone Appearance (July 1, 1998).

56The National Association of Court Management Annual Meeting in San Antonio, Texas, on August 13, 1998 was host to numerous such vendors. Even after paying vendor fees, the time and costs saved make these approaches most worthwhile for civil litigants and counsel.

57See Local Rules 2.01(b) and 2.03 of the United States District Court for the District of Massachusetts; proposed Rule 26(a) of the Utah Rules of Civil Procedure; Rule 26.1 of the Arizona Rules of Civil Procedure.

58See Rule 33.1 of the Arizona Rules of Civil Procedure (the so-called "Zlaket Rules," for the judge who chaired the Supreme Court's Committee to Study Civil Litigation Abuse, Cost and

Delay) and Rule XVII of the Arizona Uniform Rules of Practice.

59This limitation is modeled on the Arizona Zlaket Rules, Rule 30(a).

60See, for suggestions on how to conduct depositions in four hours, Kenneth R. Berman, "The Four-Hour Deposition," *Litigation* 19:3 (Spring 1993), p. 51. See also Zlaket Rules, Rule 30(d), placing a presumptive limit of four hours on depositions.

61The Rand Corporation critique of the Civil Justice Reform Act praised the public disclosure of pending cases required by the Act and noted, "one aspect of the CJRA appears to have had an effect. The act requires a semiannual report, available to the public, disclosing how many 'old' cases each judge has...the number of 3-year-old cases pending has been declining since this public reporting began." James S. Kakalik, "Just, Speedy and Inexpensive? Judicial Case Management Under the Civil Justice Reform Act," *Judicature* 80:4 (January-February 1997), p. 187.

62See Local Rule 5.03(a) of the United States District Court for the District of Massachusetts; *Manual for Litigation Management and Cost and Delay Reduction*, Federal Judicial Center (1992), pp. 76-78.

63Mass.R.Crim.P. 10(b).

64Local Rule 1.3 of the United States District Court for the District of Massachusetts ("Sanctions"); and 28 U.S.C. § 1927.

65California Administrative Office of the Courts, "Prompt and Fair Justice in the Trial Courts: Report to the Legislature on Delay Reduction in the Trial Courts," Vol. I (July 1991), p. I-24.

66Title 4, Division V, Rule 1902. Delay Reduction Goals. Adopted by Judicial Council of California, effective January 1, 1990.

67California Administrative Office of the Courts, "Prompt and Fair Justice in the Trial Courts: Report to the Legislature on Delay Reduction in the Trial Courts," Vol. I (July 1991), p. II-13, table 2-4.

68James S. Kakalik et al., *Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court*, p. 89.

69K. Kent Batty et al., *Toward Excellence in Caseflow Management: The Experience of the Circuit Court in Wayne County, Michigan*, p. 41.

70See, for example, City of Scottsdale, Arizona, Job Posting #8133 for Calendar Coordinator position (August 2, 1998).

71James S. Kakalik et al., *Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court*, p. 84.

72Ibid., p. 86.

73This judge, and I am certain others, would gladly link pay to administrative performance. However, decisions on the merits on continuances and the like require that judges and clerk-magistrates not be included in administrative pay incentives.

74Responses from court administrators to inquiry on National Center for State Courts "Court2Court" list serve, [court2court@ncsc.dni.us], September 2-4, 1998.

75Gary B. Huish, "Piecerate Pay Plan in Clerk's Office Motivates Quantum Leap in Quality Production," *The Court Manager*, Vol. 12, No. 2 (Spring 1997), p. 7.

76Ibid.

77See, e.g., Gary B. Huish, "Piecerate Pay Plan in Clerk's Office Motivates Quantum Leap in Quality Production," p. 9.

78The Smart Calendar was a featured topic at the National Association of Court Management "Knowledge Fair" at the NACM annual meeting in San Antonio in July 1998.

79See Nash, Zullo and Zullo, *Lawyer's Wit and Wisdom*, pp. 139, 184 and 189, as cited by David C. Steelman et al., "Improving Caseflow Management to Promote Prompt and Affordable Justice," National Center for State Courts, Williamsburg, Virginia, draft monograph dated August 13, 1998, p. 1-1.

80See, e.g., David C. Steelman et al., "Improving Caseflow Management to Promote Prompt and Affordable Justice," draft monograph dated August 13, 1998, National Center for State Courts, Williamsburg, Virginia, pp. 1-2. Michael D. Planet, "Reducing Case Delay and the Costs of Civil Litigation: The Kentucky Economical Litigation Project," p. 291.