

HOW TO OVERCOME AN UNACCEPTABLE BACKLOG

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During the last 35 years, I have worked directly in over 50 countries and indirectly in many more. There are but a few which are not concerned about their backlog. We have heard from all sides that “justice delayed is justice denied,” and that is demonstrably true.

Not only has this been verified by needs assessments I have made in scores of countries, but it has been the subject of countless conferences and meetings I have attended. Will Rogers said, “Everyone talks about the weather but no one does anything about it.” Everyone talks about backlog but we can do something about it.

Someone said, “Having a backlog is like having an elephant. How do you eat an elephant?” The answer is: “One bite at a time.” It is finding the tools to eliminate a backlog and then implementing them.

Fortunately, it is not as difficult as one might think. I believe there are only three tools. That is, my experience in all parts of the world has demonstrated that successful reduction of backlog occurs in three ways.

I.

The first is to add more judges. The argument is that there are more cases so more judges are needed. As logical as that seems, the argument ordinarily fails. One response is that in many cases it would be far better to train judges to do their work more effectively. But more important, legislatures ordinarily are slow to respond to requests for more judges. And even if it were otherwise, I doubt that this tool can be used alone to solve the problem – there is a reasonable limit to horizontal expansion.

Fortunately, the two remaining tools have been successful in combating backlog in all parts of the world – without exception. They are removing cases from the courts and speeding disposition of the cases remaining. These tools are usually referred to as “alternative dispute resolution” (ADR) and “case management.”

II.

Obviously, it will be easier to overcome backlog in the court by removing cases from the courts – that is, by resolving disputes pending in court without trial (ADR), you necessarily reduce the backlog.

While there are several ADR methods, in the context of filed cases, mediation works best. In arbitration, the parties merely substitute a court decision maker for a non-court decision maker. While the process can take less time and be less complicated, and may, in some

circumstances, cost less, it still has a similar adversarial process. Thus, relatively few parties will voluntarily abandon a pending court case to have it decided by an arbitrator.

Mediation, on the other hand, is less threatening. If the case cannot be successfully mediated, the parties can return to the trial schedule. Thus, the control of the process is within the hands of each party – either can end the medication by opting out.

The consensual nature of mediation is less threatening than litigation and arbitration. Mediation is nothing more than having a helpful discussion leader attempt to determine the real controversy and suggest possible solutions. If successful, the dispute will end by voluntary consent – not by a decision of a third person.

Mediation also has the benefit of solving the real issue on a broad basis while courts are limited to the litigation issues. In mediation, a mediator can go beyond the litigation issues and offer solutions such as other benefits having nothing to do with the litigated case. This may well change the incentive to settle. For example, a contract dispute in litigation between a successful franchisee and franchisor might be settled by allowing expansion of the successful franchisee – thus providing incentives on both sides and motivation for settlement.

It should come as no surprise that the parties are more satisfied with a mediated settlement than with a court decision. The court loser still believes that he or she was right and blames the system, the judge, and the lawyer. Studies have shown that both parties to a mediated settlement generally are satisfied. I suppose this is because each will focus on what he or she receives from the settlement rather than from what was left on the table. In addition, the result was consensual, not imposed. Thus, society is better served by mediation. The process is one of healing rather than deciding. This is especially true if mediation occurs as soon as possible after filing of the lawsuit.

Thus, by emphasizing mediation society is served in two ways. First, the parties leave more satisfied and relationships can be healed. Second, by removing cases from the court, backlog is decreased and more time is available for the cases which must go to trial.

III.

This brings me to case management. Traditionally, the pace of litigation has been determined by the lawyers representing the partes. But too often, it is to the advantage of one or more parties to delay. The lawyer representing the client delays. This is counterproductive to court efficiency. Case management transfers determination of the pace of litigation from the lawyers to the judge.

How does this work? From the time a case is filed, the court takes charge. It sets the schedule for the various case management tasks. The first is a “status conference.” There, the judicial officer determines what is necessary to prepare the case for an efficient trial. A litigation schedule is filed in the form of an order. A date is set for the next event: either another status conference or a “pretrial conference,” depending on the complexity of the case. Discovery and motions are regulated and are to be completed at the earliest time.

At the pretrial conference, the parties stipulate to facts and list all facts and issues of law which are in dispute. All foundation questions for exhibits are resolved. A list of witnesses is submitted, including experts. The pretrial order, which then takes the place of the pleadings, is entered. It sets the date of trial, lists the trial time allotted, lists all witnesses and exhibits, etc.

The trial, based upon the pretrial order, is then controlled by the trial judge to allow an efficient trial focused upon the actual dispute.

The status conference and pretrial conference are often held by the judge who will try the case. In other jurisdictions, they are held by another judge, a magistrate, a registrar, or other judicial officer.

IV.

My observation is that when these two processes are used together, both are more successful. For example, at each event in the case management process, the judicial officer encourages the parties to consider mediation. Merely calling mediation to the attention of the parties often encourages the beginning of successful settlement discussions. If additional assistance is needed, the judicial officer is in a position to offer suggestions about the use of a mediator.

In some jurisdictions, the judicial officer conducting the case management event will offer his or her services. In others, a different judicial officer is used as a mediator. In others, volunteer lawyers are used. The person used is not critical to successful mediation. But two requirements have proven important. First, it should be court annexed mediation – that is, the mediation is tied to and used by the court. Second, mediators need training – whether they are judicial officers or lawyer mediators.

But working together, there is a synergism created between mediation and case management which makes both more effective.

V.

Can they be successful in your jurisdiction? My experience has been that wherever they have been properly implemented, measurable improvement has occurred.

For example, some forty years ago, these changes began in courts of the United States. Following the process described above, courts now generally have trials in less than ten percent of the cases filed. That is for every ten cases filed, one goes to trial. Similarly, backlog statistics showed an important positive result. This is not remarkable. By the disappearance of 90% of cases filed, case management techniques speed up the litigation process of the remaining cases.

Thus, we can do more than talk about backlog. By accepting the generic principles of case management and mediation and adapting them to your particular system and legal culture, worldwide experience has demonstrated that every country can successfully attack their backlog. No longer need justice be denied by justice being unnecessarily delayed.

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