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Excessive Delay in the Courts: Toward a Continuance Policy Relating to Counsel and Parties

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Delay in the administration of justice is a common cause of complaint . . . A judge, without being arbitrary or forcing cases unreasonably . . . may well endeavor . . . to enforce due diligence in the dispatch of business before the court.[1]

THE MAXIM "JUSTICE DELAYED IS JUSTICE DENIED" is an expression which is becoming all too meaningful in our courts today. Many of the large metropolitan courts in this country are being strangled by the ever-increasing backlog of cases.

A plethora of reasons is responsible for this backlog. One reason was revealed in a study of the court system of the District of Columbia:

> The court of general sessions and the district court both have rules which are designed to control and limit continuances. Nevertheless, the granting of continuances appears to be routine. For example, our review indicated that almost 50 percent of the major misdemeanor cases in the court of general sessions were continued at least once after a trial date had been set. The rate for civil cases was even higher; a sample of daily calendars for 1967 and 1968 showed that continuance on the jury trial date ranged from 35 to 70 percent while the nonjury range was 35 to 60 percent. In the district court, continuance rates, while lower, were not significantly better. Of the civil cases pretried in January, 1969, more than one-third were subsequently continued before trial. On the criminal side, in the fall of 1968, approximately 26 percent of the cases alerted for trial each week were formally continued and numerous other cases were trailed day to day waiting to go to trial.[2]

Such statistics obviously point to a situation in which much time and expense is wasted—time which could be spent at trial. While there appears to be no adequate study of the number of trial days lost each year through liberal continuance policies, the statistics cited above indicate that the figure is considerable.

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[1] ABA CANONS OF JUDICIAL ETHICS, No. 13.

[2] REPORT OF THE COMM. ON THE ADMIN. OF JUSTICE TO THE COMM. ON THE DISTRICT OF COLUMBIA, 91ST CONG., 2D SESS., COURT MANAGEMENT STUDY (Comm. Print 1970).

In most court systems, continuance policies are either non-existent or couched in vague terms such as "good cause shown."[3] It is the aim of this study to formulate guidelines for a sound continuance policy which will serve to speed the administration of justice without interfering with the high standard of judicial fairness necessary to proper adjudication.

Court Powers to Deal With the Problem

The authority to develop a continuance policy is vested in the courts since they have the

> . . . inherent power to establish rules for regulating their proceedings and for facilitating the administration of justice. . . . This power exists independently of statute, and its exercise is especially to be commended at this time when the constantly increasing volume of litigation necessitates maximum efficiency in expediting courtwork lest justice be delayed and thereby virtually denied.[4]

Indeed, the courts have the affirmative duty to provide each litigant an opportunity to have his case adjudicated speedily.[5]

While it is true that the statutes and court rules of many jurisdictions delineate specific grounds upon which motions may be brought, all of these statutes and rules, in the final analysis, leave the decision on the request to the sound discretion of the trial court.[6]

A court which grants motions on a routine basis abdicates its responsibility by, in effect, permitting the trial bar to regulate the flow of cases. The trial bar, in general, tends to be concerned only with the status of individual cases and not with the entire backlog of litigation, as is the court.[7] This is not to suggest that the trial bar does not have some responsibility for the flow of cases; as officers of the court, they should request continuances only when absolutely necessary.

The Continuance Rule: "Inherent Power of the Courts"

The inherent power of courts to regulate their own procedure has spawned the continuance rule. The well-established rule of the common law, which applies to both civil and criminal cases, states

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[3] *See,* the New Rules of the Court of Common Pleas, Cuyahoga County, Ohio, (available from Clerk of Common Pleas Court, Cuyahoga County, Cleveland, Ohio 44113). These rules are believed to be typical. They contain no reference to a continuance policy.

[4] Meyer v. Brinsky, 129 Ohio St. 371, 195 N.E. 702 (1935); *see* U.S. Sup. Ct. R. 50; an example of rules promulgated under this rule is seen in the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (1971).

[5] ABA CANONS OF JUDICIAL ETHICS, No. 18.

[6] ARIZ. CIV. R. 42(c); FLA. CRIM. R. 1.190(g)(2); HAWAII REV. STAT. ch. 19 § 1909 (1968); ILL. PRAC. ACT & R., SUP. CT. R. 2B 1 (h); MICH. COMP. LAWS ANN. § 768.2 (1968); MINN. STAT. ANN. § 631.02 (1947); MISS. CODE ANN. § 1520 (1942); MO. STAT. ANN. ch. 545 § 710 (Vernon's 1944); MO. SUP. CT. R. 25.08 (a). One writer has even suggested that a statute cannot grant an absolute right to a continuance. Garner, *Continuances in Akransas,* 4 ARK. L.R. 449 (1950).

[7] COURT MANAGEMENT STUDY, *supra,* note 2 at 66.

that the issuance of a continuance is within the sound discretion of the trial court, and the ruling of the trial court will not be disturbed on appeal except for an abuse of discretion.[8] Many courts have restated the rule to the effect that a continuance shall be granted where the ends of justice require it,[9] or where the refusal of such a request would substantially prejudice the rights of the movant.[10] Nor may a continuance be refused to deny a litigant his day in court.[11] Some courts state that continuances should be granted liberally,[12] while other jurisdictions are more restrictive.[13]

The granting or refusing of a continuance depends upon the particular facts of the situation, and the grounds upon which a motion may be predicated are limited only by the ingenuity of the parties involved.[14] Where a court has no guidelines to follow, the inevitable result is a mass of case law leading in all directions and allowing little uniformity among or within jurisdictions.

Limitations on the Inherent Power of Courts

Generally, the only limitation on the inherent power of courts to grant continuances is the abuse of discretion rule invoked by appellate courts on review.

> Although there are many grounds, statutory and otherwise, upon which a continuance may be sought, an analysis of the decisions discloses that in most of the cases in which the requested relief has been denied, reviewing courts have been unable to find an abuse of discretion under the particular circumstances and accordingly have refused to reverse the judgment of the trial court for its refusal to grant a continuance.[15]

The power of trial courts to issue a continuance is thus extremely broad, and appellate courts in most instances are reluctant to interfere with the trial court's ruling.

Case law is limited only to those instances where some question arose concerning the trial court's discretion. Other than the

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[8] Ungar v. Sarafite, 376 U.S. 575 (1964); Avery v. Alabama, 308 U.S. 444 (1940); Isaacs v. United States, 159 U.S. 487 (1895); *see* Akron v. Public Util. Comm'n, 5 Ohio St.2d 237, 215 N.E.2d 366 (1966), *cert denied* 385 U.S. 828 (1966); State *ex rel* Buck v. McCabe, 140 Ohio St. 535, 45 N.E.2d 763 (1942); Norton v. Norton, 111 Ohio St. 262, 145 N.E. 253 (1924); Hoff v. Fisher, 26 Ohio St. 7 (1874); Loeffner v. State, 10 Ohio St. 598 (1857). Note that the principle is equally well established in every other jurisdiction, and is often cited without authority. These cases are selected as representative only.

[9] Brown v. Air Pollution Control Board, 27 Ill.2d 450, 227 N.E.2d 754 (1967); Orsi v. Young, 112 Ill. App.2d 360, 251 N.E.2d 309 (1969); Kehrer v. Kehrer, 28 Ill. App.2d 296, 171 N.E.2d 239 (1960).

[10] Burford v. Stuart, 422 P.2d 428 (S. Ct. Okla. 1967).

[11] Lindsey v. Escude, 189 So.2d 465 (La. Ct. App. 1966).

[12] Dean v. Carter, 131 Mont. 304, 309 P.2d 1032 (1957).

[13] Cleeland v. Cleeland, 249 N.C. 16, 105 S.E.2d 114 (1958); *see* Jankelson v. Cisel, 3 Wash. App. 137, 473 P.2d 202 (1970).

[14] McCasky, *The Matter of Continuances,* 18 OHIO ST. L.J. 106 (1957).

[15] 3 OHIO JUR. 2d *Appellate Review* § 756 (1953); COURT MANAGEMENT STUDY, *supra,* note 2 at 66.

District of Columbia study, no reliable data is available to determine the percentage of continuance requests granted as a matter of course. Nevertheless, it may be fairly stated that most continuance requests are routinely granted,[16] and that only where such requests are arbitrarily or capriciously denied will an appeal be taken and the case reported. Thus, the abuse of discretion rule may be an ineffective curb on liberal continuance policies.

While the abuse of discretion rule forms one limitation on the issuance of continuances, procedural due process forms another. A complete discussion of the litigant's right to a fair and impartial opportunity to be heard is beyond the scope of this paper. However, it is appropriate to comment on this topic briefly, for it is frequently mentioned as a consideration in the granting or refusing of a motion for a continuance, and is often an underlying consideration in other cases.[17]

Two aspects of procedural due process are frequently mentioned in cases, and will be briefly discussed. First is the right in civil cases to notification of the suit. In criminal cases this is the right to notification of the charges against the accused. Second, and as a corollary to this rule, is the opportunity to be heard. This applies in both civil and criminal cases.

In civil actions, one of the essential elements of procedural due process is the right to notification.[18] This is a right of creditors, for example, to notification when the bankruptcy court acquires original jurisdiction;[19] or to an opposing party when a substantial amendment to any pleading is filed.[20] Such notice must be reasonable and adequate for the purpose and the nature of the proceedings, and suitable to the character of the rights which may be affected by it.[21] In civil cases, notification of the suit must be given a sufficient length of time prior to the hearing in order to afford the other party the opportunity to be present.[22]

In criminal cases, the defendant is entitled to an indictment or information which states the specific charges against him.[23] "No principle of procedural due process is more clearly established than that of notice of the specific charge . . ."[24] All that is constitutionally required of such an indictment or information is that it be

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[16] Jankelson v. Cisel, 3 Wash. App. 137, 473 P.2d 202 (1970).

[17] *See* Ungar v. Sarafite, 376 U.S. 575 (1964); Avery v. Alabama, 308 U.S. 444 (1940); Isaacs v. United States, 159 U.S. 487 (1895).

[18] Anderson Nat'l. Bank v. Luckett, 321 U.S. 233 (1944).

[19] Hanover Nat'l. Bank v. Moyses, 186 U.S. 181 (1902).

[20] Laing v. Rigney, 160 U.S. 531 (1896).

[21] Link v. Wabash R.R., 370 U.S. 626 (1962); *see* Dohany v. Rogers, 281 U.S. 362, 369 (1930); Roller v. Holly, 176 U.S. 398, 409 (1900).

[22] *Id.*

[23] Cole v. Arkansas, 333 U.S. 196 (1948).

[24] *Id.* at 201.

valid on its face and specifically state the charges.[25] Such a process effectively informs the accused of the charges against him.

The second element of procedural due process affecting continuance policy is the right to be heard. In civil cases, this is construed as a right to an *opportunity* to be heard whenever it is necessary for the protection of the parties.[26] This is not an absolute right. Reasonable limitations, fairly imposed to expedite justice, and not prejudicial to the rights of the parties, are not only tolerated, but demanded by due process.[27] Unnecessary delay may result in loss of this right.[28]

Similar principles apply in criminal cases. The filing of an information or an indictment from the grand jury is all that is necessary under clearly established principles of procedural due process to grant the accused ". . . a *chance* to be heard in a trial of the issues raised by the charge, *if desired* . . ."[29] (emphasis added). As demonstrated by the court in the *Cole* case, this is a right which may be knowingly and intelligently waived, or which may be lost through unnecessary delay. The right also impliedly includes a reasonable opportunity to prepare.[30]

Procedural due process also provides protection against arbitrary action by the trial court.[31] Such a determination is necessarily dependent upon the facts in each case. In *Powell v. Alabama,* the court held that the trial court's failure to give the defendant reasonable time and opportunity to secure counsel violated due process.[32]

Grounds for Continuances

Because of the many reasons for which a continuance may be requested, it is apparent that no one general rule can or should be formulated to cover the exigencies of every situation. At best, recommendations toward a continuance policy can only be based on some of the more frequent reasons for requested continuances. Accordingly, the grounds which will be discussed are limited to those which relate to attorneys and to parties.

Absence of Counsel

Withdrawal or Discharge of Counsel

Civil Cases

One of the frequent grounds upon which a motion for a continuance is predicated is that of withdrawal or discharge of counsel.

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[25] *Id.; see also* Costello v. United States, 350 U.S. 359 (1956), *rehearing denied,* 351 U.S. 904 (1956).
[26] Turpin v. Lemon, 187 U.S. 51, 58 (1902).
[27] State *ex rel* Buck v. McCabe, 140 Ohio St. 535, 45 N.E.2d 763 (1942).
[28] *See* Cole v. Arkansas, 333 U.S. 196, 201 (1948).
[29] *Id.*
[30] DeMeerleer v. Michigan, 329 U.S. 663 (1947).
[31] Washington *ex rel* Oregon R.R. & Navig. Co. v. Fairchild, 224 U.S. 510 (1912); *see* Reynolds v. Cochran, 365 U.S. 525 (1961).
[32] Powell v. Alabama, 287 U.S. 45 (1932).

In civil cases, it has been stated that this does not give the litigant an absolute right to a continuance.[33] To obtain a continuance as a matter of right under such circumstances would result in unnecessary delay, since a litigant desiring delay would be free to discharge his attorney at any stage of the proceedings.[34] The overruling of a motion in such circumstances does not deny the litigant his day in court, nor does it violate the procedural due process right to counsel.[35]

Many factors are weighed by the courts when considering a request for a continuance on the basis of withdrawal or discharge of counsel. Paramount among the factors considered in these cases, as in all requests for a continuance, is the element of *good faith.* Counsel should never bring a motion for a continuance purely as a delaying tactic, and if he does, the court should deny it. Another factor to be considered by the court is the length of time available to the moving party between the date of counsel's withdrawal or discharge, and the trial, to enable movant to obtain new counsel and to properly prepare the case without delay. Other factors to be considered include adequate notice of the trial date and availability of associate counsel in lieu of chief counsel.

The first requirement is that of good faith. The right to be represented by counsel in a civil case contemplates the allowance of a reasonable opportunity to obtain counsel.[36] However, if a litigant does not exercise that right, or chooses to exercise it in such a way that it will retard the administration of justice, he may be forced to proceed to trial without counsel.[37] The clear import of such holdings is that an element of good faith must always be present when requesting a continuance on the grounds of withdrawal or discharge of counsel. Thus, in a case in which a party dismissed his attorney just prior to the trial because of dissatisfaction with him, and it appeared that the case had been pending for several years, the motion was denied for lack of good faith.[38] Similarly, in a Minnesota case in which the attorney was discharged under suspicious circumstances during the course of the trial, the motion was also properly denied.[39]

The time at which the attorney withdraws is also a determinative factor. For example, where an attorney withdrew in April and the case did not come to trial until September, the court in *Roberts v. McDaniel*[40] denied the motion, stating that

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[33] *In re* Dargie's Estate, 33 Cal. App.2d 148, 91 P.2d 126 (1939).

[34] Grunewald v. Missouri Pacific R.R., 331 F.2d 983 (8th Cir. 1964); Berger v. Mantle, 18 Cal. App.2d 245, 63 P.2d 335 (1936); Brunson v. Hamilton Ridge Lumber Corp., 122 S.C. 436, 115 S.E. 624 (1932); Peterson v. Crockett, 158 Wash. 631, 291 P. 721 (1930).

[35] *In re* Dargie's Estate, 33 Cal. App.2d 148, 91 P.2d 126 (1939).

[36] Wykoff v. Winisky, 9 Mich. App. 662, 158 N.W.2d 55 (1968).

[37] *Id.*

[38] National Am. Banks v. Bankers Int'l Ins. Co., 386 F.2d 216 (3rd Cir. 1967).

[39] Kothe v. Tysdale, 233 Minn. 163, 46 N.W.2d 233 (1951); *see* Benson v. Benson, 66 Nev. 74, 204 P.2d 316 (1949), where the court held that it was the defendant's fault that he was without counsel.

[40] Roberts v. McDaniel, 22 Ill. App.2d 485, 161 N.E.2d 47 (1959).

> . . . giving the party the right to select counsel of his own choice emphasizes a responsibility upon him to select counsel who will diligently represent him and who will prepare for trial without unnecessary delay.[41]

A continuance has also been denied where attorneys withdrew at various times prior to trial: three weeks,[42] two weeks (for non-payment of fees),[43] nine days,[44] and six days.[45] In all of these cases, the court found in denying the motion that there was adequate time to secure other representation.

Denial has even been upheld in a case where the party diligently attempted to obtain new counsel but failed to do so. In *Maynard v. Bolers*[46] counsel withdrew before notice of the trial date and appellant subsequently contacted eight firms, all of which refused to represent him. He finally obtained counsel, but only after the trial date had been set. The attorney agreed to represent him only if a continuance could be secured. The court, in denying the motion, stated:

> Where a party has had actual knowledge that his case is set for trial for a certain time and appears at that time, he is not entitled to a continuance in the absence of a showing that he has not had such knowledge long enough to enable him to properly prepare . . . the fact that eight attorneys had refused to represent him is not grounds for a continuance at the trial.[47]

It is frequently stated in these cases that failure to employ counsel until just prior to trial is insufficient grounds,[48] since the party has had ample notice of the time of the trial.[49] Where there are two attorneys and one withdraws, and the motion requests additional time for the substitute counsel to prepare, courts have held that the party has already *had* adequate time.[50]

In *Evans v. Scottsdale Plumbing Co.*,[51] the court specified in its order that an attorney would not be allowed to withdraw until his client had executed a stipulation stating that such withdrawal would not delay the trial. Subsequent to counsel's withdrawal, when a conuance was requested to obtain new representation, the motion was denied on the basis of the stipulation. Such a procedure may serve as a useful example for other courts when counsel wishes to withdraw or is discharged.

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[41] *Id.* at 490, 161 N.E.2d at 50.
[42] Houser v. Frank, 186 Kan. 455, 350 P.2d 801 (1960).
[43] Harms v. Simkin, 322 S.W.2d 930 (St. Louis Ct. App. 1959).
[44] Slaughter v. Zimman, 105 Cal. App.2d 623, 234 P.2d 94 (1951).
[45] Stern Equip. Co. v. Portell, 116 A.2d 601 (D.C. Mun. Ct. App. 1955).
[46] Maynard v. Bolers, 99 Cal. App.2d 805, 222 P.2d 685 (1950).
[47] *Id.* at 686.
[48] Miller v. Grier S. Johnson, Inc., 191 Va. 768, 62 S.E.2d 870 (1951).
[49] McFaddin v. Oakwood Realty Co., 139 S.W.2d 636 (Tex. Civ. App. 1940).
[50] Luse v. Waco Commun. School Dist., 258 Iowa 1087, 141 N.W.2d 607 (1966).
[51] Evans v. Scottsdale Plbg. Co., 10 Ariz. App. 184, 457 P.2d 724 (1969) [hereinafter cited as *Evans*].

Only where the trial court has clearly *abused its discretion* will a denial of a continuance be reversed. An analysis of the cases shows that the denial of a continuance by the trial court where counsel has withdrawn or has been discharged has been sustained on appeal in approximately three of every four cases.[52] However, where the refusal of the trial court is reversed, the general reason cited is that representation by counsel is a basic right and the trial court should allow a reasonable time for preparation.[53] An example of this rule is seen in a Texas case where an attorney withdrew on the day before trial, and thirty minutes prior to the trial new counsel was obtained. On appeal, the trial court's refusal to grant the continuance was reversed.[54]

In *Lowe v. Arlington*,[55] the attorney withdrew seventeen hours prior to trial and the court, in reversing the trial court's refusal to continue, stated that:

> . . . a fundamental element of due process is adequate and reasonable notice appropriate to the nature of the hearing. Such notice involves a reasonable time to prepare.[56]

However, this reasoning has been rejected by the same courts, where substitute counsel was involved,[57] (see the sub-section on *Docket Conflicts, infra*). To justify reversal, the courts require that it be shown that these continuances were not requested for purposes of delay, and that the withdrawal or discharge of counsel was not collusive to obtain delay.[58]

Reversal of the trial court's refusal to grant continuances seldom occurs. As pointed out, the general rule is that the decision of the trial court to deny the continuance will not be disturbed absent a showing of abuse of discretion. Where a motion which has been denied by the trial court is reversed on appeal, it is usually because the trial court permitted the attorney to withdraw.

Perhaps the best rule which can be formulated for the withdrawal or discharge of counsel is suggested by the *Evans* case, *supra*. Such a rule would permit counsel to withdraw or permit a party to discharge counsel only upon execution of a stipulation to the effect that the case will not be delayed. Once the stipulation is executed,

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[52] 48 A.L.R.2d 1155, 1159 (1956).

[53] Griffin v. Russell, 161 Ky. 471, 170 S.W. 1192 (1914); Fidelity-Phoenix Fire Ins. Co. v. Oliver, 25 Tenn. App. 114, 152 S.W.2d 254 (1914).

[54] Leija v. Concha, 39 S.W.2d 948 (Tex. Civ. App. 1931); *accord,* Smith v. Bryant, 264 N.C. 208, 141 S.E.2d 303 (1965) (Attorney withdrew for non-payment of fees).

[55] Lowe v. Arlington, 453 S.W.2d 379 (Tex. Civ. App. 1970); *accord,* Finch v. Walberg Dredging Co., 76 Idaho 246, 281 P.2d 136 (1953); Stefanov v. Ceips, 395 S.W.2d 663 (Tex. Civ. App. 1965); *see also,* 48 A.L.R. 2d 1150 (1956).

[56] Lowe v. Arlington, 453 S.W.2d 379, 382 (Tex. Civ. App. 1970).

[57] Slaughter v. Zimman, 105 Cal. App.2d 623, 234 P.2d 94 (1951); Stern Equipment Co. v. Portell, 116 A.2d 601 (D.C. Mun. Ct. App. 1955); Houser v. Frank, 186 Kan. 455, 350 P.2d 801 (1960); Harms v. Simkin, 322 S.W.2d 930 (St. Louis Ct. App. 1959).

[58] Morimoto v. State, 47 Ariz. 314, 55 P.2d 806 (1936).

no further delay will be allowed on the grounds that the party cannot obtain counsel, provided the party has had adequate notification of the trial date.

Criminal

In criminal cases the sixth amendment right to counsel is much more zealously guarded and a defendant's lack of representation for any reason may warrant automatic reversal.[59] However, the decision is still a function of the trial court's discretion, and the court still scrutinizes the factors which lead to the request. The courts look to the conduct of the defendant as it contributes to delay, and to the diligence which the defendant exercises in attempting to replace counsel, in order to determine his good faith.

It is clear that a defendant may not attempt to delay his trial date by discharging his attorney shortly before trial and then requesting a continuance.[60] Thus, in a case where the defendant had discharged his court-appointed attorney and had obtained new counsel on the eve of trial, a continuance for time to prepare was held properly denied.[61] Where the attorney who had been on the case for five months was discharged two weeks prior to the trial, the motion was also held to be properly denied.[62]

The courts frequently state in criminal cases that if the defendant is at fault he cannot complain if he is without adequate representation.[63] This rule has been applied in cases where the attorney attempted to withdraw because of non-payment of fees where he had taken the case on the express stipulation that he be paid in advance,[64] and where counsel withdrew seven days prior to trial with no reason given.[65]

Time of withdrawal or discharge is a factor in cases in which the defendant fails to act diligently in replacing counsel. In this situation, the court will refuse to grant a continuance. Lack of diligence is interpreted as willful delay. This rule has been invoked in denying a continuance where the defendant had three weeks notice,[66] seven days notice,[67] and six days notice[68] to obtain new counsel. In

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[59] Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

[60] Holt v. United States, 267 F.2d 497 (8th Cir. 1959); *cert. denied*, 365 U.S. 838 (1961).

[61] Mixon v. Commonwealth, 282 Ky. 25, 137 S.W.2d 710 (1940).

[62] Harper v. United States, 143 F.2d 795 (8th Cir. 1944).

[63] Stirling v. State, 38 Ariz. 120, 297 P. 871 (1931).

[64] People v. Collins, 242 Cal. App.2d 626, 51 Cal. Rptr. 604 (1966).

[65] Gathright v. State, 245 Ark. 840, 435 S.W.2d 433 (1968).

[66] United States v. Redwitz, 328 F.2d 395 (6th Cir. 1964); *accord*, United States v. Moore, 419 F.2d 810 (6th Cir. 1969) (one week); Ebsen v. State, 249 Ark. 477, 459 S.W.2d 548 (1971) (six months to prepare and party obtained counsel ten days prior to trial); State v. Dickson, 198 Kan. 219, 424 P.2d 274 (1967) (obtained counsel two days prior to trial); State v. Adamson, 197 Kan. 468, 419 P.2d 860 (1966) (ten days to prepare for trial).

[67] Winegar v. State, 92 Okla. Crim. 139, 222 P.2d 170 (1950).

[68] State v. Wilson, 139 Wash. 191, 246 P. 289 (1926).

none of these cases did the defendant obtain new counsel until shortly before trial. These decisions are based on the theory that the defendant had reasonable time to obtain new counsel, and that his lack of diligence in obtaining new counsel was the principal cause of the delay. In the absence of a showing of substantial prejudice to defendant, no continuance will be granted.[69]

In certain situations, the appellate courts have found an abuse discretion on the part of the trial courts, amounting to reversible error. In *People v. Robinson*,[70] two defendants were represented by a single attorney, and two weeks prior to trial one defendant demanded another attorney after learning of a possible conflict of interest. The other defendant, in jail, indigent, and unable to retain counsel, did not know of the public defender's office. The only time he could communicate with the court was at the start of the trial. The refusal of a continuance to obtain representation was held tantamount to a denial of the right to counsel, and the conviction was reversed. Similarly, in *Rice v. State*,[71] where the attorney withdrew on the eve of trial and a continuance to obtain new counsel was refused, the appellate court reversed on the grounds that the trial court had permitted the attorney to withdraw and that it was thus an abuse of discretion not to allow the defendant time to seek adequate counsel. Reversal was also warranted where defense counsel failed to appear,[72] and where counsel absconded with the defendant's funds.[73] In these cases the defendant was found not to be at fault.

In habeas corpus proceedings, the District Court for the Northern District of New York has held that the defendant had been denied his Sixth Amendment right to counsel where defense counsel withdrew at the trial because of friction with the judge, and the defendant was unable to afford an attorney. A judge's offer of the services of a legal aid attorney with only one hour to prepare a multiple indictment case (an offer the defendant refused), and subsequent refusal to grant a continuance, was held an abuse of discretion.[74] It was also held a violation of due process to refuse a continuance where defendant's counsel withdrew at the trial and a court-appointed attorney was given thirty minutes to prepare; in this case, it was later demonstrated that had the defendant had enough time, he could have produced a witness who would have vindicated him.[75]

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[69] Nash v. State, 248 Ark. 323, 451 S.W.2d 869 (1970).

[70] People v. Robinson, 42 Cal.2d 741, 269 P.2d 6 (1954).

[71] Rice v. State, 220 Ind. 523, 44 N.E.2d 829 (1942).

[72] Chenault v. Commonwealth, 282 Ky. 453, 138 S.W.2d 969 (1940).

[73] Blakeney v. State, 228 Miss. 162, 87 So.2d 472 (1956).

[74] United States *ex rel* Davis v. McMann, 252 F. Supp. 539 (N.D.N.Y. 1966), *cert. denied*, 390 U.S. 958 (1967).

[75] Merritt v. State, 219 A.2d 258 (Del. 1966); *see also* People v. Simpson, 31 Cal. App. 2d 267, 88 P.2d 175 (1939); Cash v. Culver, 120 So.2d 590 (Fla. 1960); People v. Ritchie, 66 Ill. App.2d 417, 213 N.E.2d 306 (1966); Roberts v. Commonwealth, 339 S.W.2d 640 (Ky. 1960).

In all of the cases where an abuse of discretion was found, the defendant was also found not to be at fault, and the continuance was found not to have been for the purpose of delay.

As in civil cases, the use of the stipulation for withdrawal or discharge of counsel is recommended. Under this system, if counsel is discharged or withdraws, a stipulation should be executed which states that no continuance will be subsequently sought in order to obtain counsel. Particularly in criminal cases, the court should not permit withdrawal or discharge, even by stipulation, within two weeks of the trial date. Many of the cases in which denial of continuance to obtain counsel was held an abuse turned on the point that the court had permitted the attorney to withdraw shortly prior to trial.

Docket Conflicts

Civil

Conflicts of docketing often cause one of the attorneys involved in a case to seek a continuance on the basis that he is presently engaged in another court. In considering a motion on this basis, courts often refer to the right of a party to have a particular attorney, the rights of the other party, sufficient notice of the trial date, and the presence of associate or substitute counsel.

Generally, the retention of a lawyer who is required to be in another court does not give the movant any right to a continuance. Counsel is responsible for knowing when his case will come to trial, and if he cannot be in attendance on that day, he should have other counsel available to try the case.[76] Thus, in civil cases, there is no absolute right to a particular attorney—especially where the continuance is requested for purposes of delay. Trial date conflicts will be considered adequate grounds *only* where the need for particular counsel is demonstrated:

> There may be circumstances under which a trial court would be justified in delaying a trial by reason of conflicting trial engagements of counsel, but *it would require a showing of a necessity for the presence of a particular counsel . . . before this court would be justified in finding that the refusal to postpone constituted an abuse of discretion.* If a fixed rule were adopted that, whenever counsel had conflicting trial engagements, a continuance should be granted, it would render possible such delays as would interfere with the administration of justice. The disposition of the vast amount of litigation pressed upon the attention of our courts cannot be subject to such contingencies . . .[77] (emphasis added)

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[76] Gregoire v. National Bank, 413 P.2d 27 (Alas. 1966); *cert. denied,* 385 U.S. 923 (1966); Northwestern Benev. & Mut. Aid Ass'n v. Prim, 19 Ill. App. 224 (1885), *aff'd* 124 Ill. 100, 16 N.E. 98 (1888); Mann v. Terre Haute, 240 Ind. 245, 163 N.E.2d 577 (1960).

[77] Heinz v. Atlantic Stages, 113 N.J.L. 321, 174 A. 682 (1934); *accord,* Haight v. Green, 19 Cal. 113 (1861).

When a party has received adequate notice of the trial date, a continuance request will be denied. Where a motion was made five days prior to trial,[78] on the day of trial,[79] and even when the parties have stipulated that a continuance should be granted,[80] the motion has been denied. Some courts state that the motion will be denied where the movant knew of the trial date, presumably on the basis that the movant is at fault and cannot thereafter be heard to complain.[81] Other courts state the question in terms of the rights of the parties involved.[82] Such a view holds that the other party suffers undue expense and vexation when a continuance is granted.[83] It is only in a very unusual case that an attorney should be permitted to request a continuance for a conflict in another court.[84]

Some cases have turned upon the consideration that associate counsel was present, and that the moving party was, therefore, adequately represented and not entitled to a continuance.[85] This was the result even where the other party consented to the continuance.[86] Some courts have even stated that it is the duty of the engaged attorney to have an associate counsel ready to try the case.[87]

In certain circumstances, denial of continuance for absence of counsel due to an engagement in another court has been reversed for abuse of discretion. In many of these cases, however, the court based its decision on other circumstances, without which there might have been a contrary result. Thus, where an attorney appeared as a witness in another case,[88] and where an attorney was himself the defendant in another court,[89] it was held an abuse to deny the motion. In other cases, when a conflict resulted from a change in the time of holding court sessions by the legislature,[90] or when the case was called out of order,[91] the motion should have been granted. It has also been held an abuse to deny the motion where the attorney was

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[78] Flynn v. Fisk, 60 Cal. App. 670, 213 P. 716 (1923).

[79] Tiffin v. Cummings, 144 Cal. 612, 78 P. 23 (1904); Patton v. Evans, 92 Utah 524, 69 P.2d 969 (1937).

[80] Daugherty v. Lanning-Harris Coal & Grain Co., 218 Mo. App. 187, 265 S.W. 866 (1924).

[81] Davies v. Infragnio, 54 Ill. App.2d 299, 203 N.E.2d 725 (1964); Stallard v. Witherspoon, 306 S.W.2d 299 (Ky. App. 1957).

[82] Birmingham v. Goolsby, 227 Ala. 421, 150 So. 322 (1933).

[83] Adamek v. Plano Mfg. Co., 64 Minn. 304, 66 N.W. 981 (1896).

[84] Evansville & Ind. Ry. v. Hawkins, 111 Ind. 549, 13 N.E. 63 (1887).

[85] Hopkins v. Smothers, 114 S.C. 448, 104 S.E. 30 (1920).

[86] Moulden v. Kempff, 115 Ind. 459, 17 N.E. 906 (1888).

[87] Northwest Benev. & Mut. Aid Ass'n v. Prim, 19 Ill. App. 224 (1885).

[88] Bayers v. McPhea, 4 Colo. 204 (1878); Maistrosky v. Harvey, 133 So.2d 103 (Fla. App. 1961); Hambrick v. Stewart, 29 Ga. App. 220, 114 S.E. 723 (1922); Moulden v. Kempff, 115 Ind. 459, 17 N.E. 906 (1888); Evansville & Ind. Ry. v. Hawkins, 111 Ind. 549, 13 N.E. 63 (1887); Martin v. Rossignol, 226 Md. 363, 174 A.2d 149 (1961); Laumeier v. Laumeier, 308 Mo. 221, 271 S.W. 481 (1925); York v. Steward, 30 Mont. 363, 76 P. 755 (1904).

[89] Hill v. Clark, 51 Ga. 122 (1874).

[90] Rossett v. Gardner, 3 W.Va. 531 (1869).

[91] Watkins' Adm'r. v. Ahres & Ott Mfg. Co., 18 Ky. L. Rptr. 926, 38 S.W. 868 (1897).

engaged in the Supreme Court[92] and, generally, where there are extreme circumstances.

Criminal

Continuances should be denied when the scheduling conflict *is* the fault of the defendant. Nor is it a deprivation of due process to deny a continuance requested because counsel is enagaged in another court.[93] Some courts, in refusing to grant continuances, suggest that the schedule conflict may be the defendant's fault.[94]

Similarly, where an attorney's caseload is so heavy that he is unable to meet his trial obligations, the defendant may be penalized. The Supreme Court of Massachusetts expressed the general view in *Commonwealth v. Festo*[95] by stating:

> . . . there is congestion in the dockets of the Superior Court. No attorney can accept personal retainers for a larger number of cases than he can try when they are reached, and expect courts to continue any case for his convenience or that of his clients.[96]

Attorneys must be able to arrange their work load so as to be able to handle the case load they accept.[97]

Care must be exercised when formulating a continuance policy in the criminal area. To deny a request for a continuance in a criminal case under any circumstances, because of absence of counsel, is always subject to review as a violation of the Sixth Amendment guarantee of right to counsel.[98] The Supreme Court since *Gideon*,[99] *Escobedo*,[100] and *Miranda*,[101] has zealously guarded the criminal defendant's right to counsel.

But the Sixth Amendment does not grant a license for arbitrary interference with the judicial process:

> To hold that a defendant charged with crime has an absolute right to counsel of his own solicitation, with unlimited right to insist upon continuances of his trial, and that the court, jury, and witnesses must await the convenience of his counsel in fulfilling oher engagements, would be subversive of the prompt administration and execution of the laws —upon which depends largely their effectiveness—and subject the time and service of citizens serving the State gratuitously, as jurors and witnesses, to the wishes and interests

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92 Harde v. Purdy, 62 Misc. 232, 115 N.Y.S. 92 (Sup. Ct., App. Term 1909).

93 *Id.;* Feinberg v. People, 174 Ill. 609, 51 N.E. 798 (1898).

94 Griffin v. State, 85 Ga. 602, 69 S.E.2d 665 (1952); State v. DiBenedetto, 82 N.J.L. 168, 82 A. 521 (1912), *aff'd* 83 N.J.L. 792, 85 A. 1135 (1912); *accord,* Gilmore v. United States, 273 F.2d 79 (3rd Cir. 1959).

95 Commonwealth v. Festo, 251 Mass. 275, 146 N.E. 700 (1925).

96 *Id.,* 146 N.E. at 701.

97 Brickey v. State, 148 Ark. 595, 231 S.W. 549 (1921).

98 Tolbert v. United States, 55 A.2d 91 (D.C. Mun. Ct. App. 1947).

99 Gideon v. Wainwright, 372 U.S. 335 (1963).

100 Escobedo v. Illinois, 378 U.S. 478 (1964).

101 Miranda v. Arizona, 384 U.S. 436 (1966), *rehearing denied,* 385 U.S. 890 (1966).

> of the attorney engaged in the defense. It is too apparent for argument that the court below must, in the nature of things, have some control over such matters.[102]

To hold otherwise would subject the judicial process to unlimited delays, whenever counsel or client felt them necessary for his case. Such tactical delays are often sought by the defendant in an effort to wear down the prosecution witnesses, who often become discouraged after several fruitless trips to the courthouse where continuance after continuance is obtained by defendant's counsel. The end result is that when a case finally comes to trial, the prosecution witnesses fail to appear.[103] The defendant thus obtains vindication by default, not by justice. Such practices obviously add not only to the backlog of cases, but also to a lack of respect on the part of the public for our court system.

It is suggested that where counsel is engaged in another court, substitution should be required, unless it can be shown that there is a necessity for a particular counsel. Pre-trial conference agreements as to trial date may eliminate many of the present scheduling conflicts.

Disability or Death of Counsel

Civil

Generally, continuances requested on the grounds that an attorney's absence was due to illness should be granted where there is a showing that the disability was legitimate, that it occurred late enough in the proceedings to preclude the appearance of substitute counsel, that it is obviously not requested as a dilatory tactic, and where it is made clear that counsel would be able to return to trial work within a reasonable time.

Where an attorney appears in court and makes the motion himself, the trial court must determine from counsel's own testimony and appearance the validity of the excuse and may, if it desires, issue a continuance on its own motion.[104] In one case, where defense counsel became intoxicated at the trial, the judge adjourned the case until the following morning and ordered the defendant to obtain new counsel overnight and proceed at that time. Defendant appealed the ruling on the grounds that he lacked adequate time to obtain counsel. The ruling of the trial court was sustained, however, presumably because the defendant was at fault for retaining intemperate counsel.[105]

Continuances have been denied where associate counsel was present, on the theory that the refusal to grant the motion did not

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[102] People v. Goldenson, 76 Cal. 328, 19 P. 161 (1888).

[103] Letter from Samuel S. Herrup to the author, April 18, 1972; *see* The Appearance Control Project in the New York City Criminal Court (1971, unpublished; available from the author, c/o Cleveland State University).

[104] Hawes v. Clark, 84 Cal. 272, 24 P. 116 (1890).

[105] McAllister v. Ealy, 98 Okla. 223, 225 P. 146 (1924).

violate the party's right to counsel.[106] Continuances have also been denied where it was the chief or leading counsel who was absent,[107] even where the associate stated that he was not prepared to try the case.[108] These courts take the position that as long as the party is represented by (some) counsel, no continuance is necessary.[109]

Generally, where a continuance is predicated on grounds of illness of counsel, a certified physician's statement must be attached to the motion stating that counsel cannot physically attend trial,[110] that the illness is "sudden," and that counsel will, within a reasonable time, be able to return to trial work.[111]

In these situations, the first question which the court is likely to raise is the adequacy of notice to the defendant between the time the illness occurred and the trial date. In one case, five days notice has been held to be adequate notice to obtain new counsel, and not "sudden".[112] The second question is whether or not due diligence was exercised by defendant in obtaining new counsel.[113] In this connection, the Arkansas Supreme Court has held that a continuance was properly denied where it appeared that counsel had been ill all summer, even though a physician's statement was submitted attesting to the fact that counsel was too ill to appear in court. The motion was denied because there was no showing of suddenness, and because the party had had adequate time to obtain new representation after learning of counsel's condition.[114] A continuance was also denied in a case in which the attorney would not have been availiable for two to three months because of illness.[115] Where counsel has died, the court again looks to the question of suddenness and diligence[116] and sufficiency of notice of the trial date.

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[106] American Rubber Corp. v. Jolley, 260 Ala. 600, 72 So.2d 102 (1954); Missouri & N. Ark. R.R. v. Robinson, 188 Ark. 334, 65 S.W.2d 546 (1933); Volkering v. Allen, 96 Cal. App.2d 804, 216 P.2d 552 (1950); Commercial Lumber Co. v. Ukiah Lumber Mills, 94 Cal. App.2d 215, 210 P.2d 276 (1949); Hartford Fire Ins. Co. v. Hammond, 41 Colo. 323, 92 P. 686 (1907); Kurtzman v. Kurtzman, 339 Ill. App. 431, 90 N.E.2d 245 (1950); Forked Deer Pants Co. v. Shipley, 25 Ky. L. Rptr. 2299, 80 S.W. 476 (1904); Middaugh v. Chicago & N.W. R.R., 114 Neb. 438, 208 N.W. 139 (1950); Early-Foster Co. v. El Campo Rice Milling Co., 212 S.W. 964 (Tex. Civ. App. 1919).

[107] Missouri & N. Ark. R.R. v. Robinson, 188 Ark. 334, 65 S.W.2d 546 (1933); Middaugh v. Chicago & N.W. R.R., 114 Neb. 438, 208 N.W. 139 (1926).

[108] Commercial Lumber Co. v. Ukiah Lumber Mills, 94 Cal. App.2d 215, 210 P.2d 276 (1949); Hartford Fire Ins. Co. v. Hammond, 41 Colo. 323, 92 P. 686 (1907); Early-Foster Co. v. El Campo Rice Milling Co., 212 S.W. 964 (Tex. Civ. App. 1919).

[109] Wiedekind v. Toulumne County Water Co., 83 Cal. 198, 23 P. 311 (1890).

[110] Smith v. Daniel, 46 F.2d 740 (6th Cir. 1931), *cert. denied*, 283 U.S. 852 (1931); Davis v. Shengley, 88 Ohio App. 423, 100 N.E.2d 261 (1950); Texas Mexican Ry. v. King, 132 S.W. 966 (Tex. Civ. App. 1910).

[111] Thomas v. Toppins, 206 Cal. 18, 272 P. 1042 (1928); Matthews v. Matthews, 220 So.2d 246 (La. Ct. App. 1969).

[112] Cudd v. State, 159 Okla. 87, 14 P.2d 406 (1932).

[113] Condon v. Brockway, 157 Ill. 90, 41 N.E. 634 (1895).

[114] Reliance Life Ins. Co. v. Hardy, 144 Ark. 190, 222 S.W. 12 (1920).

[115] Jackson v. Jackson, 201 Okla. 292, 205 P.2d 297 (1949).

[116] *In re* Weswall's Estate, 11 Ariz. App. 314, 464 P.2d 634 (1970); Ostro Inc. v. Boydston Bros., 323 Ill. App. 137, 54 N.E.2d 742 (1944); Crabtree Coal Mining Co. v. Hambry's Adm'r., 28 Ky. L. Rptr. 687, 90 S.W. 226 (1906).

In summary, a continuance based on counsel's illness *should* be granted when a physician's certificate is submitted to the court which states that it would endanger counsel's health to attend court, that the illness is sudden, and that counsel will be able to return to trial work within a reasonable time. Conversely, if there is associate counsel present, the continuance should be denied unless it can be demonstrated that there is a necessity for the presence of particular counsel.

Criminal

A continuance was considered properly denied in a criminal case when the trial court judge rejected the attorney's contention that he was too ill to proceed.[117] The trial court may also refuse to grant a continuance where there is conflicting medical testimony.[118] However, where the illness is sudden and deprives the party of representation, the motion should be granted.[119]

Despite the effect of the Sixth Amendment on criminal cases, if associate counsel is present and capable of representing the defendant, a continuance may properly be denied.[120] However, where an affidavit was submitted to the court to the effect that leading counsel was ill and that junior counsel was incompetent to try the case, denial of a continuance was held an abuse.[121] Denial in such a case would have effectively left the defendant without representation.

A few courts have attempted to appoint counsel for the defendant in such situations, and on appeal this was approved where it was shown that the defendant was not thereby injured.[122] In such circumstances, if the defendant is not at fault and the motion is brought in good faith, due process demands that reasonable time be allowed substitute counsel to prepare.

It is recommended that continuances be allowed only when counsel presents a physician's certificate that the illness was sudden and when he assures the court that he will be available for trial work within a reasonable time.

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[117] United States v. Prujansky, 415 F.2d 1045 (6th Cir. 1969); Middleton v. State, 396 Ga. App. 697, 148 S.E. 304 (1929).

[118] State v. Blakeney, 164 La. 669, 114 So. 588 (1927).

[119] People v. Crovedi, 65 Cal.2d 199, 53 Cal. Rptr. 284, 417 P.2d 868 (1966); Allen v. State, 10 Ga. 85 (1851); State v. Zellers, 7 N.J.L. 220 (1824); Wyatt v. State, 410 P.2d 86 (Okla. Crim. 1965).

[120] United States v. Moore, 419 F.2d 810 (6th Cir. 1969); Morris v. United States, 7 F.2d 785 (8th Cir. 1925), *cert. denied,* 270 U.S. 640 (1925); Hopkins v. State, 52 Fla. 39, 42 So. 52 (1906); Wright v. State, 184 Ga. 62, 190 S.E. 662 (1930); Roth v. State, 70 Ga. App. 93, 27 S.E.2d 473 (1943); People v. Davis, 406 Ill. 215, 92 N.E.2d 649 (1950); Roberts v. State, 188 Ind. 713, 124 N.E. 750 (1919); Tolliver v. Commonwealth, 165 Ky. 312, 176 S.W. 1190 (1915); State v. Davis, 203 N.C. 13, 164 S.E. 737 (1932), *cert. denied,* 287 U.S. 649 (1932); State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957).

[121] Johnson v. Commonwealth, 119 S.W. 745 (Ky. App. 1909).

[122] Curry v. State, 17 Ga. App. 377, 87 S.E. 685 (1915); Reid v. State, 14 Okla. Crim. 651, 174 P. 800 (1918).

Absence of Parties

Civil

When the absence of a party is predicated as a ground for a continuance, the usual reason is illness or unavailability of the party. In this connection, the issue usually is whether or not the presence of the party is required at the trial.

In civil cases, some courts hold that the party is already present through counsel,[123] and accordingly, his presence is not necessary. To sustain the motion, then, it generally must be shown that the party is a material witness in the case.[124] Thus, if the party is the only one who knows where the necessary witnesses and information are located, the continuance should be granted.[125] In support of the motion, counsel must aver to what matters the party would testify at the trial,[126] and establish that other witnesses could not testify to the same matters.[127] If other witnesses can testify to the same material, the continuance will be denied.[128] Following this rule, it has been held that the mere allegation that a party is necessary,[129] or that the party is needed to confer with counsel, are not sufficient grounds.[130] The right of a party in a civil trial to be present is not absolute,[131] and it must appear that counsel cannot adequately proceed to trial without the presence of the party.[132]

Due diligence, however, must also be exercised to secure the attendance of the party.[133] There must be a showing that a denial would work actual prejudice to the moving party before a continuance should be granted on such grounds,[134] and due diligence must be shown.[135] If the party voluntarily absents himself, no continuance should be granted.[136]

Even in cases where the party is shown to be a material witness, an attempt must be made to obtain the testimony of the party by

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[123] Nomes v. Edsall, 18 F. Cas. 296 (No. 10290) (C.C.D.N.J. 1848).

[124] *Ex parte* Driver, 258 Ala. 233, 62 So.2d 241 (1952); Brown v. Geib, 94 Okla. 270, 221 P. 1006 (1923); Benson v. Madden, 206 Or. 427, 293 P.2d 733 (1956).

[125] Pacific Gas & Electric Co. v. Taylor, 52 Cal. App. 307, 198 P. 651 (1921).

[126] Lerner v. Bluestein, 175 S.C. 59, 178 S.E. 265 (1934).

[127] Obion County v. Houser, 9 Tenn. App. 646 (1929).

[128] Spadoni v. Maggenti, 121 Cal. App. 147, 8 P.2d 874 (1932).

[129] Merryman v. Sears, 50 Ariz. 412, 72 P.2d 943 (1937); Paulucci v. Verity, 1 Kan. App. 121, 40 P. 927 (1895).

[130] King v. McWhorter, 174 Miss. 187, 163 So. 679 (1935).

[131] Gorman v. Sabo, 210 Md. 155, 122 A.2d 475 (1956); Jennings Co. v. Dyer, 41 Okla. 468, 139 P. 250 (1914).

[132] Martin v. Nichols, 121 Ga. 506, 49 S.E. 613 (1904); Morse v. Lowe, 111 Ga. 274, 36 S.E. 688 (1900); Mosley v. Bridges, 65 Ga. App. 64, 15 S.E.2d 260 (1941); McCurry v. Cunningham, 21 Ga. App. 546, 94 S.E. 914 (1918).

[133] McGrath v. Tallent, 7 Utah 256, 26 P. 574 (1891).

[134] Hartford Fire Ins. Co. v. Etheridge, 132 S.C. 488, 129 S.E. 428 (1925); Barns v. Atlantic Coast Line R.R., 110 S.C. 259, 96 S.E. 530 (1918).

[135] Vevelstad v. Flynn, 230 F.2d 695 (9th Cir. 1956), *cert. denied*, 352 U.S. 827 (1956).

[136] Ballard v. Nye, 18 F.2d 98 (5th Cir. 1927).

other means.[137] Note, however, that this requirement is vitiated if the illness is sudden and there is no time to take a deposition.[138] If a deposition by the party is available, the continuance may still be denied.[139] In a case where a party was ill and the court granted counsel time to obtain a deposition, a later motion for a continuance to take a deposition was properly denied since it could not be demonstrated that the party was too ill to submit to the taking of the deposition.[140] In federal court, the motion was also held properly denied where the party was ill, the trial court noting that a deposition could still have been secured.[141]

Likewise, where the testimony could have been obtained by stipulation,[142] or admission,[143] the continuance was held properly denied. Some states specifically make the granting[144] of an admission grounds for refusal of a continuance in their statutes and court rules.[145] A continuance has also been held properly denied where an affidavit of the absent party had already been introduced into evidence.[146]

It thus becomes apparent that when a party who is a material witness is absent involuntarily, and his testimony cannot be obtained by deposition or other method, the continuance should be granted. If the party is voluntarily absent, or his testimony could have been obtained by other means, the continuance should not be granted.

Criminal

In criminal cases, the right of the defendant to be present at his own trial is guaranteed by the Sixth Amendment right of confrontation, and the due process clauses of the Fifth and Fourteenth Amend-

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[137] Engelstad v. Dufresne, 116 F. 582 (9th Cir. 1902).

[138] Roberts v. Sinkey, 136 Kan. 292, 15 P.2d 427 (1932).

[139] Davis v. United Fruit Co., 402 F.2d 328 (2nd Cir. 1968), *cert. denied,* 393 U.S. 1085 (1969); Gordan v. Butter, 182 Neb. 626, 156 N.W.2d 778 (1968); Merriman v. Lary, 205 S.W.2d 100 (Tex. Civ. App. 1947), *rehearing denied,* (1947); Kaiser v. Hutcheson, 112 S.W.2d 1058 (Tex. Civ. App. 1937).

[140] Roseberg v. Scott, 120 Kan. 576, 244 P. 1063 (1926).

[141] Ballard v. Nye, 18 F.2d 98 (5th Cir. 1927).

[142] Kitchens v. Hutchins, 44 Ga. 620 (1872).

[143] *See* Haflin v. United States, 223 F.2d 371 (5th Cir. 1955), *rev'd. on other grounds,* 358 U.S. 415 (1959); Brooks v. Bast, 242 Md. 350, 219 A.2d 84 (1966); Powell v. State, 39 Ala. App. 246, 100 So.2d 38, *cert. denied,* 267 Ala. 100, 100 So.2d 46 (1957); Moody v. Vickers, 79 Ohio App. 210, 72 N.E.2d 280 (1947).

[144] An admission in this matter refers to a statutory procedure which takes place as follows: When the movant requests a continuance because of an absent witness, he submits an affidavit stating to what that witness will testify; if the opposing party admits the witness would so testify the affidavit is introduced into evidence as a deposition and the continuance denied. *See* note 145 *infra.*

[145] ARK. STAT. ANN. ch. 27, § 1403 (1947); CODE OF GA. ANN. § 81-1411 (1935); IDAHO CODE ANN. § 10-109 (1948); ILL. PRAC. ACT & SUP. CT. R. 231(b); IND. STAT. ANN § 9-1401 (1971 Burns); KY. CIV. R. 43.03; LA. CODE OF CIV. P. art. 710; MISS. CODE ANN. § 2522 (1942); MO. STAT. ANN. § 510:110 (1942 Vernon); N. M. STAT. ANN. § 21-8-11 (1953); ORE. REV. STAT. § 17.050 (1971); S. D. COMP. LAWS § 15-11-9 (1967).

[146] Lewis v. Bartley, 300 F.2d 788 (7th Cir. 1962); Skinner v. Lundy, 149 F.Supp. 57 (W. D. Ky. 1957).

ments. The usual grounds for a continuance in criminal cases is illness of the defendant, and we shall confine our discussion to this point.

Generally, in order to obtain a continuance on this ground, the defendant must show by a physician's certificate that to go to trial would cause undue interference with his health; *i.e.,* that he is not physically able to attend trial. Where this showing is made, a continuance should be granted.[147] However, where the trial judge can physically observe the defendant, he may refuse to grant the motion and proceed with the trial, regardless of a physician's certificate to the contrary.[148] Thus in *State v. Storm,*[149] even though a physician stated that the defendant had a pulse of 105, a temperature of 100½ degrees, and respiration of 22, and recommended that that he stay in bed, the trial judge, after observing the defendant, refused to grant the continuance and his action was sustained by the court of appeals. Similarly, where a physician's statement contended that the defendant was suffering from a chronic epididymitis and prostatitis and was nervous and exhausted, the appellate court found no abuse in denying the continuance, since the trial judge personally observed the defendant.[150]

Even without observation of the defendant, the continuance may be denied if the facts as presented in the certificate are found insufficient. In a recent Illinois case, where the defendant had a 97 degree temperature and 100 pulse, and the physician certified that the defendant was not physically able to go to trial, the court properly refused to grant a continuance, stating that there was insufficient evidence.[151] And in a case in which a physician stated that it would endanger the defendant's life to go to trial, the motion was also held properly denied, presumably because the defendant was not even bedridden.[152]

In cases where the defendant has voluntarily incurred the disability, the continuance should be denied.[153] Voluntary disability should never be a ground for granting a continuance.

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[147] Shaneyfelt v. State, 40 Ala. App. 13, 109 So.2d 146 (1958), *aff'd,* 268 Ala. 520, 109 So.2d 149 (1958); *accord,* Reid v. State, 478 P.2d 988 (Okla. Crim. 1971).

[148] Martin v. State, 194 Ark. 711, 109 S.W.2d 676 (1937); Rowland v. State, 125 Ga. 792, 54 S.E. 694 (1906); Warren v. State, 53 Ga. App. 221, 185 S.E. 385 (1936); State v. Starr, 24 N.M. 180, 173 P.674 (1918), *appeal dismissed,* 254 U.S. 611 (1920); State v. Pierce, 175 Wash. 523, 27 P.2d 1087 (1933).

[149] 24 N. M. 180, 173 P. 674 (1918); *appeal dismissed,* 254 U.S. 611 (1920).

[150] Commonwealth v. Hanley, 337 Mass. 384, 149 N.E.2d 608 (1958), *cert. denied,* 358 U.S. 850 (1959).

[151] People v. Halfee, 354 Ill. 123, 188 N.E. 186 (1933).

[152] Fuller v. State, 40 Ala. App. 297, 115 So.2d 110 (1958), *cert. denied,* 269 Ala. 657, 115 So.2d 118 (1959); *accord,* Young v. Commonwealth, 271 Ky. 65, 111 S.W.2d 433 (1937); State v. Dean, 163 S.C. 213, 161 S.E. 449 (1931); State v. Lee, 58 S.C. 335, 36 S.E. 706 (1900); Kelly v. State, 139 Tex. Crim. 156, 138 S.W.2d 1075 (1940).

[153] Russell v. Commonwealth, 403 S.W.2d 694 (Ky. Ct. App. 1966); Bourne v. State, 103 Miss. 628, 60 So. 724 (1912).

The foregoing cases suggest that in the criminal area, a continuance should be granted for absence of a party only where the disability is involuntary, and a physician's certificate attests to the fact that to go to trial would endanger the defendant's health. Where the trial judge can personally observe the defendant, the certificate may be disregarded if the judge finds that the defendant can stand trial.

Conclusions and Recommendations

It is apparent from the foregoing discussion that no one rule could or should be formulated to cover all situations which may give rise to a motion for a continuance. Thus, several suggestions are offered to cover the situations discussed. Methods of implementing these policies are also discussed.

Counsel

In the case of withdrawal or discharge of counsel, the good faith of the moving party is of paramount importance. When counsel wishes to withdraw or is discharged from a civil suit, his client should be required to execute a stipulation to the effect that no further delays will be requested on this ground.

In criminal cases, the use of the stipulation is also recommended. However, because the right to counsel is strenuously safeguarded, it is recommended that no withdrawal or discharge be permitted within two weeks prior to the trial date. A change occurring two weeks or more before the trial would allow the defendant sufficient time to obtain other representation to prepare the case.

In the area of docket conflicts, it is recommended that adequate notice of the trial date be agreed upon by the parties at the pretrial hearing. This will allow counsel to arrange their schedules so as to eliminate conflicts.

Since there is no right to a particular attorney, except in unusual instances, it is recommended that in civil cases the matter be brought to trial regardless of conflict. Where a party is left without counsel, substitute counsel must be used, or the party should be forced to trial without counsel. Such a procedure has been instituted in the Common Pleas Court of Pittsburgh, Pennsylvania, very successfully.[154] While such sanctions appear to be harsh, they prove to be seldom invoked. Charles H. Starrett, Jr., Administrator of the Pittsburgh Court of Common Pleas, stated:

> . . . because of the effect upon a lawyer's reputation and the effect of such activity on his malpractice insurance, the trial bar has quickly learned to avoid situations which would require the court to invoke such a sanction.[155]

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[154] Letter from Silvestri Silvestri, Judge, Com. Pl. Ct., Allegheny County, to Samuel J. Roberts, Justice of the Supreme Ct. of Pa., May 1, 1972.

[155] Letter from Charles H. Starrett, Jr. to Steven J. Madson, May 25, 1972. See Budget Laundry Co. v. Munter, No. 2362 (Allegheny County Common Pleas, Pa., April, 1970).

In criminal cases, adequate notice of the trial date should help to eliminate many conflicts. However, because the right to counsel is more stringently safeguarded in criminal cases, a rule such as that recommended for civil cases is inappropriate. Where the defendant is left without representation, it is suggested that substitute counsel be appointed by the court, if possible, and that a reasonable amount of time be given for trial preparation. In order to encourage members of the trial bar to be present at trial, it is suggested that where counsel fails to appear, appropriate sanctions be imposed for contempt.

Where illness of counsel is the basis of the motion, and the attorney is before the court, it is apparent that the court should exercise its discretion. In both civil and criminal cases, if associate counsel is present, the motion should be denied.

Where counsel is not before the court in a civil action, a physician's certificate should be required. This certificate should state that the illness is one which would render it dangerous to counsel's health to attend court, that the illness was sudden, and that counsel will be able to return to trial work within a reasonable time. If any of these requisites is not met, the motion should be denied. In situations where the requirements are not met and counsel is not present, appropriate sanctions on counsel should be levied.

In criminal cases, the same procedure is recommended. If the defendant is left without counsel, substitute counsel should be appointed, again with a reasonable amount of time given to new counsel to prepare his case.

Parties

When a party is absent from trial in a civil case, it must be shown that the party is a material witness to the case. In addition, it must be shown that no other witness can testify to the same matters and that the information could not be obtained by deposition, stipulation, admission, or other means. If these requirements are not met, no continuance should be granted. Voluntary absence should never be considered as a basis for a continuance.

In criminal cases, voluntary absence is not a valid basis for a continuance. Since the usual basis of a request in criminal cases is illness of the party, it is recommended that where the defendant is before the court, the court exercise its discretion. Where the defendant is not before the court, a physician's certificate should be submitted which states that it would be dangerous for the defendant to attend trial.

Implementation

Many of the rules suggested above contemplate adequate notice of the date on which the trial will begin. To effectively implement these rules, it is recommended that the following procedures be utilized.

As soon as possible after an answer is filed in a civil case, a pre-trial conference should be conducted. At this conference, two objectives should be accomplished. First, the issues should be narrowed and resolved, if possible. If settlement is not possible, the court should either assign the case to arbitration or set a *tentative* trial date.

Approximately three weeks prior to trial, a "settlement conference" should be held.[156] At this conference, all efforts should be expended to conclude the case. If this is not possible, then a firm trial date should be fixed by the court with the consent of counsel.[157] By utilizing such a procedure, two results are contemplated. First, the settlement of cases "on the courthouse steps" or during voir dire would be reduced. When parties refuse to settle until this time, the court is put to undue expense and loss of time. However, when one party deems a continuance necessary at this point, and the opposing party can show that a continuance would operate to his economic detriment, the court may, in its discretion, require the movant to post a bond or pay the opposing party's costs as a condition of granting the continuance.[158]

It is also contemplated that by setting a firm trial date at the settlement conference, many of the docketing conflicts which now exist may be eliminated. Many courts presently schedule two or more cases for the same day.[159] Such policies often result in counsel's not knowing whether a case will actually be tried on a particular date. This inevitably leads to docket conflicts. By agreeing to a firm trial date at the settlement conference, counsel knows exactly when the case will come to trial. Thus, the court would be warranted in denying a continuance requested for a docket conflict which arises at a later date.

Although critics of such a policy may suggest that a second pre-trial hearing will serve only to further clog the docket, this may not be the result, since one function of the pre-trial conference is the settlement of many cases which might otherwise go to trial. The addition of a settlement conference, combined with the possible sanctions on counsel, should aid in the settlement of cases prior to trial. The settlement conference also provides a medium for working out a trial date which is agreeable to all, thus eliminating many docketing conflicts.

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[156] *See,* The Superior Court of Los Angeles, California, *Policy Memorandum for the Conduct of Trial Setting, Pretrial, and Settlement Conferences* (1971).

[157] This type of procedure for setting trial date has been successfully used in arbitration. See *A Manual for Accident Claims Arbitrators,* ACCIDENT CLAIMS ARBITRATION, at 139 (1970).

[158] For a case where costs are used as a condition for granting a continuance, see Gentry v. Lakey, 276 N.E.2d 857 (Ind. App. 1971) where the trial court awarded $100 costs to the plaintiff for a continuance granted to the defendant. On appeal, this ruling was held to be within the trial court's discretion.

[159] New rules of the Common Pleas Court of Cuyahoga County, Ohio, *supra* note 3.

In criminal cases, similar procedures are recommended. Any negotiation of the plea should take place at the pre-trial conference, and a firm trial date should be set by the court with the advice of counsel at that time. A later conference is not then deemed necessary.

It is contemplated that these recommendations can be implemented under most calendaring systems, including the personal docket system. In that system, each judge has a thorough knowledge of the case before him, since he has dealt with it through the various stages of litigation. Thus the problems of docket conflicts, or the use of depositions for absent witnesses, can effectively be solved at the pre-trial level by the judge who will try the case. At trial, the judge will then know when a continuance is necessary.

These recommendations represent only a start toward the development of a rational continuance policy. These suggestions will not in themselves remedy the massive backlog of cases in the courts, but are offered only as a beginning of the retreat from the quagmire of cases presently strangling the courts.