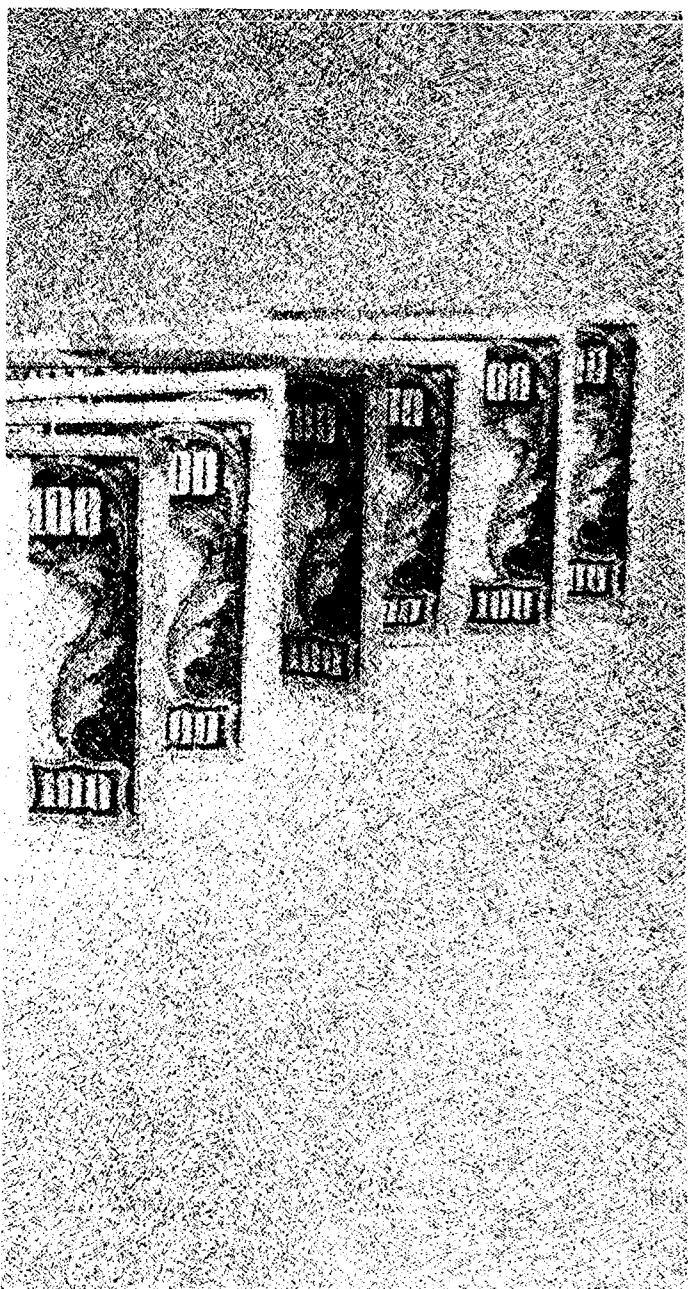




Expenses: The Roadblock to Justice

A detailed plan for making litigation affordable

By Maurice Rosenberg, Peter F. Rient, &
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“It has become increasingly apparent that large numbers of people are practically barred from our courts by the expense of litigation,” warned then American Bar Association President Leonard S. Janofsky in the September 1979 issue of the *ABA Journal*. Chief Justice John S. Palmore of Kentucky last year described the problem more vividly in a speech on “The Urgency of Economic Litigation”:

The average citizen today dreads the thought of being involved in a lawsuit. He is afraid of courts and

afraid of lawyers, mostly because the cost, the time, and the worry are too great. In California, I am told, if a case involves no more than \$6,000 it is not worth litigating, because it will be eaten up by costs. And it all boils down to a matter of *time*. Lawyers are costly because of the time they must devote to a case. Obviously, then, if we can cut down the time the cost will be less.

There is sound evidence that the expense of litigating—for both defendants and plaintiffs—warps the substantive law, contorts the face of justice, and, in some cases, essentially bars the courthouse door. There also is evidence that the problem is most acute when a litigant with a worthy cause is not entitled to legal aid, but must face legal expenses out of proportion to the amount at stake. Cases involving sums in the range of \$1,000 to \$25,000 are the hardest hit. When ordinary damage cases of that size are litigated to a conclusion, the lawyers’ fees on both sides soon devour a substantial fraction of the disputed amount. The plaintiff’s alternative is to abandon the claim or settle under pressure, while the defendant can choose between surrendering or bargaining away a good defense on the merits because the cost of presenting it is too great. For both sides, the bright promise held up by the American justice system is frequently a chimera.

How to reduce the out-of-scale costs of litigating middle-size claims is a problem that received considerable attention from the agenda of the U.S. Justice



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Department's Office for Improvements in the Administration of Justice, but solutions that would assure an affordable way to pursue or defend middle-size claims have been elusive. After research, discussion, and consultation, we have developed a possible framework for resolving disputes over medium-sized claims at a reasonable cost that combines simplified procedures with provisions to shift attorneys' fees appropriately. This recently formulated approach offers a general framework that every jurisdiction can employ to meet its special needs.

While the plan's primary objective is to resolve disputes over modest sums of money in a fair and cost-effective way—relative to the stakes involved—it has other goals as well. One is to provide a mechanism for prompt, simplified processing of such claims. Another is to encourage the parties to come to reasonable settlements themselves by using procedures that facilitate compromise. The proposal also seeks to simplify and expedite trials in cases that cannot be settled. Finally, the system tries to promote substantive justice by providing that the party who prevails against an unreasonable adversary be awarded attorney's fees, thereby preventing dilution of the victory.

The Justice Department has not yet considered this proposal, but, if approved, it could be cast in the form of a model statute or set of rules which interested state authorities can adopt on a trial basis. In general, the system would apply to actions for money damages from \$1,000 to \$25,000, and perhaps as high as \$50,000, which would be processed according to the following three-phase litigation plan:

First, an eligible case would be referred by the court to a quasi-judicial officer or a panel for expedited hearing and provisional determination of liability and damages—a process similar to the arbitration programs now used in some state and federal courts.

A party dissatisfied with the hearing's results could insist on a judicial determination of the controversy. These cases would enter phase two and be placed on an expedited trial calendar. The parties would be required to exchange formal offers of judgment shortly before the trial date. A special incentive would be provided to encourage reasonable offers and thus improve chances of settlement: if either party made an offer that was rejected but turned out to be at least as favorable to the adversary as the result of the trial, that party would be entitled to postoffer costs and attorney fees.

In phase three, cases that persist beyond the expedited hearing and settlement procedure would

receive prompt and simple trials, using depositions and documentary evidence in lieu of live witnesses to simplify and speed up the formal judicial ruling.

The outline above is only a skeletal framework for a flexible justice system for medium-sized cases. Many alternatives are available to flesh out each phase, in order to make the system adaptable in virtually any jurisdiction.

• **Eligibility.** The monetary range of disputes covered by the proposal should exclude relatively small and very large claims. The lower limit (set at \$1,000 in our example) should mesh with the upper limit of the state's small claims courts, because claims below that limit probably are handled best by the even simpler procedures in those courts. Fixing the upper limit is more difficult—experience under existing court-annexed arbitration shows that the larger the award, the higher the rate of insistence on trial.¹ Therefore, the upper limit must be set with an eye to keeping down the rate of "appeals" in cases in the upper range; otherwise, instead of achieving economy, an expedited hearing might result in wasteful duplication. Another risk to consider is that some counsel may deliberately inflate *ad damnum* clauses either for negotiating purposes or to remove the case from the system. That probably will not occur often, since inclinations toward inflated claims will be discouraged by the attractive qualities of the program, which would be available only for smaller claims.

Claims for equitable relief need not necessarily be excluded from the system if such cases meet the monetary requirements. Screening mechanisms could be used to weed out cases realistically seeking substantial equitable relief, or overly complex cases, or cases that raise constitutional or other major legal issues. While the system should apply automatically to all eligible cases filed after its adoption, it also could be made available to consenting parties in larger cases or to litigants in pending cases who found the special procedures attractive.

• **Phase 1—The Expedited Hearing.** In several jurisdictions experience with court annexed arbitration plans that require an expedited hearing before trial indicates that such hearings can provide speedy and inexpensive dispute resolution, particularly if referral comes shortly after filing.² Counsel fees tend to be lower because of the limitations on discovery and the informality of the hearing, and costs to the system appear to be substantially less than those for a full court trial.³

Shortly after the close of pleadings, the court should refer each eligible case to a quasi-judicial of-



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ficer or panel of such officials for an expedited, informal hearing and provisional determination. Before the hearing there would be sufficient time for limited discovery—through interrogatories with limitations on their number and length—and for case-dispositive motions, but the emphasis should be on avoiding procedural obstacles to an early consideration of the merits.

Each state could name hearing officers with the background and qualifications best suited to local needs and could prescribe the number of hearing officers and their compensation. Senior or retired judges could be considered, as could quasi-judicial officials such as magistrates or masters. Qualified attorneys also might be selected. Provisions should be adopted to require disqualification, using judicial disqualification standards, and to monitor the performance of hearing officers.

The proceedings would have to be kept relatively informal so that a party could participate without an attorney (although the parties should be free to appear at the hearing with counsel or other representatives). In the interest of informality, any relevant non-privileged evidence should be admissible, subject to the hearing officer's power to reject evidence that is cumulative or of slight probative value.

The tribunal would be required to render a decision promptly. Its ruling, together with a brief written statement of findings and supporting reasons, should be filed with the clerk of the court. Unless either party insists on trial within a short specified time thereafter, that ruling should have full force as a final civil judgment and be nonappealable and nonimpeachable except on grounds such as those allowed for attacking an arbitrator's award—fraud, bias, or other radical defects. Each side would bear its own expenses, and if both sides accepted the tribunal's decision, the cost of the hearing, including the fees of the hearing officers, would be paid by the state.

A party dissatisfied with the provisional award would be free to demand a trial. In some states, that should help the program ward off challenges for impairing constitutional guarantees as to the form of trial, and in others, it should blunt opposition based on the unacceptability of precluding or inhibiting a judicial determination in nonpetty cases. In any event, the experience with existing court-annexed arbitration plans is that the rate of insistence on trial is low to moderate, and the fraction of cases that actually go to trial is quite small, with many "appealed" cases settled between the request for a court adjudication and trial.⁴

While constitutional or political reasons may make it necessary to provide recourse to a judicial forum, we believe it is permissible to create incentives for accepting the result of expedited hearings and mild disincentives for proceeding to trial. Decisions on the mechanisms for this purpose should depend on the relative weight of several distinct and sometimes conflicting considerations. One is the importance of the right to a judicial trial—the more highly it is prized, the fewer disincentives for insistence on trial there should be. Since financial disincentives have the greatest effect on litigants of limited means, we must avoid disincentives that fall too heavily on less affluent parties.

Equities favoring the party willing to accept an initial ruling also must be seriously considered. Even if a ruling is not substantially confirmed at trial, making it a complete dead issue may be too harsh; to view it merely as a factor influencing the parties' settlement negotiations would deny the dignity of the earlier proceeding. A party willing to accept a negotiated ruling could justifiably regard as unfair a system that does not impose risks on his adversary for rejecting that ruling. Without a disincentive, the adversary could, with relative impunity, force that party into further proceedings, require him to make a settlement offer, and even threaten him with the prospect of having to pay costs and attorney's fees from the trial.

Moreover, efficiency and economy make full participation in hearings and acceptance of their outcomes desirable. The soundness of this objective depends on whether initial hearings produce results that are tolerably close to those that trials would produce in the same cases. Limited data collected in California show a tendency for hearing awards to approximate subsequent judicial awards in many cases and for variances in others to be insubstantial,⁵ suggesting that encouraging parties to abide by initial rulings is not often likely to defeat substantive justice.

On balance, we think that modest incentives to participate fully in the expedited hearing and to abide by its results are warranted. First, to encourage parties to present their best cases at the hearing, the results of that proceeding could be made admissible at trial. Second, as is commonly provided by court-annexed arbitration plans, the party insisting on trial could be required to pay the court costs of the initial proceeding, including the fees of the hearing officers; the tender should be refundable only if the case settles before trial or if the insisting party improves his position at trial. This tender requirement could be waived for in-

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digents to avoid placing an undue burden on the right of poor litigants to trial, but those parties still would have to reckon with the admissibility of the hearing outcome and findings when deciding whether to proceed to trial.

Alternatives also might be considered. Depending on the weight given to the various factors, these could include: prohibiting reference to the hearing at the trial, omission of the advance tender requirement, making the tender nonrefundable whatever the results of trial, increasing the exposure of the insisting party by including liability for lawyers' fees generated up to that point, or making the amount of the tender a percentage of the provisional award.

• **Phase 2—Pretrial Practice and Offers of Judgment.** A case not resolved at the expedited hearing stage should be returned to the court's calendar for trial. It either could be placed in the calendar position it would have occupied if it had not been referred for expedited hearing or could be given a preference over nonreferred cases. The latter approach would be more conducive to speedy disposition, particularly in jurisdictions with congested calendars and a backlog of cases ready for trial. In any event, the emphasis should be on providing a prompt trial. And because the parties already would have had an opportunity for some discovery before the expedited hearing and presumably have presented their best cases at the hearing, additional pretrial discovery should be permitted only by leave of court on a showing of good cause.

Shortly before trial (but far enough in advance to permit subsequent settlement negotiations), both sides should be required to exchange offers of judgment. There are two considerations that would encourage them to make reasonable offers and thus enhance the prospects of settlement: they would know the decision of the impartial hearing tribunal, which would help them evaluate their cases, and they should make their offers knowing that the amount they set may result in either paying or being paid an award of subsequent costs and attorney's fees, depending on the relationship between the trial verdict and their offers.

A party whose offer turns out to be reasonable, in the sense that it was at least as favorable to the adversary as the trial verdict, should be awarded costs and attorney's fees for the trial; a party whose failure to accept a reasonable offer resulted in an unnecessary trial (in the sense that he could have obtained at least the same result by accepting the offer) should have to pay costs and attorney's fees to his opponent. In other cases, if neither offer turned out to be as favorable to the opponent as the trial outcome, neither party should be awarded costs or fees.

This aspect of our proposal is based on the "offer of judgment" provisions of Rule 68, Federal Rules of

Civil Procedure, and of parallel state rules. But it goes beyond those rules by providing that costs could be shifted in favor of either party instead of solely in the defendant's favor and by including attorney's fees in the costs subject to shifting. An amendment to Federal Rule 68 along these lines is under consideration by the Advisory Committee on Civil Rules. A similar device exists in England, where the losers generally pay the winners' counsel fees, but English practice permits an award of fees to a losing defendant who previously paid into court an amount equal to or greater than the plaintiff's judgment. Experience there indicates a fairly high rate of use, a high rate of settlement, and a low, but still significant, rate of offers not bettered or barely bettered at trial.⁶

• **Phase 3—Trial.** If the case is one that invokes the right to trial by jury, that right must be preserved in its essential aspects, as constitutionally required. The proceedings should be simplified, though, to the maximum extent possible. For example, the jury might consist of six persons as in most civil jury cases in the federal courts, voir dire might be simplified, and peremptory challenges might be sharply limited. The trial itself could be streamlined by such devices as encouraging use of depositions and documentary evidence in lieu of new viva voce testimony. In addition, as noted above, the results of the preliminary hearing and the reasons for the decision should be admissible, subject in a jury trial to appropriate cautionary instructions. The use of testimony given at the hearing (if recorded) also should be considered; it might be admissible for impeachment purposes, for use as substantive evidence, or for use only on stipulation of the parties or in unusual circumstances such as the death of the witness.

• **Award of Costs and Attorney's Fees.** In line with the overall aim of reducing costs, the system should try to obviate additional, second-round litigation over whether costs and attorneys' fees should be awarded and, if so, in what amount. As we visualize the plan, award of fees should be mandatory if a party fails to improve on his or her adversary's offer of judgment, with two exceptions. The first is for cases governed by an existing fee shifting scheme. For example, if the legislature has expressed its intention to favor a certain type of action by providing for fee shifting to prevailing plaintiffs, that policy presumably should govern. The second exception should permit the court to deny an award to prevent obvious injustice to a party who failed to improve on his or her opponent's offer of judgment but who nevertheless was entirely reasonable in going to trial. For example, in interpreting Federal Rule 68 in *Delta Airlines v. August* [101 S. Ct. 1146 (1968)], the Supreme Court held the rule inapplicable when a plaintiff loses outright, as opposed to winning a judgment less favorable than the defendant's offer, thus making cost-shifting not mandatory when the losing plaintiff had rejected a \$450 offer of judgment made in response to a nonfrivolous \$20,000 claim. Despite the loss, it would be unfair to

penalize such a party with additional costs.

In calculating fees, the fact that a prevailing defendant is entitled to recover fees makes it impractical to rely regularly on an award of a percentage of the verdict as a measure of entitlement. Unfortunately, other formulas are complex and issue-laden, opening the possibility of a second proceeding as costly as the trial itself. Still, it seems desirable to maintain some proportion between the fees awarded and lawyer effort reasonably expended—a party should not be required to subsidize a foe's overinvestment in litigation. A good compromise might be to award a fixed sum per hour of trial on the theory that the cost of legal representation subsequent to the offers of judgment is likely to be connected to the trial's duration.

In conclusion, the system for affordable litigation of mid-size disputes described here is not a perfected plan. Its goals are simply to provide a means of adjudicating monetary disputes promptly, fairly, and at reasonable cost through expedited determinations or settlements, while carefully preserving the right to trial for litigants who insist on it. This system combines three elements that have shown promise when used in isolation: quick, informal hearings under judicial auspices; incentives for reasonable offers of judgment; and provisions for shifting the burden of attorney's fees to a party who after trial is identifiable as not only the loser but as unreasonable.

This system should be attractive to litigants and potential litigants who face lawsuits in which victory would otherwise be Pyrrhic because the costs of the litigation may be disproportionate to the stakes involved. Given its adaptability to local or special circumstances and needs, the system should also interest

the authorities in a jurisdiction in which the courts must dispose of large numbers of mid-size cases.

The plan's operational simplicity, plus its promises of speed, informality, and low cost, will make justice more accessible than it can be now. These features should make prospective litigants less likely to turn away from a search for redress, while the preliminary determination and settlement incentives should, in most cases, lead to a resolution without trial. As a result, parties should be able to resolve their differences at relatively low cost, and the court system itself would benefit from a reduction in workload and expense.

The ABA Action Commission to Reduce Court Costs and Delay agreed at its meeting on May 31-June 1, 1981, to support the program described in this article on an experimental basis and to encourage several selected states to consider its adoption in a form suitable to local needs and conditions. Inquiries regarding the program and requests for help in implementing it should be addressed to the Action Commission, 1800 M Street, N.W., Washington, D.C. 20036.

1. See Johnson *et al.*, *Access to Justice in the United States: The Economic Barriers and Some Promising Solutions*, in 1 (bk. 2) ACCESS TO JUSTICE 913, 962 (1978).

2. See *id.* at 966-67.

3. See *id.* at 965-67.

4. See *id.* (trial rates of 3 percent of cases assigned to arbitration in Philadelphia and 1.4 percent of appealed cases in Cleveland); Yakutis, *Judicial Arbitration, California Style*, 18:1 JUDGES' J. 33, 54 (Winter 1979).

5. See Note, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes*, 29 HASTINGS L.J. 475, 502 (1978); Letter from Elizabeth S. Rolph, Rand Corp., to Assistant Attorney General Maurice Rosenberg (Sept. 29, 1980) (on file in Office for Improvements in the Administration of Justice) (data for Santa Clara County, Calif.).

6. See Zander, *Payment into Court*, 125 NEW L.J. 638 (1975).

8. See articles in the January 1977 and January 1980 issues of THE ALABAMA LAWYER, as well as pages 11-16 of the 1977-78 ANNUAL REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE COURT OF ALABAMA.

9. The present ABA Judicial Administration Division members of CISJA are: Chairman, Hon. James J. Richards, chief judge, Superior Court of Lake County, Hammond, Indiana; Vice-chairman, Hon. Arthur J. Simpson, Jr., Assignment Judge, Superior Court of New Jersey, Hackensack, New Jersey; William H. Adkins II, state court administrator, Maryland Court of Appeals, Annapolis, Maryland; Hon. Cameron M. Batjer, Supreme Court of Nevada, Carson City, Nevada; Hon. Jean S. Cooper, administrative judge, HUD Board of Contract Appeals, Washington, D.C.; Hon. James J. Johnston, Hennepin County Municipal Court, Minneapolis, Minnesota; R. Stanley Lowe, Esq., Casper, Wyoming; Alice L. O'Donnell, Esq., Federal Judicial Center, Washington, D.C. and Hon. Frederick Woleslagel, 20th District Court of Kansas, Lyons, Kansas. Retired members include: former chairman: Hon. Winslow Christian, California Court of Appeals, San Francisco, California; and former vice-chairmen: Richard J. Bartlett, dean, Albany Law School, Albany, New York; and Hon. Louis H. Burke, retired justice, Supreme Court of California, Nicasio, California.

Key former staff members from the National Center for State Courts include: Project Director, Orm W. Ketcham; Project Director, Douglas C. Dodge; Deputy Director, Victoria S. Cashman; and Deputy Director, Mae Kuykendall.

Throughout the project the ABA staff liaison has been Ernest Zavadnyik, Esq.

Simpson

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tee on Implementation of Standards Relating to Court Organization. The broadened mandate and the CISJA name began in August 1976—in anticipation of the February 1977 approval of the third volume by the House of Delegates.

3. Similarly, the work of the ABA Special Committee on Standards for the Administration of Criminal Justice (1964-1973), the ABA Special Committee on Administration of Criminal Justice (1973-1977), and the ABA Standing Committee on Association Standards for Criminal Justice (1977-) are summarized in the introduction to the four-volume ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed., 1980), just published by Little, Brown and Company.

4. Particularly noteworthy has been the support of James C. Swain, director, Adjudication Division, OJCP, Office of Justice Assistance, Research, and Statistics, U.S. Dept. of Justice and William Herndon, special assistant for courts, LEAA.

5. A comparative analysis of the two model judicial articles appears in Dodge and Cashman, *The ABA Model Judicial Article*, 3 STATE COURT J. 8, No. 1 (Winter, 1979).

6. Unprogrammed or unscheduled occurrences present CISJA with an excellent chance to advance the implementation of the standards in a jurisdiction.

7. Arizona, Arkansas, California, Connecticut, Florida, Georgia, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, Oregon, Pennsylvania, Tennessee, Virginia, Washington, Wisconsin, and the District of Columbia.