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- Where there is consent among the parties to vary a timetable or postpone mediation, for example, case management masters and judges should give such consent deference. While it is important for the court to ensure that the parties' request is reasonable and in keeping with case management principles, dogged adherence to the limits and obligations imposed by Rule 77 simply delays proceedings and encumbers the court and court staff with more obligations.

Finally, for case management to be successful, those involved in creating the system, administrating the system, and working within the system must recognize that each case is unique and that what has worked for some parties will not work for others. The case management system must be flexible. Counsel and their clients must be allowed to turn to case management as a tool to be used as needed to assist in running their actions in an efficient and cost-effective manner. Until some of these issues have been appropriately dealt with, key aspects of case management will continue to be a source of frustration for responsible counsel and a source of joy for the delay artists, of whom there are an unfortunate number.

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Case management procedure provides a positive contribution to the administration of justice. The process has substantially reduced the backlog in our judicial system, has aided in settlement via mandatory mediation and provides a forum for litigators to push their case forward. Reports and evaluations prepared in recent years indicate that, statistically, civil case management has helped our judicial system. However, despite these positive attributes litigators remain critical. The three main areas of complaint are: (1) the costs and pace of litigation, (2) legal pre-determinations, and (3) the timing and quality of mandatory mediations.

Cost and Pace of Litigation

Not all cases call for hands-on management and, for that matter, not all litigants want management. Cases not requiring management are

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those in which each advocate is making an effort to push forward the litigation. In such a case, if counsel agree to adjourn a motion for a third time, they should not have to convince a master. This bureaucratic superfluousness adds nothing but costs to the process.

Another problem is the resultant slow pace of litigation. Waiting for a master's motion to be heard can now take three to four months. While the reasons for this delay are not completely clear, it appears to be due in part to the limited number of masters. The retirement and expected retirement of masters has necessitated the appointment of additional masters. The Ontario Bar Association has requested the appointment of three additional masters (two for traditional civil and case management matters and one for construction lien matters).[1] Whether new appointments will help remains to be seen.

Further, the requirement to constantly seek court approval has increased the number of interim proceedings and has become a frustrating component of the process. In a recent report of the Case Management Implementation Review Committee,[2] adjudicators and court staff expressed concern over the micromanagement of timelines, administrative delays and the sheer volume of work which is a by-product of the management process. The report recognizes that timely access to justice is a necessary requirement for case management to succeed. Presently, a number of subcommittees have been charged with the task of making recommendations and suggesting initiatives to reduce the delay. We can only hope that the results will justify the efforts.

Legal Pre-Determinations

One of the most espoused reasons for case management is that a master or judge oversees the case until trial and therefore is familiar with the facts and the players and can stamp on inappropriate tactics. A hazard of this scenario, however, is the possibility of judicial pre-determination. The complaint is that one adjudicator is given too much control, thereby cultivating an environment in which decisions are made before submissions are heard. Fairness is compromised for the sake of expediency. As a result, the very characteristic that makes for expediency may also adversely affect the quality of justice rendered. This concern can only be addressed by an ongoing effort of masters and judges to be conscious of this potential hazard.

However, litigators are also guilty of legal pre-determination. The attitude some lawyers have towards case management hinders its

1. Orlando V. Da Silva, "Additional Case Management Masters Needed", Civil Litigation Section Ontario Bar Association, Volume 12, No. 4.
2. *Report of the Case Management Implementation Committee* (Superior Court of Justice and the Ministry of the Attorney General, February 2004).

effectiveness. Many lawyers view case management as tedious and mechanical. Instead of lawyers who have carriage of the file, juniors appear at pre-trial conferences. This attitude devalues the usefulness of the process and increases the delay in and the expense of the litigation unnecessarily.

Mandatory Mediation

Litigators complain that the mediation stage in case management occurs prematurely. Specifically, complaints are that there is often insufficient information to conduct an effective mediation. Mediation within 90 days after the first defence has been filed is not suitable in some cases. For example, in personal injury actions, plaintiffs commence actions for injuries sustained and for projected future damages. Future damages can not be assessed in many cases at an early stage in the litigation.

Another aspect of early mediation is that the parties may simply not be ready to settle. Mentally, they have not undergone the reality of the legal system. They have not yet spent funds or had sufficient contact with the adversarial system to realize the gravity of the process. Mediation at a later date would alleviate this problem and allow for document discovery and examination for discovery. More information for settlement discussions would be available. Parties would have grasped the realities of the legal process. All of these factors would make mandatory mediation more effective. On the other hand, a consequence of extending the time until mediation would be that the cost benefit of an early mediation is lost. A solution to this problem is a more flexible timetable for mediations.

The Case Management Implementation Review Committee is well aware of these concerns and steps are being taken to make mediation more effective. Despite these shortcomings, in Toronto, 38% of mediated cases are disposed of within the first six months of filing the first defence.[3] This statistic supports the notion that since the introduction of mandatory mediation in 1999, mandatory mediation has been effective.

Conclusion

In order for case management to be effective, there needs to be a flexibility that allows counsel to manage their cases where there is no need for court intervention. This flexibility may be more easily cited than achieved. But whatever procedures are adopted, there must be masters and judges available on a timely basis to hear motions. Delay measured in months is not acceptable.

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3. *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Executive Summary and Recommendations* (March 12, 2001), Figure 1.3.