

1995

Let's Try a Small Claims Calendar for the U.S. Courts

William W. Schwarzer

UC Hastings College of the Law, schwarz@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

William W. Schwarzer, *Let's Try a Small Claims Calendar for the U.S. Courts*, 78 *Judicature* 221 (1995).

Available at: http://repository.uchastings.edu/faculty_scholarship/738

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcus@uchastings.edu.

Faculty Publications

UC Hastings College of the Law Library

Author: William W. Schwarzer

Source: Judicature

Citation: 78 JUDICATURE 221 (1995).

Title: *Let's Try a Small Claims Calendar for the U.S. Courts*

Originally published in JUDICATURE. This article is reprinted with permission from JUDICATURE and American Judicature Society.

Let's try a small claims calendar for the U.S. courts

A small claims calendar may help the federal courts deal with the flood of pro se and small stakes civil cases more efficiently and fairly.

by William W Schwarzer

The federal courts, both district and appellate, are experiencing a sharp and steady increase in filings by pro se litigants. In many districts, filings by self-represented parties are approaching 50 percent of all civil filings. This volume, and the peculiar problems it creates, imposes increasingly heavy burdens on both the courts and litigants.

A related problem involves the increasing number of counseled cases filed in district courts for which the stakes are too small to make it economically feasible to proceed through discovery and trial. For the pro se cases, there is an urgent need to lighten the burdens they pose on the courts. For both categories of cases, there is an equally urgent need to improve accessibility and quality of justice.

One solution may be for federal district courts to establish a small claims calendar to further the fair and efficient disposition of some portion of their pro se and small claims litigation.

WILLIAM W SCHWARZER, a senior U.S. district judge for the Northern District of California, served as director of the Federal Judicial Center from 1990-1995.

An overview of the problems

Pro se litigation covers a wide range of cases, including civil rights cases and habeas corpus petitions mostly filed by state prisoners, employment and other discrimination cases, routine civil

cases by or against people unable to retain counsel, and miscellaneous personal grievances, many against the government. Data collected by the Federal Judicial Center five years ago indicate that at that time, 23 percent of all civil filings had at least one pro se party, and of those about two-thirds were prisoner cases. Approximately one-fifth of all employment discrimination cases and nearly one-third of all other civil rights cases were pro se. The trend since then has been upward.

The volume and composition of pro se filings varies across districts. In some districts with large state prisons, prisoner cases predominate. In other districts the mix is more eclectic. But pro se cases for the most part share certain characteristics that create particular difficulties for the courts. Many are frivolous or at least unmeritorious, but the absence of counsel often makes it difficult to determine with assurance whether dismissal is warranted. When a case goes to discovery and motion practice, the pro se's lack of legal competence injects disorder and confusion into the proceedings and makes it more difficult for the judge to arrive at an appropriate ruling. If the case goes to trial, these difficulties are aggravated.

Because self-represented litigants are often firmly convinced of their victimization and lack legal competence and confidence in their judgment about the merits of their cases, mediation, settlement, and other ADR procedures are rarely effective. Moreover,

the role of the neutral is likely to be compromised by the pro se litigant's need for advice and assistance. Some pro se litigants are given to filing repetitive actions, and some present security concerns. And when pro se cases reach the courts of appeals, they sometimes result in decisions that increase the burdens on the district court.

While the vast majority of these cases are probably without merit, any pro se case challenges the courts to see that justice is done. Judges must try to identify the potentially meritorious cases and make it possible for the litigants to develop and pursue them. Since the merits are frequently obscured by indecipherable pleadings, and the litigants often are not competent to develop and pursue their cases effectively, judges and their staff, who must stand in for absent counsel, face a disruptive and burdensome task.

Much of the work is done by pro se law clerks, but most courts do not have enough of them. Some of the burden then falls on the judges' law clerks, and some of it is also done by magistrate judges, but they too are fully occupied by other work. In the end, however, each case requires the attention of a district judge. Given the special problems these cases present and the burdens of the judge's other duties, there is considerable risk that these cases, even meritorious ones, may languish in the courts and receive only perfunctory attention.

Pro se litigation also imposes burdens on represented parties. Especially in prisoner cases, a large amount of legal and paper work is required of counsel responding to pro se pleadings. Discovery, motion practice, and trial are much more difficult to conduct without counsel on the other side. Attempts to settle can be frustrating.

As for cases that, though counseled, involve only small stakes—such as those involving minor injuries or commercial disputes over modest amounts—the inability to fully litigate them economically impedes access to justice. While ADR in various forms can help parties resolve such cases, often it is not a realistic option.

The views expressed are those of the author and not necessarily those of the Federal Judicial Center.

Although these cases present no special problems for the courts, expediting their disposition will help ease docket burdens.

Addressing the problems

No comprehensive information on the courts' responses to these problems is available. From the limited information at hand, it appears that courts have only recently realized the magnitude of the pro se problem, and their efforts to deal with it are still episodic and fragmentary. Some courts have included provisions in their local rules or civil justice expense and delay reduction plans, such as exempting pro se cases from certain pretrial requirements, creating a separate litigation track with streamlined discovery and motion practice, providing pro se litigants with information, and simplifying the paper work. A few courts have attempted to provide pro bono counsel to at least some indigent litigants, reimbursing some of the discovery costs out of the court's attorneys' admission or library funds. Some individual judges have devised case management techniques intended to facilitate the efficient resolution of pro se and small claims cases.

The small claims calendar proposed here is intended to achieve three objectives: expedite the resolution of cases; reduce the amount of activity required to resolve them; and promote fair outcomes and litigant satisfaction. The calendar would give the parties the choice of a substantially streamlined process of resolution, in which some traditional elements are exchanged for early and less costly adjudication and a ceiling on exposure. With the consent of the parties, discovery, motion practice, jury trial, and the right to an Article III judge are waived in exchange for a speedier and less costly judicial resolution. For the courts, the incentive is the accelerated yet fair termination of cases with minimal expenditure of judicial resources.

People concerned that a small claims calendar may provide second-class justice to parties with small claims

and to pro se litigants may challenge the concept. But the response is that it is entirely voluntary, requiring the consent of both parties. Rather than providing second-class justice, the small claims calendar offers an additional option, an economical alternative for all litigants willing to accept the procedure. It also provides quick and unconditional access to a final and binding adjudication by either an Article III or a magistrate judge, depending on who is assigned to the calendar.

The small claims calendar offers an economical alternative for all litigants.

How the calendar would work

The details of a small claims calendar will vary with the circumstances of a particular court and the court's preferences, but here in broad outline is how it might operate:

Establishing the calendar. A court could establish a small claims calendar by local rule or general order; no further authority would be required. Although the use of general orders has been discouraged by the Judicial Conference's Standing Committee on Rules of Practice and Procedure, if the calendar is established as a pilot, and particularly if it has a sunset provision, a general order may be preferable to a local rule. The order could provide for automatic termination of the pilot on a specified date unless renewed by the court.

The calendar could be assigned on a rotating basis to the court's district and magistrate judges, perhaps for a month at a time for each judge. Depending on how the assignment procedure is handled, litigants would not know with certainty what judge will try the case. To show the importance the court attaches to the calendar and to encourage consents, enough district

judges (preferably all judges on the court) should participate to have a fair proportion of the trials before an Article III judge. To encourage consents, a court might also consider permitting the parties to stipulate to the judge to hear their case.

The judge assigned to the calendar would set cases as the need appears, as in the case of the motion calendar. For the period that the judge has the calendar, it would be given priority as necessary to achieve a trial date within 30 days of the filing of the consent. Since trials would be brief and since any judge should have the calendar for only a month, this should be feasible.

Although a single court-wide small claims calendar with all judges participating would be preferable, individual judges could establish their own calendars for their cases incorporating features similar to those discussed here.

Upon the parties' consent, the judge would offer an early streamlined trial and prompt judgment by either the judge or a magistrate judge.

Jurisdiction. The local rule or order would provide that any civil case may be transferred to the calendar with the written consent of all parties. The amount a plaintiff could recover, and a defendant could lose, in a small claims calendar trial would be capped to induce consent. The cap amount would be specified in the consent form and set by the court in light of local circumstances and preferences. It should be high enough to capture a significant number of small claims cases but low enough to be suitable for adjudication by streamlined procedures. The amount suggested here is \$75,000. Neither punitive damages nor injunctive or other specific relief (such as habeas corpus) could be awarded.

Transfer of cases to the calendar. All civil cases would continue to be assigned to individual judges, the assignment remaining in effect until termination. Upon execution by all parties, any case could at any time be transferred to the small claims calendar without further action by a judicial of-

ficer. Parties could consent at any time during the litigation, but early consents should be encouraged to maximize savings in time and money for litigants and to minimize judicial involvement. In some cases the consent might not come until after the parties have been informed about this option by the judge in the initial conference.

Procedures need to be designed with care to ensure that consent will be informed. To avoid manipulation of the process, it is essential that once consent has been given it cannot be withdrawn. The small claims calendar judge hearing the case, however, would have discretion to remand it to the assigned judge if for any reason the case did not appear to be suitable for the calendar—if, for example, it appeared to involve a substantial question of law, extensive proof, or complex evidentiary issues.

Pretrial proceedings. Once the consent has been filed, all pretrial proceedings would end except as otherwise agreed by the parties. No discovery would take place except by stipulation. Since the parties have consented to the calendar, they could be expected, though not compelled, to voluntarily exchange relevant documents and make key witnesses available for interviews, and the judge may order such disclosures once the case comes to trial. No motion practice would occur, but parties could agree that specified motions, such as a Rule 12 motion, may first be submitted for a ruling by the assigned judge and that the case would be transferred to the calendar in the event the motion is denied.

Trial. Because an objective of the calendar is early disposition of cases with minimum cost, it should be managed in order to assure consenting parties that their cases will come to trial within 30 days of the filing of the consent. The accelerated schedule would limit the amount of legal activity. Requests for continuances would require the approval of the small claims calendar judge and should be granted only if necessary to prevent injustice. While this accelerated procedure without discovery would not be suitable for many cases, there are others in which the critical facts are well known and the evidence and testimony are readily at

hand. Not so long ago, after all, many cases went to trial without discovery. Even now, in a fair number of cases, little or no discovery takes place.

At trial, the parties would appear with all witnesses and exhibits, ready to proceed. Although the rules of evidence should generally apply, in the absence of a jury the judge would have wide discretion to apply them liberally. The judge should control the proceeding to develop the material facts quickly and bring about a speedy yet fair resolution of the pivotal factual disputes. The judge may issue subpoenas and require the attendance of witnesses and the production of documents if that appears necessary. If legal questions arise that the judge feels unable to resolve promptly and that would delay disposition of the case, the case may be remanded to the assigned judge.

Inevitably the judge's role will be more inquisitorial than usual. There may be times when the judge must assist an unrepresented party in presenting the case. Judges, however, encounter that need even now in cases tried by pro se litigants. To protect the integrity of the proceedings, they should be on the record unless both parties waive it. Formal findings of fact and conclusions of law are waived by the consent, but the judge will be expected to give a statement of reasons for the decision sufficient to help the parties understand the outcome.

Trials would ordinarily be held at the courthouse. But when consents are filed in prisoner cases, trials should be held at the institution to avoid the cost and delay of transporting prisoners and witnesses to court.

Assistance of counsel and others. Since the calendar would be open to all consenting cases, parties may appear through counsel even if the opponent is unrepresented. Represented plaintiffs in civil rights cases would be entitled to recover attorneys' fees subject to the limitation that the aggregate of attorneys' fees and damages may not exceed the specified jurisdictional limit stipulated to as a part of the consent (here suggested to be \$75,000). An unrepresented party would be permitted to have the assistance of a lay person where appropri-

ate, for example, when the party experiences language difficulties or otherwise lacks competence, but lay assistants would not be entitled to an award of attorneys' fees. The judge would have discretion to exclude lay people or limit their participation if necessary for the fair and orderly conduct of proceedings.

Appeals. Although the final termination of cases would be expedited and costs reduced if consent also waived appeal rights, waiver of appeal should probably not at first be required since waiver could be a substantial deterrent to consents. While the scope of any appeal would be narrow, given the breadth of the consent and the nature of the proceeding, preserving a measure of protection against serious error at trial may help overcome some of the resistance to the calendar.

Questions to consider

The proposal raises a series of questions that warrant further consideration.

Litigant consent. Ensuring that consent to the small claims calendar is informed is critical. The consent form that litigants would receive must explain clearly and concisely the rights waived: the right to conduct discovery and file motions, to having a trial by jury, to object to entry of judgment by a magistrate judge in the event the case is tried when a magistrate judge has the small claims calendar, and to recover more than a specified amount. The form must explain that the case will go directly to trial before a district or magistrate judge who will control the presentation of evidence at the trial and render a decision promptly. It must give a fair and balanced statement of the advantages and disadvantages of consent. The court would probably need to provide means for responding to questions, such as a pamphlet that answers commonly asked questions; a person (perhaps a volunteer) in the clerk's office to provide information (but not to give legal advice); and, if the numbers warrant, an interactive electronic kiosk or an informative videotape. Parties could also be advised that they can defer giving consent until after the case has been called for an ini-

(continued on page 263)