Appellate Practice
American Bar Association Litigation Section
Spring 2024, Vol. 43 No. 2

Steady, but Slow: Understanding and Navigating Delay in Federal Courts

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Mar 14, 2024

Patience has always been a virtue for those litigating in federal court, but court congestion in recent years has made it a prerequisite. Fully briefed motions and appeals sit for months on end before argument is even scheduled. Civil trials get set for the court's first available date, a year away. And judicial posttrial and appellate rulings can take longer still. The court sets the schedule—and your case will have to wait its turn.

That, of course, is cold comfort to clients who want their cases resolved. They are right to ask: "Why is it taking so long?" "What can we do about it?"

The answers vary from court to court and judge to judge. But advocates are not entirely powerless to push their cases forward. If you understand why the court is slow, what court initiatives can reduce delay, and how to position yourself in light of that information, you can help move things along. At a minimum, a full picture can help you set realistic expectations for your clients—and prepare you to move quickly when the time comes.

Why Does It Take So Long?

If your case is taking longer than you'd like, there could be many reasons why, depending on your specific judge and forum. There is one explanation for delay in federal courts, however, that applies almost across the board: too many cases, too few judges.

For the last few years especially, judicial vacancies have been a persistent problem. As of January 1, 2018, 148 of 890 authorized federal judgeships were vacant—that's *one in six* seats empty. The number has fluctuated since then, ultimately falling to 61 vacancies (one in 15 authorized judgeships) at the start of 2024.

But even if there were zero vacancies, it would not solve the systemic staffing problem. The number of new cases being filed has been growing: In the year leading up to September 2023, there were 339,731 new civil cases filed in federal courts, almost 25 percent more

than the year before. Median time-to-trial rates in some district courts range as high as *five years*.

As a result, the Judicial Conference of the United States has called for backup, recommending that Congress authorize 66 new judgeships in the hardest-hit districts. For example, the Middle District of Florida saw over 700 new cases *per judge* last year, a number that could fall to a more manageable (though still undeniably intimidating) 534 per judge if five new seats are added as proposed. When and whether that backup will arrive, however, remains to be seen.

What Can You Do About It?

Delay, whether at trial or on appeal, may be inevitable—but it is not entirely outside your control. Here are three ways that you can help keep things moving for your clients.

1. **Keep court practices and procedures in mind.** Delay often stems from judicial inaction—ready-for-decision motions and appeals can sit undecided for months or even years on end. But you can use court procedures to your advantage, and understanding the court's own delay-reduction tools can help you set client expectations.

   Local rules and practices can guide you as to whether, when, and how to bring a time-sensitive motion to the attention of the district court or appellate clerk's office. Some judges, including in the Southern District of New York, even require litigants to alert the court if a motion has not been decided within a certain time. But attorneys beware: Whenever reaching out to chambers, be sure to comply with all ethical, court-specific, and judge-specific rules—and to consult with counsel familiar with your jurisdiction's practices—regarding such communications.

   If the district court's delay becomes extreme and you've exhausted your options there, you might also consider filing a mandamus petition with the relevant court of appeals to compel the district court to act. *See* 28 U.S.C. § 1361. Again, beware: Mandamus is an extraordinary remedy rarely granted; and filing a petition could irritate the district judge that still has to decide your case. In the right circumstances, however, just filing a petition can spur action.

   Even when there seems little you can do, understanding the federal courts' delay-reduction procedures can help you set client expectations about when case-critical motions will be resolved. One procedure in particular—the "six-month list" (or "CJRA list," named after the Criminal Justice Reform Act that requires it)—has been shown to influence the timing of district court decisions.

Every six months, the Administrative Office of the U.S. Courts publishes a list stating, for each federal district judge in the country, the number of cases that have been pending for more than three years and the number of motions and completed bench trials that have been ripe for decision for at least six months. (A motion becomes "ripe" in that sense 30 days after it is filed.) Although there are no penalties for having matters listed, "the list" looms large for many district court judges. Peer pressure, competitiveness, and public accountability are strong motivators.

The result, statistics show, is a significant spike in motion dispositions and case closures right before the list-reporting periods close at the end of March and September. So, if it is March and your motion has been pending in district court since August, there is a decent chance that your presiding judge will want to resolve it before the end of the month to keep it off the six-month list. On the other hand, studies have shown that if the judge fails to meet the *first* list deadline, there is an increased chance that the motion will remain undecided until just before the *next* report date. The list, of course, is no crystal ball. Federal judges vary widely in how much they care about it, and thus how many motions they are willing to leave on each one.

There are also administrative reasons that your motion might be excluded from the list, which will remove any motivation to decide it by the March or September cutoff. That can happen, for example, if your case has been stayed at some point, or if your judge has had a reason to suspend briefing on your motion (say, to facilitate settlement talks). For those or other reasons, judges sometimes terminate a motion administratively—including on the eve of the six-month list deadline. Though substantively harmless, terminating a motion can affect not only whether the motion appears on the list but also your ability to electronically file documents related to the motion. As a result, if the stay is lifted or briefing otherwise resumes, you might have to take action to reactivate your motion.

2. **Self-expedite.** While speeding up the court is an uncertain prospect, speeding *yourself* up is a sure thing. Stipulate to brisk briefing schedules in your trial matters. Or file your briefs before they are due on appeal. The sooner a matter is fully briefed, the sooner it enters the judicial decision-making queue, and the sooner (one hopes) it will be decided.

   This tactic can have an especially significant effect in appeals. Consider the U.S. Court of Appeals for the Federal Circuit. As in other circuits, parties routinely seek (and consent to) lengthy extensions of time for both opening and response briefs, often 60 days apiece. Maybe the appellant seeks 30 more days on reply. Suddenly, the total briefing schedule has ballooned by *five months*. You can cut months off that time—even while consenting to reasonable extension requests—just by filing your own brief *on time*. If you file early, you

can cut more still.

3. **Consider alternative paths to a quick resolution.** Finally, for clients with a special need for speed, keep in mind alternatives to ordinary-course litigation.

   If speed is paramount, resolution short of a trial or appellate decision might be your client's preference. Federal courts—at both the trial and appellate levels—offer mediation and other alternative dispute resolution (ADR) programs. Indeed, district courts *must* offer such programs. 28 U.S.C. § 652(a).

   Another option is to proceed with litigation, but before a magistrate judge rather than a district judge. If all parties consent, the magistrate judge can preside over a case up to and including trial and judgment. *See* 28 U.S.C. § 636(c); Fed. R. Civ. P. 73. Alternatively, the district judge can refer certain pretrial motions to magistrate judges for decision or for a report and recommendation. 28 U.S.C. § 636(b). Magistrate judges generally have lighter, more predictable dockets, and thus can move more quickly. But speed is not everything. Before consenting to a magistrate judge, carefully consider whether doing so could change your client's likelihood of success.

Conclusion

If your cases are taking a long time to resolve, you are not alone. Fast is not always an option. But slow and steady can still win your case. If you push your cases forward, take advantage of court procedures, and keep in mind alternatives for time-sensitive matters, your cases might get there just a bit sooner.