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There's another side to the story on judge stats

By: Nancy Gertner December 29, 2022

The Nov. 28 issue of Lawyers Weekly reported on a U.S. District Court judge who had considerably more motions pending for more than six months (37) than other Massachusetts judges ("As lawyers wait for judge to rule, dockets show signs of frustration").

The article noted criticisms of the judge, implying that his colleagues whose pending motions were in the single digits — or better yet, zero — were judging the right way and he was not.

Judges with better statistics should be applauded, but there is another side of the story, which the article only briefly described.

The article referred specifically to the "six-month list," a list each judge must submit documenting cases older than three years and motions pending more than six months. Let's be clear: It is a shaming mechanism, incentivizing judges to get in line by publicizing delay. And it is surely important: justice delayed, as they say, could well be justice denied. But expedition is not the only goal of the civil justice system.

Professor Harold Koh, the former dean of Yale Law School, said it best: "When you cannot measure what is important, you tend to make important what you can measure."

He added that "judges tend to do what is measured, and what is measured and valued in today's courthouses is how many cases are closed, not how justly they are decided." Koh credits that with exacerbating the change from a culture of trial to a culture of settlement and dismissal, with cases terminated earlier than ever before based on less information about the claim, the evidence or the merits.

In the "Unintended Consequences of Judicial Accountability," authors Miguel F.P. Figueiredo, Alexandra D. Lahav and Peter Siegelman chronicled the six-month list and its impact. (I consulted with the authors.) Too much attention was given to "incentivized tasks," namely, expedition in motion decisions, at the expense of "what cannot be rewarded," notably their quality.

In addition, suggesting that the pressure to close may well affect the quality of the decisions, the authors found that "cases in the list weeks have a higher appellate remand rate than those decided at other time."

What about access to justice for the underserved and the continuing problem of unequal resources? In one Massachusetts case, a manufacturer appealed a jury verdict in favor of a plaintiff injured by the company's saw. A new trial was ordered, this time reassigned to me. Between the Appeals Court decision and the reassignment, the man died. His lawyer missed a simple deadline for filing a notice of death and substituting his estate as plaintiff.

In reviewing my six-month list, my clerk noted that I had discretion to dismiss the case but added: "Justice in the world says let his estate — his family — have another trial."

And so I did. Efficiency was surely important, but so was keeping a family that suffered one egregious loss from suffering another at the hands of less than competent counsel.

Then there are cases that may well be especially disadvantaged by the six-month list pressure because the substantive decisional law has raised the bar for plaintiffs — like civil rights cases, Social Security disability appeals, ERISA cases.

In my article "Losers' Rules" (Yale Law Journal), I noted that when I was on the bench judges were encouraged not to write formal decisions unless they had to, all in the interest of expedition. The result: written opinions when granting summary judgment, and not when denying it.

As decision after decision detailed only the meritless claims, decisionmakers were more and more inclined to view all employment discrimination cases as frivolous. Worse, one-sided decision-making led to decision heuristics — the "Losers' Rules" — that reinforced the pattern, justifying pro-defendant outcomes and exacerbating the skewed development of the law. Under pressure to decide and cull that list, those "rules" were a shortcut to dismissal.

We can measure the number of cases resolved, but not the quality of the judging. We can measure how quickly cases are closed, but not whether there was a fair resolution. With the sole exception of DNA exonerations, judges have no meaningful feedback loop, no way of knowing if case outcomes are just.

Too often, closing a case is its own reward. The six-month list is surely helpful but hardly the only measure of a fine judge.

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