University of Michigan Journal of Law Reform

Volume 16

1983

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American Bar Association Action Commission to Reduce Court Costs and Delay

THE ORGANIZED BAR: A CATALYST FOR COURT REFORM

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Throughout the past decade court reformers have been searching for a system of procedural rules which will help courts minimize both the delay and the expense of litigation. Over the last two years, Kentucky courts have experimented with rules which cut trial court delay by over fifty percent and substantially reduce the time lawyers spend exercising procedural rights.[1] Encouraged by the favorable results of this experiment,[2] the Kentucky Supreme Court has ordered that these rules be gradually implemented in all Kentucky trial courts of general jurisdiction.

The Chief Justice of the Kentucky Supreme Court, John Palmore, was the key figure behind both the rule-making and implementation stages of the Kentucky reform process; the organized bar's role in this process was minimal. The Kentucky Bar Association had no part in making or implementing the new rules and local bar association involvement was modest and ad hoc. The active involvement of Justice Palmore was partially due to the requisites of Kentucky law — the Kentucky constitution vests exclusive rule-making authority with the Supreme Court[3] — and partially to the Chief Justice's strong interest in trial court reform and his concomitant willingness to take control of the reform process. In most states, however, there is unlikely to be some-

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1. For a comprehensive discussion of the Kentucky reforms, see Connolly & Planet, *Controlling the Caseflow — Kentucky Style,* 21 JUDGES' J. 8 (1982). This article concludes that the Kentucky Rules should form the structure for other trial court costs and delay reduction programs. Assuming ample judicial resources and the absence of statutory constraints, a caseflow management program (based on the Kentucky caseflow principles) can be crafted for *any* trial court or trial judge in a way that will substantially duplicate the success of the program in Kentucky. *Id.* at 59.

2. Connolly and Planet report that the Kentucky Rules resulted in less delay, with the average case subject to the Kentucky Rules closing 11 months earlier than under normal procedures; lower attorneys' fees because judicial control over the discovery process reduced discovery formality; a faster pace of litigation, prompting settlements earlier in the process and savings in time lawyers spent on procedural matters, resulted in savings to clients paying by the hour and by flat fees; and lower court costs. The amount of time that judges spent per case was not increased, because a reduction in hearings on motions offset the increase in conference activity. Quality of justice, measured by trial preparation time and settlement figures, was not affected. *See generally id.*

3. KY. CONST. §§ 11, 116.

one like Justice Palmore having both the constitutional authority to effect major trial court reforms, and the personal commitment to achieve them. To the extent that these states wish to duplicate Kentucky's successes, they cannot fail to make the bar an integral element of the court reform process.

Some state bar associations have been integrated into the judicial legislation process by the legislature or the courts deeming them to be continuing commissions on judicial administration. The state bar is often made a partner of the courts in the effort to minimize the cost and delay of resolving disputes. Because government, including the judicial branch, serves the public best when held accountable by dispassionate outsiders, oversight of court operations and stimulating the policy-making phase of reform are fundamental necessities. Neither the legislative nor the executive branch can perform these functions nearly as effectively as the bar. Yet, a survey of state chief justices revealed that few believe their bar associations currently have a significant impact on rule making.[4] One obvious reason for this is that one third of all state bar associations do not have a committee responsible for administration of civil justice issues.[5] Many of these states have unified bars, like the Kentucky Bar Association, that have not been empowered by state government to act as commissions on judicial administration.[6] And though voluntary bars have no such legislative impediments — indeed, state and local bars rarely have active committees to study and oversee the administration of civil justice — the survey nonetheless suggests that their contributions to court reform have been minor.

This Article theorizes that state and local bar associations can play a vital role in ridding their courts of excessive costs and delay. Theory can become practice, however, only if state and local bars are reorganized to broaden their oversight and lobbying functions, in order to make them more effective vehicles of reform.[7] This Article, then,

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4. *See* C. KORBAKES, J. ALFINI & C. GRAU, JUDICIAL RULEMAKING IN THE STATE COURTS 249-56 (1978). The survey revealed that only 42% of the chief justices deemed the state bar's contribution "very significant," 28% thought the bar's contribution was "moderately significant," 10% thought it was "slightly significant," and 20% believed it was "not significant."

5. AMERICAN BAR ASSOCIATION, DIRECTORY OF BAR ACTIVITIES 18 (1980). Only 19% of the bar groups had a committee with some responsibility for reducing litigation costs and only 43% had a similar committee working for delay reduction.

6. A *unified* bar has two essential features: (1) as a condition of licensure all lawyers are required to be dues-paying members; (2) the bar association is created by court rule or legislation. A *voluntary* bar is a private, voluntary membership entity. Nineteen states have no unified bars. Of the remaining 33 states (including the District of Columbia and the Commonwealth of Puerto Rico) with unified bars, four also have voluntary bar associations. American Bar Associations, 1980-81 Directory Bar Associations 33 (Chicago, 1980).

7. Currently, the ABA Action Commission is attempting to gain insights into the validity

discusses the role the organized bar can and should play in achieving procedural reform that will reduce the delay and cost of litigation. Part I describes the various stages of the reform process, using the Kentucky experiment as a model,[8] and outlines the contributions that can be made by bar associations at each stage. Part II sets out a structural model for bar associations that will enable the organized bar to become an effective and efficient court reform agent.

I. The Bar's Role in the Reform Process

As evidenced by the Kentucky experiment, the process of revising procedural court rules entails two rather broad phases, each comprised of several distinct steps. First, those involved with the reform effort must identify the specific areas in which reform is needed, and develop rules that will best respond to the problems identified. Once this policy-making stage is completed, reformers must have an effective means to implement these rules. At both the policy-making and implementation levels of the reform process, the organized bar's role is crucial.

A. Policy-Making

Making judicial policy to effect court reform involves three discrete steps. First, those advocating reform must encourage judicial policymakers, whether the judicial or legislative branch, to acknowledge that reform is necessary. Second, reformers must analyze the problems that are most pressing and explore all alternative ways of resolving them. Finally, rules must be formulated that are responsive to these problems.

1. Acknowledgement— The most serious obstacle to achieving procedural reform at the trial court level may be the judiciary's failure to recognize the serious consequences of the cost and delay of litigation. In Kentucky, such judicial myopia was not a problem. Chief Justice Palmore of the Kentucky Supreme Court had become concerned that delay and costs were forcing state policy-makers to consider alternative methods of dispute resolution, and that classic adjudication was not being given a chance to prove its effectiveness. Even without the encouragement of the organized bar, Chief Justice Palmore was willing to experiment with rules of practice that would hasten dispute resolution by requiring trial judges to supervise attorneys' conduct of litigation.

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of this theory. A survey is being conducted of several state bar associations detailing bar activity and organization in promoting court reform. The study will focus on political strategies that have aided bar-promoted court reform, as well as common barriers to successful reform efforts.

8. Much of the description of the Kentucky reform process that follows is based on the author's personal observations. A report documenting this material is available from the author.

Few other chief justices, however, have shown a similar interest in moving their trial court systems along the path to comprehensive docket reform.[9] This suggests that, even though the judicial branch is often authorized to modify, and is at least partially responsible for modifying rules that govern courtroom procedures, lodging independent rule-making power in the judicial branch will not alone guarantee that the need for court reform will be perceived by the judiciary.

Indeed, the inherent quiescence of many rule-making bodies coupled with a concentration of rule-making power in the judicial branch may well increase the possibility that cost and delay problems will not be acknowledged by the judicial officers of most states.

In these states, the impetus for change must come from outside the judiciary. The executive and legislative branches, due to inadequate technical staffing, partisan politics, and competing priorities, cannot be relied upon to press for major trial court reforms. State bar associations on the other hand, are particularly suited to this task. In *Lathrop v. Donohue*,[10] the United States Supreme Court recognized that a state bar association could be deemed to be an office of state government, operating *inter alia* as a continuing commission on the state of judicial administration.[11] State bar associations, therefore, could fulfill an important governmental role by apprising judicial policy-makers of the problems of trial court costs and delay, and lobbying the appropriate rule-making body to consider enduring solutions.

2. *Analysis*— Analyzing possible solutions to the problems of litigation delays and costs is a necessary predicate to forming policy — the alternative is uninformed decision making. In Kentucky, Chief Justice Palmore carefully studied how other state judicial systems were attempting to reform their trial courts. He was persuaded that procedural rules could be crafted to reduce the costs and delay attendant to Kentucky litigation. He decided that the best way to counteract rules slowing the pace of litigation and encrusting the process with needless procedure would be to experiment with rules embodying the concepts of total

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9. A notable exception was the late Chief Justice C. William O'Neill of Ohio, who pushed actively for criminal and civil docket reform through Ohio's Rules of Superintendence. By dint of his energy and interest in docket reform, many Ohio trial courts reported some reduction in delay, primarily for their criminal dockets. Ohio's failure to adopt rules governing caseflow, as Kentucky did, however, has resulted in a retrogression since his death. *See generally* Grave & Cheskin, *Ruling Out Delay: The Impact of Ohio's Rules of Superintendence*, 66 JUDICATURE 109 (1982).

Some chief justices have stimulated or actively supported reforms of the structure of state court systems, such as centralizing administration and unifying trial courts. *See* Lowe, *Unified Courts in America: The Legacy of Roscoe Pound*, 56 JUDICATURE 316-23 (1973). Arguably, unification is a precondition to effective docket reform.

10. 367 U.S. 820 (1960).

11. *Id.* at 828-33, 848.

case management[12] and active judicial control.[13] These concepts were endorsed in 1974 by the American Bar Association (ABA),[14] and their validity has since been confirmed by research conducted by the National Center for State Courts (NCSC)[15] and the Federal Judicial Center (FJC).[16] Rules were drafted that placed lawyers and judges on a time schedule for every phase of litigation so that the typical case would reach trial in six months.

Chief Justice Palmore delegated to his Administrative Office the tasks of site selection, rule drafting, administrative planning, and evaluation, but made himself accessible when the stature of his office would enhance the experiment's credibility. Most importantly, he personally tracked the progress of the experiment throughout the eighteen month trial period. The draft rules subjected courts to certain temporal constraints, and Chief Justice Palmore appreciated the need to monitor the administration of the rules during the experimental phase of the program. Consequently, members of his Administrative Office periodically collected data reflecting rule compliance. These results were reported to Chief Justice Palmore, and when he noted scheduling breakdowns, he contacted the appropriate chief circuit judge regarding the need to modify internal calendaring procedures.

At the end of the eighteen-month trial period, when most of the cases subject to the experimental rules had been closed, Chief Justice Palmore ordered an assessment of the impact of the rules on the practice of law and the administration of justice. An analysis of the findings, prepared by the American Bar Association, was forwarded to the Chief Justice in June of 1982, and rule-making soon followed.

Trial court administration is a quickly changing field and experimentation or field testing in a court environment is a highly technical area and may require greater expertise than most state bar associations have available. At the analysis stage, though, the state bar served an important oversight function by commenting on site selection, and on the

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12. The total case management concept entails case management over each case from filing of the matter to disposition, settlement, dismissal, or trial. *See generally* Sipes, *The Journey Toward Delay Reduction in Trial Courts: A Traveler's Report,* STATE CT. J., Spring 1982, at 4.

13. The active judicial control concept envisions the judge exercising his inherent and explicit power to govern the procedural development of a case, in place of the adversaries exercising perceived prerogatives to move the case along at their pace.

14. *See generally* AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION RELATING TO TRIAL COURTS (1976).

15. *See* T. CHURCH, E. CARLSON, J. LEE & T. TAN, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978); L. SIPES, A. CARLSON, T. TAN, A. AIKMAN & R. PAGE, MANAGING TO REDUCE DELAY (1980).

16. *See generally* P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978); P. CONNOLLY & P. LOMBARD, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS (1980); S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (1978).

drafting of the experimental rules, and by soliciting support for the experiment's objectives from the local bar. Moreover, judicial research often has a low budget priority; state bars can help fund such research.

3. Rule Making— Persuaded by the favorable findings, Chief Justice Palmore and Justice Stephens, a colleague on the Supreme Court and ultimate successor as Chief Justice, persuaded fellow members of the court that the experimental rules should be adopted as the official rules of practice for Kentucky. Decision making was prompt and decisive; by September 1982, the new rules were adopted and ordered to be implemented in the civil dockets of Circuit Courts.

The relative speed with which the experimental rules replaced the old court rules may partially be a consequence of the independent rule-making authority of the Kentucky Supreme Court. A more bureaucratic rule-making process — one like the federal process, which is layered with committees and involves the legislature to a significant degree — undoubtedly would have retarded promulgation of the rules. Moreover, the independent nature of Kentucky's rule-making process may have created an environment that abetted Chief Justice Palmore's efforts towards a comprehensive court reform program. The efficiency of the rule-making aspect of the reform effort in Kentucky, however, appears to owe more to the leadership and skills of the Chief Justice and his predisposition to effect change in the trial courts than to the nature of Kentucky's rule-making process.

In many states the process of rule making involves the state bar in a variety of roles, usually in an advisory capacity. To the extent that the state bar has been following the reform process from the recognition stage, its advice to the judicial policy-making body at the rule-making stage should flow as a matter of course even though the bar does not have a formal role in the rule-making process. Thus, when the state bar has been excluded from the reform process by the judiciary, it should comment on the proposed reforms even if its views are not officially considered by the rule makers.

B. Implementation

The act of rule making does not by itself cure systemic court problems; promulgation of new rules does not automatically change practice, nor does it immediately produce expected results. On the contrary, implementing new rules entails a host of potential pitfalls, each of which can defer change or frustrate reform. Successful procedural reform involves two stages: active involvement of the bar in introducing the new program, and in monitoring its performance.

1. Introducing the program— The Kentucky Supreme Court recognized that implementation of the new rules would fail unless it developed

a sound implementation strategy. The new rules excepted circuit courts from the rules' ambit, but delegated to the Supreme Court's Administrative Office the authority to void exceptions on a court-by-court basis. The pace of implementation, therefore, was guided by the administrative arm of the judiciary, which had sufficient responsibility and authority to pave the way for the successful administration of the rules in the circuit courts. The Kentucky Supreme Court selected three initial sites, including the original experimental site, in which to pilot test the rules.

The Kentucky judiciary was aware of the need to familiarize both the bench and the bar with the new rules. Consequently, for the bench, the Administrative Office conducted a workshop for the judges and staff personnel who would administer the new programs. At this workshop, the Chief Judge of the Campbell County Circuit Court, the experimental site, described potential implementation problems and judges were able to obtain answers to practical questions about administration. The clerk and caseflow manager of the Campbell County Circuit Court explained the monitoring and scheduling process and the new court forms developed for the program. For the bar, the Kentucky Supreme Court scheduled a workshop for lawyers practicing in each of the two new court sites. Members of Campbell County's bench and bar gave presentations on the background and objective of the programs, its rules, and the impact of these rules on practice in Campbell County. An open-ended question and answer period followed the presentations. Chief Justice Palmore and Chief Justice-elect Stephens participated in all three workshops. By attending, the two justices confirmed the judiciary's confidence in the program and its commitment to the rules' successful implementation.

The process of introducing the rules also entailed an extensive analysis of the host court's management system and resource needs. This analysis is crucial. In Kentucky, for example, one of the host circuits covered four counties, each of which maintained a holding court. In such circumstances, if the discovery and final pretrial conferences had been conducted in the presiding judge's chambers with counsel present, the cost in travel time might have offset savings from reduced procedural formality under the rules. Conducting the conferences on the telephone has been demonstrated to be an effective substitute for personal appearance,[17] and so the Administrative Office furnished the participating circuits with the equipment, budget, and training necessary to conduct the conferences over the telephone. Without such pre-introduction analysis, administration of the rules might have resulted in *no* cost savings to litigants.

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17. *See generally* CHAPPER & HANSON, PHASE I EVALUATION OF TELEPHONE CONFERENCING TO CONDUCT MOTION HEARINGS IN CIVIL LITIGATION (1982).

Here again, the bar's role should primarily be one of oversight. Because procedural rules cannot address significant shortcomings in resources and court management, the state and local bar should take steps to ensure that these implementation problems are squarely addressed by local judges, court administrators, and the legislature.[18] The state bar association might ask the administrative office of the courts to draft an implementation plan for each court site. The local bar could then review the plan with an eye towards insuring that resources and docketing issues are addressed, as well as and other court management problems expected to constrain reform.

2. *Monitoring Program Administration*— Determining whether implementation has successfully minimized court costs and delay will continue to be a judicial function in Kentucky. The Supreme Court's Administrative Office has developed a system to monitor the administration of the program by which certain milestone events in the progress of program cases will be statistically analyzed. The resulting information has both operational and research potential. Sample data can be periodically collected and studied by the Administrative Office staff. If patterns of blockages in the movement of cases surface, the administrative office can alert the judge to the problems.

The local bar has a special interest in insuring that the local bench continues to implement the master plan faithfully, and the state bar can help facilitate this monitoring function.

Because the local bar would be unable to detect the level of adherence and evaluate the effectiveness of the plan without access to the Administrative Office statistics, the state bar should lobby for local bar access to the statewide judicial information system. Additionally, the state bar should supply the local bar with the analytic expertise to open and sustain an effective dialogue between the local bench and bar. Finally, where local problems are unsolvable because their causes are rooted in state policy, the state bar should consider exerting lobbying pressure on appropriate governmental bodies.

II. BAR ORGANIZATION

Presently, most bar associations are incapable of serving as effective reform agents. They are typically limited both structurally and by their varied perceptions of the bar's role in the reform process. For example, the bar's role in judicial administration reform is often

18. *See generally* Baar, *The Scope and Limits of Court Reform*, 5 JUST. SYS. J. 274 (1980). Reform is essentially a political process. To effectuate change state bar associations must be prepared to lobby state government entities, whether judicial or legislative, to obtain the resources and management results that are needed to implement the rules.

perceived by both the bench and the bar as reactive. This limits reform efforts to bench initiatives. Lawyers tend to focus on specific rules to cure perceived practice problems, but this myopia ignores systemic causes of cost and delay, such as the failure of trial judges to take control over their dockets and trial calendaring. Few lawyers have the technical know-how needed to analyze docket delay and expense problems, and state bar staffs usually cannot make up for this lack of expertise. This places the bar at a disadvantage in maintaining an intelligent dialogue with the bench. Bar politics may also be a factor limiting the bar's role; the outcome of the race for the state bar presidency rarely is based on a candidate's views on judicial administration reform. Absent a presidential priority favoring court reform, the responsible committee, even if there is one, will not get the financial assistance needed to take up the issue of court reform.

With some critical changes in philosophy and organization, though, state and local bar associations could assume a role comparable to that played by Chief Justice Palmore. A few state bar associations, such as the Connecticut Bar Association, have begun taking more active part in the reform process.[19] These bar groups share a number of characteristics. For example, they tend to be headed by a bar leadership that financially and politically supports a comprehensive and durable effort to reduce court costs and delay, and that is willing to commit its time and resources to comprehensive court reform planning and efforts. Within the bar organization itself is a judicial or civil committee that works with the judiciary to effect court cost and delay reform and sponsors ongoing problem-raising sessions with the bar membership. Often, these bar associations employ a court reform consultant and a professional lobbyist. The former assists the committee in locating cost and delay problems and suggests solutions. The latter is responsible for monitoring legislative activities affecting both bench and bar, and for mobilizing legislative support for reform efforts. Most have both an education program with a high priority placed on promoting an understanding of the special role of the bar in the justice system, improving the quality of advocacy, and reducing litigation abuses, and a disciplinary system that searches out patterns of abuse in state or federal litigation, and punishes lawyers and law firms engaged in such abuse.

These bar organizations serve as a model. By incorporating some or all of these features, bar associations can enhance their role in the crucial effort towards reducing court delays and costs through procedural reform.

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19. *See* Quade, *Let's Talk,* 9 BAR LEADER 26 (1983). The author points to the bench-bar communication gap as an impediment to court reform, and cites examples where state bars have successfully attempted to narrow that gap.

CONCLUSION

To overcome judicial inertia towards reforming the courts, state and local bar associations must recognize the need to make court reform a priority and structure themselves to discharge this undertaking. Because the judiciary is unlikely to encourage the creation of a reform-oriented bar, the bar ultimately must assume the responsibility for sensitizing lawyers to the need to engage in such activity, and for organizing the association's oversight and policy-making functions. By actively engaging in such reform-oriented measures, the bar can play a central role in achieving the procedural reform necessary to reduce the delay and cost of litigation.