AUDITORS IN MASSACHUSETTS AS ANTIDOTES FOR DELAYED CIVIL COURTS *

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Massachusetts' recent experience in using auditors to help roll back trial delay in civil courts points up one of the toughest riddles in the enigma of delayed justice, namely, how astonishingly hard it is to tell whether a given delay "remedy" has worked or failed in practice. To some extent the men who devise the remedies help deepen the riddle of what happened by failing to provide in advance for the data that will be needed to answer that question. Their understandable attitude is that when a court is suffering from excessive delay in disposing of backlogged cases, its concern must be radical improvement, not the whys and wherefores or mechanics of the solution. They usually adopt countermeasures in packages, not singly. Afterwards, if the package as a whole has worked well, it is frustrating to try to learn which measure did what.

By now it is almost trite to point out that physical scientists handling like problems of cause and effect would be careful to isolate their hypothetical antidotes and test them one at a time under controlled conditions. But courts and legislators that are faced with potential breakdown in the administration of justice are not inclined to be cool and clinical; and some even doubt their constitutional power to engage in controlled experiments.¹ The result is that they adopt crash programs, not researchers' ideals. The recent story in Massachusetts is typical.

*This Article is the result of a study conducted by the Columbia University Project for Effective Justice. The authors are grateful to Chief Justice Paul C. Reardon of the Massachusetts Superior Court for his cooperation and interest in connection with the work reported here. We acknowledge also the help of John A. Daly, Executive Secretary of the Massachusetts courts; Edward J. Kelley, Executive Clerk to Chief Justice Reardon; and Paul J. Marble, Assistant Clerk for Civil Business, Suffolk County Superior Court. Finally, appreciation is due to the members of the Project's Advisory Committee for the direction and guidance which they have supplied. The views expressed, however, are not necessarily those of the Committee or particular members thereof.

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¹ A helpful discussion of the place of the controlled experiment in judicial administration appears in Zeisel, Kalven & Buchholz, Delay in the Court 241-50 (1959) [hereinafter cited as Delay in the Court]. The Columbia Project is presently analyzing the results of an extensive, official-controlled test of the effectiveness of the pretrial conference in the New Jersey civil courts. See remarks of Michael I. Sovern, in Weinstein, Proposed Revision of New York Civil Practice, 60 Colum. L. Rev. 50, 83-86 (1960).
I. Background

In early 1956, with trial delay as high as 48 months in one county, the Commonwealth adopted a many-faceted program to quicken disposition of cases in its backlogged superior court. Included in the battery of procedures was a large-scale use of members of the bar as "auditors" with authority to try cases referred to them by the courts, subject to the litigants' option to insist on a retrial in court. Within a year the superior court's delay problem dramatically improved and by 1959 had lost its crisis proportions.

The auditor procedure has attracted interest outside Massachusetts as a potentially useful corrective for court delay, both because it seems promising in theory and because its sponsors report that it has worked in practice. Chief Justice Paul C. Reardon of the Superior Court has said: "... the auditors ... have been of tremendous value in breaking the backlog which existed in Massachusetts but a short time ago. Too much cannot be said for their contribution."

Despite this vigorous endorsement, no other state has chosen to adopt the auditor procedure. In New York, California, and Illinois, its adoption has at various times been specifically considered.
three states have been troubled by chronic court delay, and have been actively seeking remedial procedures. Presumably their refusal to install the auditor system springs from doubt that it will unburden their courts, or the conviction that even if it will, its costs and side effects will be too undesirable to bear. The contrasting estimates about the auditor system's effectiveness, costs, and values made it a timely subject for empirical study by the Columbia University Project for Effective Justice, which for several years has been analyzing and evaluating various asserted remedies for delayed justice. To be sure, not all the pro and con arguments about the auditor procedure lend themselves to empirical investigation. Many of them have nothing to do with the efficiency of the procedure as a means of unburdening the courts, but relate rather to asserted undesirable side effects of a "subjudiciary." For example, some complain that the auditor process heralds the abandonment of traditional areas of judicial concern; that it has an aura of "second-rate justice"; that part-time auditors lack the capacity of judges to get at the truth; and that it results in loose application of the rules of evidence.

Then there are arguments that directly challenge the efficiency of the process, such as that auditors eliminate only cases which would in any event be disposed of without judge or jury action; that the number of cases reaching courtroom trial may even show an increase

(1934). But the New York Judicial Council rejected both an "emergency referee" bill, and then the auditor system itself, on the ground that a "sub-judiciary" was undesirable in New York. 1 N.Y. JUDICIAL COUNCIL ANN. REP. 47 (1935); 3 N.Y. JUDICIAL COUNCIL ANN. REP. 229 n.36 (1937). The New York Temporary Commission on the Courts in its 1957 report declared it was "not convinced that the worth of a Referee or Auditor System, running counter as it does to the usual concept of a right to trial by judge or jury, has been sufficiently demonstrated and does not recommend its establishment." 4 TEMPORARY COMM'N ON THE COURTS REP. 47 (1957).


The voluntary character of these plans makes them akin to ordinary arbitration procedures. This year the Illinois Judicial Advisory Council approved a bill patterned on the Massachusetts plan, but it did not reach the floor of the legislature.

8 See, e.g., 4 N.Y. JUDICIAL CONFERENCE ANN. REP. passim (1959); 18 CAL. JUDICIAL COUNCIL BIENN. REP. 50-68 (1961); ILL. JUDICIAL ADVISORY COUNCIL, REPORT TO THE GOVERNOR AND GENERAL ASSEMBLY 3-4 (1959).

9 Since its establishment the Project has combined legal and social science methods in its researches. Among published reports on its evaluations of delay remedies are Rosenberg, Comparative Negligence in Arkansas: A "Before and After" Survey, 13 ARK. L. REV. 89 (1959); and Rosenberg & Schubin, Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania, 74 HARV. L. REV. 448 (1961).


11 Ibid.


14 DELAY IN THE COURT 216.
as a result of auditor hearings; and that cases requiring retrial involve burdens that may offset any savings achieved by a preliminary sifting of the facts at the auditor's hearing. These arguments are disputed by advocates of the auditor system.

Patently, a careful investigation of the facts can help settle some of these arguments. This report will describe the auditor procedure, will present new data on how it has functioned, and will analyze and evaluate findings that throw light on its benefits and costs.

II. THE SYSTEM IN OPERATION

In the modern version of the auditor system, some 80 lawyers throughout the Commonwealth of Massachusetts have been designated by the court to take testimony in civil actions, determine where the truth lies, and make written findings of fact which they report to the court. Unless there is special reason, an auditor must reside or have his office in the county in which the case is pending. He is subject to the usual disqualifications of a judge and, in addition, may not himself act as an attorney in a motor vehicle tort action so long as he serves as an auditor. He receives nine dollars an hour for his time in hearing the cases and preparing reports.

15 Ibid.
17 Basically, the advocates urge that the system is a cheap, flexible, and expeditious remedy for delay, since auditors can quickly dispose of cases, few of which will require retrial in court. See Harno, Our Courts and the Administration of Justice, 49 ILL. B.J. 310, 314-15 (1961). They add that even if a case goes to trial, the auditor's report will help reduce the time spent on trial because it presents sifted facts and claims stripped of padding. See 3 N.Y. JUDICIAL COUNCIL ANN. REP. AND STUDIES 229 (1937). To the same effect, see Holmes v. Hunt, 122 Mass. 505, 512-15 (1877); Allen v. Hawks, 28 Mass. (11 Pick.) 359 (1831). Finally, the proponents assert that reduction of delay can be accomplished with great saving of public funds, because auditors are temporary officers, are paid considerably less than judges, and do not require attendants or stenographers. See Falsgraf, Justice Delayed Is Injustice, 7 CLEV.-MAR. L. REV. 118, 123-24 (1959); 3 N.Y. JUDICIAL COUNCIL, op. cit. supra at 229.

18 Reardon, supra note 3, at 310. When the system was re instituted in 1956, the superior court solicited the bar associations for the names of those attorneys in each county who, in the opinion of the county associations, would prove satisfactory in handling cases on reference. The names of these attorneys were then screened by the Committee on Procedures and forwarded to the justice presiding in each county. Id. at 309.
22 Superior Court, Notice to the Bar As to Auditors, Mass. L.Q., March 1956, p. ix.
The use of auditors goes back to the reign of Henry III in the 13th century. It was a complicated and unwieldy procedure employed solely in actions of account and was largely superseded when the equitable bill of accounting developed. In Massachusetts auditors were first authorized in 1817 by a statute which confined their functions mainly to matters of account and examination of vouchers. In the course of time, statutes and judicial decisions broadened the scope of the auditors' powers until, under the statute as last amended in 1914, the superior court may in its discretion refer any action at law to an auditor. While the parties may apply for a referral, in practice nearly all are made on the court's initiative.

A referral is "final," which is to say the auditor's findings of fact become unimpeachable except for errors of law, only if the parties consent; almost always it is "nonfinal." In either event, referral is effected by an order or "rule" which fixes the time for the hearing and tells the auditor what matters he is to hear and report. At the hearing the auditor's function is to receive competent proof under courtroom rules of evidence and to pass on its credibility and weight.

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25 See LANDDELL, A BRIEF SURVEY OF EQUITY JURISDICTION 89-90 (2d ed. 1908).
26 Mass. Acts 1817, ch. 142 entitled, "An Act for Facilitating Trials in Civil Causes." The statute was held not to violate the jury trial provisions of the state constitution in Holmes v. Hunt, 122 Mass. 505 (1877), with an interesting discussion of the history of the process, on which see also Locke v. Bennett, 61 Mass. (7 Cush.) 445 (1851). Compare Allen v. Hawke, 28 Mass. (11 Pick.) 359 (1831). In Ex parte Peterson, 253 U.S. 300, 309-12 (1920), involving the federal constitution's guarantee of trial by jury, the Massachusetts auditor plan was mentioned with approval.
28 Mass. Ann. Laws ch. 221, § 56 (1955). Although use of auditors is concentrated in the superior court, the supreme judicial court, the probate court, and the district court may also refer matters to auditors, the last only with the consent of the parties. Mass. Ann. Laws ch. 221, § 56 (1955).
29 Between April 1956 and April 1960, approximately 95% of the referrals were on the initiative of the court. [1956-60] MASS. SUPER. CT. QUARTERLY REPORTS OF MOTOR VEHICLE CASES REFERRED TO AUDITORS [hereinafter cited as QUARTERLY REPORTS].
32 Less than 3% of the referrals provide that the auditor's report of the facts will be final. [1956-60] QUARTERLY REPORTS.
33 Mass. Super. Ct. (Civ.) R. 86-87. Findings on matters outside the order of reference should be stricken or disregarded. See Motla, §§ 534-35, at 299-301; Beauregard v. Dailey, 294 Mass. 315, 1 N.E. 2d 481 (1936). If the order omits specification, the hearing is limited to the issues raised by the pleadings.
34 Mass. Ann. Laws ch. 221, § 56 (1955); Motla § 534, at 300. The parties are required to be present at the hearing before the auditor; if a party fails without good cause to attend, the auditor may proceed ex parte, Mass. Super. Ct. (Civ.) R. 87, or may close the hearing and recommend that judgment be entered for the adverse party, Mass. Ann. Laws ch. 221, § 58 (1932). Fratantonio v. Atlantic Ref. Co., 297 Mass. 21, 24, 8 N.E. 2d 168, 169 (1937). Although the auditor does not have the power to compel the presence or testimony of witnesses, and has no subpoena or contempt powers, see Goldman, supra note 12, at 139 (1956), in practice a summons is issued to a witness in the same manner as in a court proceeding and can be enforced.
He does not sit to decide questions of law, but perforce applies legal principles in determining the issues. Following the hearing he makes written findings of fact, in as general or specific form as he sees fit. If any finding depends on a disputed question of law, he must either make alternative findings of fact or state the view of the law upon which his finding depends. He must also report rulings on objections to the admissibility of evidence. Each party has a right to seek revision of the report by asking the court to recommit it to the auditor. In nonfinal referrals, the parties are not bound by the auditor's findings and, on the insistence of one or both litigants, the case will be retried in court. To obtain retrial before a jury, a demand must have been made before the auditor's hearing and reasserted within 10 days after filing of the report.

At the retrial the auditor's report is admissible and becomes prima facie evidence on the matters it properly embraces. This means that the findings will be given evidentiary weight if opposed by other evidence and will be given conclusive effect if unopposed.

by application to a judge of the court. See Memorandum From Chief Justice Paul C. Reardon to the Columbia University Project for Effective Justice, February 10, 1961, p. 5 (remarks on tentative draft of this Article) [hereinafter cited as Reardon Memorandum].


35 MASS. ANN. LAWS ch. 221, § 56 (1955).

36 Ibid.

37 See Lunn & Sweet Co. v. Wolfman, 268 Mass. 345, 349, 167 N.E. 641, 644 (1929); Newell v. Chesley, 122 Mass. 522, 525 (1877) (dictum). Granting of this motion is discretionary with the court, and no appeal lies from its denial since an aggrieved party has the opportunity to renew the objection at the retrial. See, e.g., Tobin v. Kells, 207 Mass. 304, 309-10, 93 N.E. 596, 597 (1911); J. W. Grady Co. v. Herrick, 288 Mass. 304, 310, 192 N.E. 748, 750 (1934) (dictum). In the absence of a motion to recommit, the trial judge may not consider objections to the report. Smith v. Paquin, 325 Mass. 490, 492, 115 N.E.2d 461, 463 (1953). He must, however, exclude any finding of fact appearing to be based upon an erroneous view of the law or upon inadmissible evidence. MASS. ANN. LAWS ch. 221, § 56 (1955). For a description of the somewhat different procedure for objecting to the report where the findings are final, see MORTLA § 537.

38 MASS. SUPER. CT. (Civ.) R. 88. If the referral is final, neither party has a right to a jury trial unless the order of reference is set aside. Hale v. Wheeler, 264 Mass. 592, 594, 163 N.E. 178 (1928). If it is not set aside, the auditor's report is in effect a case stated. Kuzmeskus v. Pickup Motor Co., 330 Mass. 490, 492, 115 N.E.2d 461, 463 (1953). The court may reach a conclusion different from the auditor's, but must do so upon facts stated in the report. See Keele v. Johnson, 304 Mass. 572, 573, 24 N.E.2d 520, 521-22 (1939).

39 MASS. ANN. LAWS ch. 221, § 56 (1955). The auditor's report may be offered by either party or by the court on its own initiative. See Clark v. Fletcher, 83 Mass. (1 Allen) 53, 56 (1861).

40 See text accompanying note 121 infra.
The auditor system is not considered a permanent part of the judicial establishment in Massachusetts, but an emergency procedure to cope with overburdened dockets in the superior court, to be invoked as and when the need arises.\textsuperscript{45} Widely utilized in motor vehicle tort cases from 1935 to 1942, it fell into virtual disuse when World War II rationing curbed automobile accidents.\textsuperscript{46} Its renewal on April 2, 1956, was designed to deal with an engulfing volume of motor vehicle tort cases which were again clogging the dockets of the superior court,\textsuperscript{47} but its use has spread to other types of law actions.\textsuperscript{48} At the same time Massachusetts adopted other procedural measures to achieve relief from court delay. Among these were a rule limiting the number of continuances because of an attorney's engagement elsewhere, extended use of district court judges in the superior court, creation of a non-triable docket for long-inactive cases, and intensified use of pretrial procedures.\textsuperscript{49} In 1958 came an increase in the number of judges in the superior court and a provision for transfer of undersized cases to the district court.\textsuperscript{50} The cumulative effect of these other changes was undoubtedly beneficial and complemented whatever contribution the auditor program made to easing the delay problem.

### III. Scope of This Study

Ideally, to evaluate the contribution of the auditor procedure, one should study enough data to be able to gauge the effect of each of the

\textsuperscript{44} MASS. SUPER. CT. (CIV.) R. 88.
\textsuperscript{45} See 1 EXEC. SEC'Y REPORT 9 (1957); Reardon, supra note 3, at 308-09. Some counties have passed the point of need and refer but few cases to auditors. Id. at 310.
\textsuperscript{46} Large scale reference of motor vehicle tort cases to auditors was begun in Essex County in 1932, discontinued in 1933 and restored in 1935, See 3 N.Y. JUDICIAL COUNCIL ANN. REP. & STUDIES 229 n.38 (1937). For a statistical analysis of the 1932-33 experience, see COMM'N ON THE ADMINISTRATION OF JUSTICE, REPORT 210-18 (1934).

From 1935 to 1942, 46,986 cases, about 24% of the civil law cases filed, were referred to auditors. See Reardon, supra note 3, at 309; 30 MASS. JUDICIAL COUNCIL ANN. REP. 11D (1954). Referrals were discontinued after November 1, 1942, see 19 MASS. JUDICIAL COUNCIL ANN. REP. 49n. (1943), and until the institution of the present system early in 1956 their number was de minimis.
\textsuperscript{47} See 1 EXEC. SEC'Y REPORT 8-9 (1957). In the four years following the reinstatement of the system on April 2, 1956, 19,089 cases were referred to auditors. [1956-60] QUARTERLY REPORTS. This represents 15% of all civil filings in approximately the same 4-year period. 1-4 EXEC. SEC'Y REPORT (1957-60) (chart on Civil Business Statistics of the Supreme Court). Compare note 46 supra.

While most counties apparently still refer motor vehicle tort cases almost exclusively, a spot check discloses that other types are also referred.
\textsuperscript{48} See Reardon, supra note 3, at 306-08.
\textsuperscript{49} See MASS. ANN. LAWS ch. 212, § 1 (Supp. 1960) (number of superior court associate justices increased from 31 to 37); MASS. ANN. LAWS ch. 231, § 102c (Supp. 1960) (court on own motion may transfer tort and contract actions to district court where no reasonable likelihood that plaintiff will recover $1,000).
other delay antidotes adopted contemporaneously in Massachusetts. But that task would be enormous, and perhaps even impossible because of the dearth of necessary data. For similar reasons it proved undesirable to try to study the auditor procedure itself in every county of Massachusetts, or even in several of them. Suffolk County, as the major metropolitan area of Massachusetts, with thirty to forty per cent of the state’s civil litigation, seemed a profitable locus for the study.\footnote{51} Even thus limited, the job required costly and concentrated effort.

At the start of the renewed use of auditors in 1956, trial delay in the Superior Court of Suffolk County had reached 32 months.\footnote{52} At first the court referred only motor vehicle tort cases to auditors, but since early 1957 it has also been referring other types of law actions.\footnote{53} In this report it will therefore be possible to analyze the impact of the auditor system on the general run of law cases.\footnote{54} The time focus is the four-year period following the reinstatement of the system (April 2, 1956, to March 31, 1960). At the end of this period, delay was about 12 months.\footnote{55} During the four years roughly one in every eight civil actions filed, some 5,479 cases, were referred to the approximately eighteen auditors who have been serving in Suffolk County.\footnote{56} By the cutoff date, 3,544 of the referred cases had been finally disposed of and 1,537 had been fully processed by the auditors but were awaiting possible court action;\footnote{57} the remaining 398 were still pending before auditors.\footnote{58}

51 Suffolk County (Boston) has 15% of the Commonwealth’s population of about 5,000,000. In 1959, of the 32,245 civil actions commenced in the superior court throughout the state, 10,893 or 34% were in Suffolk County. 3 Exec. Sec’y Report 64-65 (1959). In 1958 the figure was 34%, 2 Exec. Sec’y Report 69 (1958), and in 1957, 35%, 1 Exec. Sec’y Report 87 (1957).

52 See Report on Status of Civil Jury Cases (1955) (Suffolk County).


54 Cases classified as “land takings” and “all others,” comprising only about 5% of the filings, see, e.g., 32 Mass. Judicial Council Ann. Rep. 86 (1956), are excluded, since they are very rarely referred to auditors. Unless otherwise indicated, totals appearing below in this Article do not include these classes of cases.


56 The number of filings of civil law cases in the four years beginning July 1, 1956 was 44,460: 10,910 in 1957; 11,734 in 1958; 10,893 in 1959; and 11,103 in 1960. See 1-4 Exec. Sec’y Report (1957-1960) (chart on Civil Business Statistics of the Superior Court). There is no reason to believe that the total of filings in the four-year survey period was significantly different. The 5,479 cases referred to auditors in the period (excluding 234 later vacated referrals) constitute 12.3% of the total filed.

57 These presumably include cases in which the parties were satisfied with the report but had not obtained a final court judgment upon it; cases in which one or both of the parties had requested further relief, either by a motion for recommittal to the auditor or for judgment on the report, or by a demand for a court retrial; and cases in which an appeal was pending from some action of the trial court. See generally Mottla § 537.

Much of the data reported here was drawn from existing court records, with the indispensable cooperation of Chief Justice Reardon and his staff. Special research was done to fill gaps when regularly kept records were inadequate. During the preparation of this report the authors consulted closely with the Massachusetts court authorities to obtain their insights concerning the day-to-day operation of the system. Necessarily, however, the approach, analytical techniques, findings, and evaluations set out here are the authors' own and should not be understood as carrying the imprimatur of the Massachusetts authorities. Indeed, Chief Justice Reardon himself disputes at least one of this study's main premises, to be discussed below.

While the paramount stress of this report is on analyzing the effect of the auditor system in reducing court delay, the authors in no sense suggest that this is the sole value to be served in the administration of justice. True, deflecting thousands of cases from the courts to the auditors may speed trial for the cases that remain, but what of the effects of the process on the deflected cases? The report will give attention to that subject, and to certain other aspects of the system, including its cost, to which the data speak.

Finally, there will be a comparison of the effects of the Massachusetts procedure with those of the Pennsylvania plan for compulsory arbitration of small cases, which has features in common with the auditor system. Both systems attempt to deflect cases from the court by referring them to an out-of-court tribunal and placing certain impediments in the way of their return, while allowing them to return if either party insists. In addition, both systems are manned by practicing attorneys. The arbitration plan differs in the following basic respects: it is confined to small cases; it recruits many thousands of lawyers on a volunteer basis for very limited service on three-man panels; on a retrial the arbitrators' findings are not known by the court or the jury; and it employs a monetary deterrent against "appeal" by requiring the party who appeals to repay the arbitrators' fees.

IV. The Effect on Court Delay:
Balancing the Judicial Supply-Demand Equation

In simplest terms, the problem of court delay can be viewed as reflecting an imbalance in the judicial supply-demand equation. Delay occurs when the demand made by a group of cases for courtroom processing exceeds the supply of court resources, namely, judge time.

59 See note 62 infra and accompanying text.

available to process them. To deal effectively with this imbalance, a remedy must restore equilibrium by altering at least one side of the equation. The primary goal of the Massachusetts system is to cut down the demand for judge time by permanently deflecting large numbers of cases from the courts.\footnote{Although some look upon auditors as auxiliary judges who augment the supply of judicial power available to the court, see \textit{Delay in the Court} 216, it seems more appropriate to view the auditor system as reducing the work demands made by the cases. A true increase in the supply of judge power results when lawyers ascend the bench, even if only temporarily, and supplant regular judges by taking over some or all of their functions. \textit{Cf. id.} at 217.} A secondary object presumably is to assure that if some cases do return to court they will require only brief trials and hence little judge time.

Whether the system in fact achieves these results depends upon whether the referred cases would have demanded substantial judge time if they had remained in the courts and whether the auditor process effectively reduces that demand. Obtaining fairly precise answers to those questions is more complicated than might at first appear. It would not do simply to determine how many cases were removed from the court's lists by referral, for not all cases made equal demands on court time and the referred cases might have been above or below average in their potential demands. Moreover, some of the referred cases later returned to the court for retrial. The first job was to learn how many potential trials there were in the referred group and then to subtract from that figure the number of actual retrials they produced. The remainder would represent the net saving in trials. The second job was to translate the potential trials and the actual trials into their respective equivalents in judicial time and then to subtract the latter's time demands from the former's. The remainder would be one element in the amount of time the auditors spared the judges.

\textbf{A. Amount of Trial Time Auditors Spare the Court}

The emphasis upon eliminating trial work for the courts is a deliberate one.\footnote{Chief Justice Reardon has questioned the correctness of this emphasis, his view being that "the great saving to the Superior Court does not lie at all along the avenue indicated by the[se] computation[s] . . . [but] is resident rather in the fact that hundreds and thousands of cases never reached a jury or jury-waived session at all simply because they collapsed when or shortly after the parties were led to a hearing room." Reardon Memorandum 2; see text accompanying note 107 \textit{infra}.} It rests on the assumption that activities related to trials account for the major part of the time-and-energy output of the court. Although the Suffolk court\footnote{As used in this Article, the term "Suffolk court" means the Superior Court of Massachusetts, Suffolk County.} does not keep records allowing a conclusive test of the assumption, it seems well warranted on the evidence from other states.
Studies in the New York Supreme Court show that although only a minor part of that court’s caseload requires trial, these cases absorb far the major part of the court’s total judge time. Much less judge time is spent on remaining tasks such as pretrial conferences, motions, and administrative duties.

In New Jersey, a Project analysis of a large random sample of “timesheets” filed by superior court judges in the period September 1959 to September 1960 discloses that trial and trial-related activities consume approximately 61% of the judges’ total time. This figure is probably lower than in similar courts in other states, since New Jersey’s so-called “assignment” judges devote an unusually large amount of their time to administration and other nontrial work.

That this situation holds true in the Massachusetts courts—namely, that durable cases, requiring trials for their disposition, make the heaviest demand on the judges’ time—appears prima facie from the way judges are deployed to the various “sessions” of the superior court. On any given court day in the survey period in Suffolk County there were between 12 and 15 judges sitting in civil cases. Of these, one judge was assigned year-round to the motions session and another judge for ten months to the pretrial session, where he also handled the assignment of cases. All other judges were assigned to trial sessions.

64 Although less than 30% of the cases which reach the calendar of the New York County Supreme Court actually go to trial, they consume approximately 84% of the court’s total judge time. See also Rosenberg and Sovern, Delay and the Dynamics of Personal Injury Litigation, 59 Colum. L. Rev. 1115, 1124-25 (1959).

65 The remaining 39% is distributed as follows: 13% to motions; 11% to pretrials; 10% to settlement conferences; 5% to calendar management and assignment. The New Jersey judges for several years have been required to file “timesheets” showing time they spend on various aspects of case processing. See Delay in the Court 186-87 & n.3. The figures presented in the text were derived from an analysis of a large random sample of these sheets filed by the 15 superior court judges who devoted their time primarily to civil law cases.

66 When these judges are omitted from the computations, we find that the remaining judges devote approximately 72% of their time to actual trial work. In the federal district courts a recent study reveals that approximately 59% of the judge time spent in processing private civil cases is absorbed by trial and trial-related activities. [1956] Director of the Administrative Office of the U.S. Courts Ann. Rep. 180, 191.

67 Letter From Thomas Dorgan, Clerk for Civil Business, Suffolk County Superior Court, to Project for Effective Justice, April 17, 1961. The justices of the Massachusetts Superior Court are not permanently assigned to a single county, but are utilized wherever needed. Mass. Ann. Laws ch. 212, § 2 (1955). The 1958 increase in the number of superior court justices apparently did not change the number generally assigned to Suffolk County.

68 Letter From Thomas Dorgan, Clerk for Civil Business, Suffolk County Superior Court, to Project for Effective Justice, April 17, 1961.

69 Letter From Edward J. Kelley, Executive Clerk to Chief Justice Reardon, to Paul J. Marble, April 10, 1961, on file with the Project for Effective Justice. In 1957 and 1958 there were usually three district court judges sitting on civil cases on the Suffolk court, one assigned to pretrials in motor vehicle tort cases, the other two, to trial sessions. Letter From Thomas Dorgan, Clerk for Civil Business, Suffolk County Superior Court, to Project for Effective Justice, April 17, 1961.
It thus appears that 83-87% of the judge power in the Suffolk court was assigned to trial work and the balance—13-17% of the total—was assigned to other aspects of processing the cases. While the mere fact that a judge is assigned to a trial session does not guarantee that he spends all his working time on trial activities, informal reports from Massachusetts court personnel suggest that he does so spend the bulk of his time.\(^\text{70}\) The New Jersey data tend to support this estimate. In that state, a superior court judge who is engaged in the equivalent of a Massachusetts trial session spends three-fourths or possibly more of his time in trials and closely related activities.\(^\text{71}\)

If it is accepted that trial tasks absorb the greater part of the supply of judge time available to the court, it becomes plain that to be effective the auditor process will have to reduce those tasks in the referred cases either by cutting down on the number of courtroom hearings or curtailing the time taken by retrials, or both. While it will also be relevant to see what effect the auditor process has in reducing nontrial demands on the court's time, the efficiency of the system will be very directly proportional to its tendency to avoid trial work for the judges. To determine whether the system has achieved a saving in this respect, the starting point is the question: How many auditor-heard cases were spared courtroom trials which otherwise would probably have been necessary? To obtain this figure required projecting known data to get (a) the percentage of referred cases which hypothetically would have reached trial,\(^\text{72}\) and (b) the percentage which actually entered the courtroom for retrial. After determining the excess of (a) over (b) it was possible to compute the number of trials spared the court.

To estimate the number of referred cases that would have reached trial during the survey period had there been no auditor procedure, the first step was to derive the percentage of civil dispositions which reached trial in 1956,\(^\text{73}\) the year before restoration of audi-

\(^{70}\) Letter From Edward J. Kelley, Executive Clerk to Chief Justice Reardon, to Paul J. Marble, April 10, 1961, on file with the Project for Effective Justice.

\(^{71}\) The equivalence is very rough, since division of judicial labor in New Jersey is by different means than in Massachusetts. In general, New Jersey superior court judges devote Mondays through Thursdays primarily to trial work and reserve Fridays for motion and pretrial work. To enhance comparability, analysis was confined to timesheets covering only the first four weekdays. If anything, New Jersey's 75%-25% division of labor between trial and nontrial work on Monday-Thursday is probably lower on the trial side than for Massachusetts judges assigned to trial sessions, because of the large amount of administrative work done in New Jersey. When the administrative judges' timesheets are omitted, the trial figure for Monday to Thursday work rises to 84%. See note 65 supra and accompanying text.

\(^{72}\) Hereinafter, to "reach trial" means, in a jury case, to impanel the jurors; in a nonjury case, to open the trial.

\(^{73}\) Throughout this Article, except where the context otherwise indicates, mention of a named year refers to the 12 calendar months from July 1 of the preceding year to June 30 of the named year; thus, judicial year 1956 runs from July 1, 1955 to June 30, 1956.
In that year the Suffolk court disposed of 9,063 "filed" civil cases of which 1,087, or 12%, reached trial. Next, assuming that the 12% trial rate would have persisted through the survey period, we applied it to the number of referred cases finally disposed of by the auditors during that period, namely, 3,544, after an adjustment to make the latter figure comparable to the 9,063 base figure from which the 12% trial rate was derived. This was necessary because the referred cases were taken from a "pretrial list," whereas the base figure included all cases filed, whether or not they reached the pretrial list. After the adjustment, it turned out that of the 3,544 referred cases the auditors disposed of, approximately 495 would have reached trial.

We then subtracted from 495 (the "(a)" figure in the formula) the estimated number of auditor-heard cases that returned to the court for retrial (the "(b)" figure). This number we computed as 400.

74 Although 471 cases were referred to auditors in the last three months of 1956, [April-June 1956] QUARTERLY REPORT, it is highly unlikely that these references could have any effect upon the percentages reported in the text.

75 The total number of civil law cases disposed of was actually 9,576. However, 513 cases involved "land takings" and "all others," which, unless otherwise indicated, are excluded from computations in this article. See note 54 supra; 32 MASS. JUDICIAL COUNCIL REP. 95 (1956).

76 This figure is derived by subtracting from the 1,200 trials of all types of cases in 1956, 32 MASS. JUDICIAL COUNCIL REP. 89 (1956), the 113 "land takings" and "all others" which were tried to completion. Id. at 88. Since these are almost exclusively nonjury cases, they rarely close short of complete trial, and failure to deduct those that settle during trial is, accordingly, not a significant omission.

77 MASS. SUPER. CT. (Civ.) R. 58-59. It follows that the referred cases are, as a group, older than the cases "filed" and hence more durable, on the principle that the older a group of cases, the higher the percentage that will reach trial. See generally Rosenberg and Sovern, supra note 64. Even if, as has been reported, some cases have been referred without first appearing on the pretrial list, they were of comparable age and thus the same considerations would apply.

78 Several steps were needed to derive this figure. First was the task of bringing the referral total into line with the "filed" total. Using 1958 statistics, we found that 13,069 cases were disposed of by the court, but that only 11,470 had gotten as far as the pretrial list (from which the auditor group was referred). The difference shows an attrition from filing to referral of 14%. Hence, the 3,544 cases in the auditor group equal 86% of a larger group of filings, namely, 4,121 cases. Next, applying the 12% trial rate to that figure yields 495.

A basic assumption throughout these computations is that the referred cases comprise a representative cross section of the cases filed, both as to type of action and durability (trial-reaching potential). With regard to type, representativeness seems assured by the fact that cases are referred without regard to the nature of the action. A breakdown of a 310-case sample, see note 79 infra, shows a close correlation to the types of cases filed in 1957, the year the sample cases entered court. Further, the sample shows 57% motor vehicle tort actions and 1956 filings show 62%, a fairly close figure. With regard to durability, there would be no reason to suppose that discretionary referral results in any deliberate skewing in either direction, except for Chief Justice Reardon's comments, which suggest that the judges have a tendency to keep the "quality" cases (those requiring trial) in the courts and to refer cases which are more likely to be settled. Reardon Memorandum 2. If this were a consistent practice, it would result in reducing the auditors' potential as court time savers.

79 11.3% of 3,544. No records are kept as to the total number of referred cases which return to the court for retrial. The only retrial figure officially reported in the QUARTERLY REPORTS is the number of cases which return to the court and are completely retried. Moreover, even these latter figures show many internal inconsistencies and appear on their face to be inaccurate. Accordingly, in cooperation
meaning that there was a net saving of (495 minus 400 =) 95 trials in the survey period, which equals 2.7% of the auditors' dispositions.

By the end of the survey period the auditors had achieved an additional but "unrealized" saving of trial energy, and this saving must also be credited. As of March 31, 1960, the auditors had concluded their work in some 1,537 cases which had not been formally disposed of because a request for trial or other court relief was still pending. Applying to that figure the net rate at which auditors spare courtroom trials (2.7%), one finds an "unrealized" saving of 41 trials. Adding these to the 95 trials already mentioned, we conclude that when all the cases sent to auditors in the 4-year survey period are finally disposed of, the court will have been spared a total of 136 trials, or 34 a year. This represents 3% of the civil cases the superior court tries annually; and translated directly into judge time, about one-third of a judge-year.

with the Suffolk court's personnel, a survey was undertaken to determine what happened to referred cases. Beginning with the entries on July 1, 1957, the clerk noted the first 310 references to auditors appearing on the civil law docket and followed them through to final disposition. Although 47 had not been closed, most of these had been transferred to the nontriable docket and were probably destined to fade away. However, to give the auditor procedure the benefit of the doubt, we regarded all unaccounted-for cases as dead, so far as retrial possibilities were concerned. It was found that 35, or 11.3% of the cases were retried after the auditor hearing. The accuracy of this figure is supported by a similar analysis of cases referred to auditors in Norfolk County during the first half of 1957. Of the 217 cases finally disposed of at the date of the sampling, 28, or 12.9%, had returned for retrial. Memorandum From the Clerk of the Norfolk County Superior Court to Chief Justice Reardon, October 21, 1960, on file with the Project for Effective Justice. A further check comes from an analysis of the Suffolk County trial record books for calendar year 1960. See note 116 infra and accompanying text. In that year 102 auditor-heard cases returned to the court for retrial. Since these cases were not referred during any particular year, it is not possible to derive a precise trial rate. However, it is at least suggestive that in each of the survey years the number of dispositions was about 900 cases, which would place the trial-reaching figure at about 11%.

These 1,537 cases and the 3,544 final dispositions total 5,081, some 398 less than the 5,479 cases that were referred to auditors in the survey period. The difference is due to the fact that 398 of the referred cases were still pending before auditors as of March 31, 1960. See note 58 supra and accompanying text.

This is not meant to suggest that the amount of trial saving was equally distributed in each of the survey years.

For each of the judicial years 1956-1959, the court's annual trial load, including "land takings" and "all others," remained at approximately 1,200 cases. Tables Received From the Clerk of the Suffolk County Superior Court (unpublished). The 34 trials spared by auditors represent 2.8% of this figure. Since at least 11 judges are assigned to the civil trial sessions in Suffolk County at any one time, it follows that the part of the trial load of which each can dispose is approximately 9%. A saving of 3% would be the equivalent of 3/16 of a judge's energies. This probably overstates the amount of saving, since each judge not only handles tried cases, but also helps process cases which do not reach trial. Conceivably, the prospect of an auditor hearing could cause cases to be settled prior to actual referral, and such cases would not appear in the figures reported above. Chief Justice Reardon implies this happened by noting that the number of annual dispositions increased from about 9,000 in 1956 to 13,000 in the years 1957-1959. Reardon Memorandum 1-2. Even if this increase were due primarily to the auditor system, it probably did not represent much saving of judge time since presumably cases which are settled before referral would not, if left alone, have persisted to a courtroom trial. Beyond that, there is reason to doubt that the auditor system was primarily responsible for the increase.
Thus far the estimates and projections have assumed that all cases which reach trial make the same demands as all others upon the court's time. That assumption must now be checked against the possibility that postauditor trials on the average run abnormally longer or shorter than they would have if there had been no auditor hearings. Three variables are involved, each having a tendency to make the time which is required for retrial of a case different from the time it would have taken to try it originally in a courtroom: (i) the amount of evidence presented; (ii) waiver of jury; and (iii) compromise during the course of the trial. All three factors reflect the possible influences of the auditor's hearing: his findings of fact will have prima facie effect at the retrial, and with his findings before them the litigants may change their settlement offers and their views as to how much evidence to introduce at the retrial and whether to waive a jury.

1. How Much Proof at Retrial

It has been suggested that in some cases the presence of the auditors' findings might serve to condense the proof at retrial compared with the amount which would be offered in a regular courtroom trial. Chief Justice Reardon has declared: "It is fair to state that the average retrial, where the auditor finds for the plaintiff, is much briefer than it would have been had the case been tried initially before the Court." 83 In such cases, his comment runs, it is "not unusual on retrial for the plaintiff to read the auditor's report and then rest, further evidence from him being by way of rebuttal only." 84 Conversely, if the auditor favored the defendant there "is usually a complete retrial with the plaintiff putting in his entire case anew." 85

Those observations make it important to know whether the party seeking a retrial is usually a plaintiff or a defendant. Available evidence is that in at least 63% of the retrials, it was the plaintiff who insisted on a courtroom hearing, for the auditor had found for the defendant in that percentage of the cases which were retried. 86 In the remaining 37% of the cases, the plaintiff probably did not always put

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83 Reardon Memorandum 4.
84 Ibid.
85 Ibid.
86 This finding is derived from analysis of all cases in calendar year 1960 that were retried after an auditor's hearing.
in only a pro forma case based upon the auditor's findings. It would thus appear that reduction in proof can seldom be counted on at retrials and that no substantial timesaving for the court will result from abbreviation of evidence.

2. Jury or Nonjury Retrials

Observers uniformly agree that trial before a jury consumes more time than would a jury-waived trial of the same case. To save time, postauditor retrials should show less affinity for juries than do regular trials. But the evidence is that a higher percentage of retrials require juries than do cases that are tried without having been heard by auditors. Of the estimated 400 retrials conducted during the survey period, 83% required juries, contrasted with a 76% rate for cases that were tried initially in the courtroom.

It is conceivable that these figures merely reflect a statistical coincidence—that jury-prone cases are more likely to seek retrial than jury-waived cases—but there is no evidence for this supposition. Certainly an auditor hearing does not strongly induce jury waivers, since in only 17 retrials in 100 was a jury waived. One is left to conclude that the auditor process does not save court time by converting potential jury trials into shorter nonjury retrials.

3. Complete or Incomplete Trials

It is self-evident that trials that go all the way to verdict or award consume more judge time than would partial or incomplete trials in similar cases. It follows that another possible way for the auditor system to reduce the time judges spend in retrials would be by pro-

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87 It seems apparent that in at least some of them, the plaintiff sought a retrial because of dissatisfaction with the amount of the award. And some satisfied plaintiffs may, for one reason or another, have preferred to present their cases in full. In addition, even if, as Chief Justice Reardon suggests, the plaintiff does rely upon the auditor's report for his case on direct, with further evidence being by way of rebuttal, see text accompanying notes 83-85 supra, the effect would seem to be that the parties present their evidence in a different order, but not necessarily in a lesser amount.

88 See DELAY IN COURT 78-79 & n.7 (jury trials two to two and one-half times as long as nonjury trials in similar cases); LEVIN & WOOLEY, DISPATCH AND DELAY: A FIELD STUDY OF JUDICIAL ADMINISTRATION IN PENNSYLVANIA 90 (1961) (nonjury trials 40%-60% shorter).

89 Of the 35 retrials contained in the 310-case sample, see note 79 supra, 29 were before a jury. This high jury demand rate is confirmed by the analysis of referrals in Norfolk County. Of the 28 retried in that sample, 26, or 93%, were retried to a jury. Memorandum From the Clerk of Norfolk County Superior Court, supra note 79.

90 Of the 1,087 cases that reached trial in 1956, 828 were tried to a jury. 32 MASS. JUDICIAL COUNCIL Rep. 89 (1956). The jury figure is derived from the total of 839 jury trials for all types of cases by a computation similar to that in note 76 supra.
moting compromises short of verdict in the retried cases. Such compromises might result from a closing of the gap between the opposed parties' expectations in the light of the auditor's findings. There is no evidence that this happens. In fact, in the 400 retrials which took place during the survey period, an abnormally high percentage went all the way to verdict or award instead of ending in a settlement part way through the trial. Specifically, it turned out that the retried cases went to completion 86% of the time,\(^9\) as against a 71% completion rate in cases that were never heard by an auditor.\(^9\)

Here again there is no evidence to suggest that the abnormal rate of completions is the product of self-selection. That is, there is no evidence that if there had not been auditor hearings in these cases an even higher percentage of the retrials would have gone all the way to a verdict. The percentage of completed trials, as against during-trial compromises, in the retried cases is so close to 100% that any tendency that might exist for an auditor hearing to promote settlements during retrial must be minimal.

Taking this evidence as a whole, we conclude that postauditor retrials consume no less court time than a like number of ordinary cases that go directly into a trial courtroom. The chart on page 44, summarizing the figures discussed above, shows on a projection basis the effects of the auditor process upon the burdens of the court in connection with retrials.

The striking feature of the chart is the apparent effect of an auditor hearing to step up both the percentage of jury trials and the percentage of complete trials.\(^8\) With regard to the former tendency, it may be that the losing party before the auditor is convinced that a jury will be more likely to overturn the auditor's findings than a judge would be. As for the high complete-trial rate, it may be that the party who prevailed before the auditor becomes much less willing to compromise than during regular trial, with the result that most cases go all the way to a decision.

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\(^9\) Thirty of the 35 retrials in the 310-case sample went to completion. In the Norfolk County sample all 28 retrials went to completion. Memorandum From the Clerk of Norfolk County Superior Court, supra note 79.

\(^9\) Of 1,087 cases that reached trial, 775 were tried to completion. 32 MASS. JUDICIAL COUNCIL REP. 89 (1956). See note 76 supra.

\(^8\) The effect of the auditor system on the trial load can be expressed somewhat differently. The following table estimates the number and type of trials spared the Suffolk court by the use of auditors in the survey period:

<table>
<thead>
<tr>
<th>Type of Trial</th>
<th>Partial Trials</th>
<th>Complete Trials</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jury Trials</td>
<td>115 fewer</td>
<td>50 more</td>
</tr>
<tr>
<td>Nonjury Trials</td>
<td>7 fewer</td>
<td>64 fewer</td>
</tr>
<tr>
<td></td>
<td>122 fewer</td>
<td>14 fewer</td>
</tr>
</tbody>
</table>

(Total = 136 fewer)
CHART

EFFECT OF AUDITOR PROCESSING ON PERCENTAGES OF CASES REQUIRING JURY AND COMPLETE TRIALS

<table>
<thead>
<tr>
<th>JURY TRIALS REQUIRED:</th>
<th>COMPLETE TRIALS REQUIRED:</th>
</tr>
</thead>
<tbody>
<tr>
<td>When No Auditor</td>
<td>When No Auditor</td>
</tr>
<tr>
<td>On Retrial</td>
<td>On Retrial</td>
</tr>
<tr>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>90</td>
<td>90</td>
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<td>80</td>
<td>80</td>
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<td>20</td>
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<tr>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

B. Amount of Other Than Trial Time Auditors Spared the Court

In addition to its impact on the court's trial load, the auditor program has achieved a further saving by aborting large numbers of pretrial conferences. A projection of the 1956 experience indicates that in ordinary course 74% of the 5,479 cases referred to auditors in the survey period would have required pretrials. They did not do so

94 Pretrial conferences in the superior court are held at the discretion of the judge. See MASS. SUPER. CT. (CIV.) R. 58. See generally Reardon, Civil Docket Congestion—A Massachusetts Answer, 39 B.U.L. REV. 297, 312 (1959). Of course, cases referred to auditors from the pretrial list are not actually pretried.

95 The projection of the 1956 percentage assumes that the referred cases comprise a random sample of the cases filed. See note 78 supra.

96 Of the 5,012 cases on the pretrial list in Suffolk County in 1956, 3,703, or 74%, were actually pretried. The remainder were settled, nonsuited, defaulted, or continued. 32 MASS. JUDICIAL COUNCIL REP. 102 (1956).
after having been referred, with a consequent avoidance of 4,054 pretrials, or about 1,000 each year. The extent of this saving can be gauged from the fact that one judge normally conducts 1,500-2,000 pretrial conferences a year. This amounts, then, to a saving of about $\frac{1}{2}$ to $\frac{3}{4}$ of one judge's annual energies.

We are satisfied that there were not any other significant savings. While the detouring of the 5,479 referred cases avoided various interlocutory applications and motions in those cases, the total judge time thereby saved was doubtless *de minimis*. In the first place, a single judge handles the motion business for the entire court and the referred cases comprised an average of only 13% of the total case load in the survey period. Secondly, even that figure does not represent a net saving, since cases were not referred until the pretrial list was made up, and they probably produced motion activity before they reached that list. Moreover, some of the referred cases certainly produce special motions, such as those to recommit unsatisfactory findings. Finally, those cases which returned to the court for retrial after an auditor's hearing had to be placed on the trial list by motion, thus absorbing court time at that stage.

C. Alternative Formula to Compute Auditors' Saving of Court Time

A simpler formula than that used above yields a less precise but useful estimate of the auditors' contribution to unburdening the court. In essence this technique is to compare the number of cases disposed of by the auditors in the survey period with the number disposed of by a specific complement of Suffolk court judges in a known period of time. Then the work product of the auditors is translated into its equivalent in judge time.

In the last year before restoration of the auditor procedure, the court had at most 15 judges and disposed of approximately 9,600 civil

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97 The superior court justice assigned to the pretrial session in 1957 conducted 2,036 pretrials; in 1958, 1,807; in 1959, 1,411. Summary of Work in Pretrial Sessions, Prepared By the Clerk of the Suffolk County Superior Court, on file with the Project for Effective Justice. Similarly, in 1957 the district court judges who conducted the pretrials in motor vehicle tort cases held on the average 1,800 per year. Ibid.

98 Note 68 supra and accompanying text.

99 See note 56 supra and accompanying text.

100 See text accompanying note 77 supra.

101 See note 57 supra.

102 See MASS. SUPER. CT. (CIV.) R. 88; MOTILA § 537.
cases of all types including 1,200 by trial.\textsuperscript{103} In the 4-year survey period the auditors disposed of about 5,100 cases. If we assume for the moment that cases which went to auditors were roughly comparable in their potential demands on judge time to the 9,600 regular cases disposed of in 1956, we can readily compute the gross saving achieved by the auditors:

\[
\frac{X}{15} = \frac{5,100}{9,600}
\]

Solving the equation, we find that during the survey period the auditors disposed of 53\% of the work done by 15 judges in a year, thus achieving a gross saving of 8 years of judge time. An upward adjustment of that figure is necessary because the 5,100 auditor dispositions are not strictly comparable to the 9,600 court dispositions. The difference is that the court's figure is made up of all cases that were filed, whereas the auditors' figure includes only those filed cases that survived to the point of referral. We know that before filed cases reach this point they undergo a certain amount of attrition or dropout. To adjust for this factor required increasing the 5,100 figure to the number of filings that produced it, to wit, 5,930.\textsuperscript{104} Using that figure in the equation set out above, the recomputed gross saving in judge time that resulted from the auditors' work was 9.3 years.

The 9.3 figure overstates the judge time saved by the auditors' work because some of the cases they processed nevertheless made demands on the court's time. This happened either prior to their referral or after their return. There is reason to assume that the auditor group of cases made demands on the court's time roughly in proportion to their number; and that the total amount of these demands can be estimated by using the 400 retrials they produced as a base. The retrials during the survey period amounted to \(\frac{400}{1200} = \frac{1}{3}\) of the trial dispositions by the court with its 15-judge complement in 1956, or 5 judge years. This formula possibly exaggerates the demands by the auditor group, since unlike the court disposition group, they were completely outside the courts from the point of referral until their return on motion to recommit or for retrial. They therefore did not

\textsuperscript{103} These figures are slightly larger than those reported previously, see text accompanying notes 75-76 \textit{supra}, since they include "land takings" and "all others." \textsuperscript{104} Approximately 14\% of the cases close between filing and compilation of the pretrial list. See note 78 \textit{supra}. 
require the pretrial conferences which would have occurred during that period, at a maximum cost of 2.7 judge years.\textsuperscript{105} Decreasing the 5 judge years which the auditor cases would have demanded by 2.7 years results in net demand of the auditor group of 2.3 years. Subtracting this from the gross saving, 9.3 years, yields a net figure of 7 years as the approximate amount of court time spared by the auditors.

Recapitulating, we have arrived by two different paths at estimates of the amount of court time spared by auditors during the survey period. By the first and more detailed route, the saving amounts to 3 to 4 judge years. By the more general route, the estimate rises to 7 judge years. We are confident that these two figures reliably bracket the area of the auditors' contribution.

It seems quite clear that these estimates do not significantly understate the auditors' contribution, for if none of the auditor-processed cases had made any demands whatsoever for court attention, they would have spared the court about 60\% of its 1956 load, or the work of 9 judges.\textsuperscript{106} This is a conservative assumption, for Chief Justice Reardon has offered his view that as a result of the referrals to auditors, "the court was left to try cases on a docket of ever increasing quality while matters never destined to a jury trial were disposed of quickly" by the auditors.\textsuperscript{107} For us, this says that the auditor group of cases would on the average have been less demanding of court time than those that remained in the court. Of necessity, one would therefore expect that the auditor group saved somewhat less than the 9 judge years their sheer volume would suggest. The calculations in this report indicate that the lesser figure would be on the order of 4 to 7 judge years.

\textbf{V. The Auditor-Processed Cases}

However important the effect of the procedure upon the dispatch of business in the superior court, it is well to keep in mind that its most direct impact has been upon the referred cases subjected to auditor hearings. The evidence is strong that for them the process has meant speed in disposition, convenience, and efficiency. All three results are apparently hallmarks of out-of-court processing of civil liti-

\textsuperscript{105} Since the annual saving as a result of aborting pretrials was between \( \frac{1}{2} \) and \( \frac{3}{2} \) of a judge year, see text accompanying note 97 \textit{supra}, the maximum saving for the entire survey period is 2.7 judge years.

\textsuperscript{106} 5,930 (the adjusted number of cases disposed of by auditors) \( \div \) 9,600 (the number of cases disposed of by the court in 1956) = 61.7\%, which we have rounded to the 60\% figure reported in the text.

\textsuperscript{107} Reardon Memorandum 2.
gation, as attested, for example, by similar reports from Pennsylvania on the compulsory arbitration procedure in action.\textsuperscript{108}

So far as concerns the time interval between referral and reaching the auditor's hearing room, there is no doubt that there was a speedup. In the last preauditor year civil cases in the Suffolk court had to wait 32 months from the date they were "entered" until they were regularly tried.\textsuperscript{109} Under the auditor procedure no referred case has had to wait more than 12 months for a hearing, and most were reached within only a few months.\textsuperscript{110} Meanwhile, trial delay in the Suffolk court fell sharply, and by the end of the 1959 court year was normally less than a year.\textsuperscript{111}

Not only have referred cases waited less time to reach a hearing room, but lawyers, litigants, and witnesses have experienced less wasted time once their case was reached.\textsuperscript{112} This apparently results from the practice of scheduling the auditor hearing for a convenient time and place and proceeding with it promptly at the appointed hour. Most observers report that the hearing itself is considerably shorter than a trial because of its informality and the absence of a jury, yet there are some complaints that auditor hearings drag.\textsuperscript{113}

It is fair to conclude that the consensus in Massachusetts is that the auditor process is an agreeable one from the standpoint of the cases and persons subjected to it. Of course, in the instances when the case must go through a retrial in court after it has passed through an auditor hearing, there is probably less zeal for the arrangement, but as has been seen, retrials occur in only a minor fraction of the cases.

There remains to consider the interesting and important question of whether many cases reach a different outcome before auditors than they would before juries. Frequent reversals or modifications in those cases that go from an auditor's hearing to a jury's verdict might point to an affirmative answer. Since it is highly undesirable that mere change in the adjudicative method bring about altered outcomes in the


\textsuperscript{109} See \textit{Report on Status of Civil Jury Cases} (1956); note 52 supra and accompanying text.

\textsuperscript{110} \textit{Interview With Chief Justice Paul C. Reardon, Edward J. Kelley, Executive Clerk to Chief Justice Reardon, and John Daly, Executive Secretary of the Massachusetts courts, in Boston, October 31, 1960.}


\textsuperscript{112} Reardon Memorandum 2.

referred cases, numerous jury-auditor disagreements in retried cases might point to a serious defect in the process.

To determine whether auditors and juries reach different conclusions in the cases exposed to both, we examined the 82 cases which were retried to completion in calendar year 1960. A comparison of the juries' verdicts and the auditors' findings shows a marked rate of disagreement in deciding the two basic issues, liability and damages. The jury confirmed the auditor in 59% of the cases and reversed or modified on one or the other issue in 41% of the cases.

There is no evidence that jury-auditor disagreements were more frequent on one basic issue than another. As to liability, juries reversed the auditor in 22% of the retried cases. As to damages, the inquiry must be confined to cases in which both the auditor and jury found for the plaintiff, since whenever either found for the defendant there were not discrepant damage awards to compare. In the 27 cases in which both awarded the plaintiff damages, the jury modified 59% of them. In round terms, the auditor and jury disagreed on the liability issue as often as they disagreed on the damage award.

As to which party benefits from the jury's disagreement, the analysis discloses that the jury was more favorable to the plaintiff on the liability question, but tended to reduce his damages. Thus, of 18 cases in which there was disagreement on liability, plaintiffs had won only 5 before the auditors, but emerged with 13 jury verdicts. In the 16 cases wherein both found for the plaintiff but differed as to the amount of the damages, the jury reduced the amount in 10 cases and raised it in 6.

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115 A like objection applies to procedures which seek to reduce delay by inducing waiver of juries in regular trials. Questionnaire surveys by the Jury Project of the University of Chicago Law School disclose that in jury-tried cases the judge presiding disagreed with the verdict on liability in 21% of the cases and that the judges' damage awards would have averaged about 20% less than the juries allowed. Zeisel, The Jury and Court Delay, 328 Annals 46, 48 (1960).

116 An additional 20 cases that returned to the court for retrial during this period were settled during trial, resulting in a trial completion rate of approximately 80%. Compare note 91 supra.

117 The terms "jury" and "verdict" are used throughout because the vast majority of retrials were before juries.

118 An auditor's damage award was deemed "modified" if the jury's verdict increased or decreased the award by at least 10%. In the cases involving such modifications, the smallest was a 17% diminution by the jury of the auditor's award, and the largest was a 133% increase.

119 There was disagreement as to liability in 18 cases compared with disagreement as to amount in 16.
The following table shows in detail the variations in auditors' findings and court adjudications in retried cases:

### TABLE

**Comparison of Auditors' Findings and Court Adjudications in Retried Cases**

#### Extent of Agreement on Liability and Damages (82 cases)

<table>
<thead>
<tr>
<th>No.</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree on liability and damages ..........</td>
<td>48</td>
</tr>
<tr>
<td>Both for defendant ..........................</td>
<td>37</td>
</tr>
<tr>
<td>Both for plaintiff for same amount ........</td>
<td>11</td>
</tr>
<tr>
<td>Disagree on liability and/or damages ........</td>
<td>34</td>
</tr>
<tr>
<td>Total .........................................</td>
<td>82</td>
</tr>
</tbody>
</table>

#### Extent of Agreement on Liability (82 cases)

<table>
<thead>
<tr>
<th>No.</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree on liability ............................</td>
<td>64</td>
</tr>
<tr>
<td>Both for plaintiff ............................</td>
<td>27</td>
</tr>
<tr>
<td>Both for defendant ............................</td>
<td>37</td>
</tr>
<tr>
<td>Disagree on liability ..........................</td>
<td>18</td>
</tr>
<tr>
<td>Auditor for plaintiff .........................</td>
<td>5</td>
</tr>
<tr>
<td>Court for plaintiff ...........................</td>
<td>13</td>
</tr>
<tr>
<td>Total ...........................................</td>
<td>82</td>
</tr>
</tbody>
</table>

#### Extent of Agreement on Damages Where Both for Plaintiff (27 cases)

<table>
<thead>
<tr>
<th>No.</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree on amount of damages ..................</td>
<td>11</td>
</tr>
<tr>
<td>Disagree on amount of damages ................</td>
<td>16</td>
</tr>
<tr>
<td>Auditor for more ..............................</td>
<td>10</td>
</tr>
<tr>
<td>Court for more ..................................</td>
<td>6</td>
</tr>
<tr>
<td>Total .........................................</td>
<td>27</td>
</tr>
</tbody>
</table>

* Percentages have been rounded to the nearest whole number by dropping decimals less than .5 and raising the others.

These figures must be interpreted in the light of the fact that the auditor's findings are read to the jury and are then given the added weight of prima facie correctness. This is in direct contrast to the Pennsylvania arbitration system, under which the jury does not know of the arbitrators' award, let alone accords it prima facie validity.\(^{120}\) Translated into trial court instructions, the Massachusetts provision for prima facie effect signifies that in the absence of contrary evidence, the jury is bound to accept the auditor's fact findings but is not bound to derive the same inferences therefrom, and that if there is contrary evidence

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\(^{120}\) See note 60 *supra* and following text.
evidence, the fact findings are entitled to evidentiary weight but are not conclusive. 121

Obviously, no one can divine the precise impact of the court’s instruction and the knowledge regarding the auditor’s decision upon the jurors’ verdict in any particular case. But it seems indisputable that the auditor’s findings will carry some persuasive force with the jury—and this is the apparent premise and intention of the Massachusetts process. However the jury may react in any particular case, what overall conclusions can be drawn by reference to the results of the 82 retrials discussed above?

As to the cases that went through retrial, the figures speak for themselves: There was a reversal or modification of the auditor’s decision in 2 out of 5 of these cases, and one-fourth more plaintiffs emerged with jury verdicts than emerged with auditor awards. 122 But the figures in and of themselves do not prove that all auditors’ determinations would undergo the same rate of revision if all were retried before juries, because the 82 retrials analyzed here may be unrepresentative of the unreviewed auditors’ awards. It may be that the lawyers who insisted on retrial did a sensitive job of selecting the cases most likely to result differently when taken to a jury; or conversely, they perhaps predicted very badly and failed to seek retrial in many cases that would have been reversed or modified. 123 The possibility that the 82 retrials are a skewed sample of the auditors’ product precludes the inference that they accurately reflect the extent of disagreement between all auditor-heard cases and their potential results if tried before the court. 124

121 See Cook v. Farm Serv. Stores, Inc., 301 Mass. 564, 566-67, 17 N.E.2d 890, 892-93 (1938); MOTTLA § 540, at 312. In Salter v. Leventhal, 337 Mass. 679, 151 N.E.2d 275 (1958), the following instruction by the trial judge was approved: “And so, both parties have availed themselves of the right to introduce other evidence which may tend to support or to contradict or control this auditor’s report. . . . You take all the facts and circumstances in the case, you take all the evidence you have heard, and you include the auditor’s report as evidence, and arrive at your own verdict on this controversy.” Id. at 697, 151 N.E.2d at 285.

122 Plaintiffs received 32 awards from the auditors as compared with 40 verdicts from the juries.

123 It is Chief Justice Reardon’s view that the self-selection is of the first type: “The cases retried are those where one or both parties are dissatisfied by the auditor’s findings to the point of essaying a retrial. It follows that the possibility of an upset of the auditor’s findings is greater in such cases than in the average case.” Reardon Memorandum 5.

124 Comparison of the results reached on the liability issue in all cases tried to completion in the Suffolk court in 1956 (both jury and nonjury) with a sampling of auditors’ reports during the survey period discloses rather substantial variations. Of the court adjudications, 52% were for the plaintiff; of 142 auditors’ reports taken at random, 64% were for the plaintiff. The former figure is in line with the statistics commonly encountered in courts of general jurisdiction elsewhere. For example, a study of a large sample of motor vehicle personal injury cases tried to completion in the California Superior Court reveals that 52.6% were decided for the plaintiff. PUBLIC MANAGEMENT RESEARCH INSTITUTE, MOTOR VEHICLE PERSONAL INJURY CASES IN THE COURTS, Table V (1961). Similarly, in the Chicago Jury Project, see
Further insights can perhaps be drawn from the figures by comparing them with the results of a somewhat similar analysis in Pennsylvania. As earlier noted, in that state's compulsory arbitration system either party has a right to seek court trial after the mandatory arbitration, provided he reimburses the county for the arbitrators' fees. In a Project study of the operation of this procedure in the Municipal Court of Philadelphia, it developed that in trespass (tort) actions juries had reversed arbitrators' awards on the liability issue in 38% of the "appealed" cases.

There are too many significant differences in the Pennsylvania process—the size of the cases subjected to it, and the motivations, penalties, and rewards regarding appeals—to permit deriving reliable conclusions from the higher reversal rate experienced there. But it is nevertheless interesting to recall that in Pennsylvania, unlike Massachusetts, the jury functions in ignorance of the prior tribunal's award and, of course, does not receive the prima facie instruction from the trial judge. An intriguing speculation is to what extent these variations may be reflected in the difference between the 38% and 22% reversal rates.

Another noteworthy variance in the results of the Massachusetts and Pennsylvania procedures relates to the matter of which side wins. Opposite patterns of decision appear in the two systems. As compared to the juries which heard the same cases on retrial, the Massachusetts auditors tended to favor defendants on the liability issue; whereas in Pennsylvania the arbitrators were distinctly less likely to find for defendants than the jurors were. We have not been able to account for this deviation.

VI. What the Auditor System Costs

To spare the court a part of its work by the auditor procedure takes labor and money. As to the labor, the major burden of the
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process is borne by members of the bar. By March 31, 1960, the 18 auditors in Suffolk County had spent approximately 8,350 days hearing referred cases, preparing reports, and doing related activities.\textsuperscript{128} This presumably represents nearly one-half of their available working time.\textsuperscript{129} As has already appeared, the result of this effort was to spare the court an estimated total of 136 trials and about one-fourth of its pretrial conference work. This works out to an investment of approximately 61 days of auditors' time for each avoided courtroom trial, but that figure must be adjusted to give credit for the pretrial saving. Moreover, according to most reports, the referred cases have been disposed of in a quick and convenient manner, and this represents an additional credit against the expense in auditor time.

There is little doubt that the actual burden on the bar is far less than the bare figures would suggest. Most of the 18 Suffolk County auditors have served in this capacity since the restoration of the system in 1956.\textsuperscript{130} Typically they are lawyers who have had long, active careers and who, it is said, rather welcome the opportunity of auditor service to retire from the grind of active practice without losing touch with their profession.\textsuperscript{131}

Relevant to the question of labor cost is the time burden on the attorneys who function as trial counsel in the auditor procedure. Each must attend the hearing itself and must prepare for it. In addition he usually prepares "Requests for Findings of Fact" and "Requests for Rules of Law."\textsuperscript{132} Often his presence is necessary at a hearing on the settlement of the auditor's proposed report;\textsuperscript{133} and there may be opposition to the report, motions to recommit it for additional findings, or motions to strike out portions of the report.\textsuperscript{134} Finally, in every 9th case referred to an auditor, the adversary lawyers, parties, and witnesses bear the inconvenience of a retrial of the same issues.

\textsuperscript{128} This figure is derived as follows. In the survey period, Suffolk County spent $376,415 for auditors' fees. This figure, divided by $9, the hourly rate of pay, gives 41,824 hours of auditor-time. On the basis of a five-hour court day, 8,365 days of auditor-time were expended during the survey period, which has been rounded to the figure reported in the text.

\textsuperscript{129} We estimate from the above figures that each auditor spent approximately 464 days in processing these cases during the four-year survey period, or about 116 days each year. Since the "working year" is in the neighborhood of 225 to 250 days, this represents about one half of ordinarily available working time.

\textsuperscript{130} Interview With Chief Justice Paul C. Reardon, Edward J. Kelley, Executive Clerk to Chief Justice Reardon, and John Daly, Executive Secretary of the Massachusetts courts, in Boston, October 31, 1960. Indeed, several of the auditors served in a similar capacity during the 1935-1942 period.

\textsuperscript{131} Interview With Chief Justice Paul C. Reardon, Edward J. Kelley, Executive Clerk to Chief Justice Reardon, and John Daly, Executive Secretary of the Massachusetts courts, in Boston, October 31, 1960; see Reardon Memorandum 4.

\textsuperscript{132} See MOTTILA § 535, at 301-02.

\textsuperscript{133} MASS. SUPER. CT. (CIV.) R. 88.

\textsuperscript{134} See MOTTILA § 536.
So far as financial debits go, the auditor system cost Suffolk County $376,415 in the 4-year survey period,\(^{135}\) an average of $74 per referred case.\(^{136}\) Figures are not available to determine whether the auditor system resulted in a "net" financial saving or loss to the county. To make the comparison, it would be necessary to compute the saving to the taxpayers of the 136 avoided trials and the 4,000 avoided pretrial conferences.\(^{137}\)

VII. FINDINGS AND TEACHINGS

In the wake of Massachusetts' enactment in early 1956 of a battery of procedures intended to reduce serious trial delay in its superior court, there was marked improvement. The auditor procedure was one of the chief remedial measures adopted. This study has attempted by means of a survey in Suffolk County covering the years 1956 to 1960 to determine to what extent the auditor system contributed to the improvement. In addition, the authors have examined the impact of the auditor process on cases that experienced it, and have estimated its cost in auditors' time and public funds. The following were some of the findings:

(1) Both in Suffolk County and in the Commonwealth as a whole, trial delay in the superior court dropped sharply after 1956.

(2) After 1956 the Suffolk court experienced a substantial step-up in its volume of annual dispositions, namely, from about 9,000 to 13,000 in each year.\(^{138}\) Meanwhile, auditors were disposing of about 1,200 cases in each year.

(3) Auditors played a role in the reduction of delay in the Suffolk court by sparing the court between 4 and 7 years of judge time by eliminating about 136 trials and 4,000 pretrial conferences that probably otherwise would have been necessary.

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\(^{135}\) [1956-60] QUARTERLY REPORTS. This figure is the amount of money paid to auditors in fees.

\(^{136}\) This average was obtained by dividing the total amount spent by the total number of cases referred to the auditors, less the 398 cases still pending before them for which bills have not yet been submitted.

\(^{137}\) To do this would require knowledge of the specific number of trial and pretrial days saved the court, how many of them were in jury as against nonjury cases, and the cost of each of these items. Unfortunately, our research did not uncover information which would permit us to make this computation. Approximately 35 years ago the cost of a jury trial was estimated at $500 a day; the estimate has risen to $650-$750 a day. See Reardon, Civil Docket Congestion—A Massachusetts Answer, 39 B.U.L. REV. 297, 302-03 (1959).

\(^{138}\) But in 1960 dispositions dropped to approximately 10,000 cases. Note 82 supra. See also text accompanying note 140 infra.
(4) The vast majority of cases referred to auditors experienced little delay in reaching hearing and, according to most reports, enjoyed more convenient and shorter hearings than if they had gone through courtroom trials.

(5) Of the auditor-heard cases, an estimated 574 required retrials in the courtroom,\textsuperscript{139} with the auditors' reports serving as prima facie evidence. In a substantial proportion of the retrials (41\%) the trier of fact—usually a jury—disagreed with the auditor on the liability or damage issue. The rate of reversal on the liability issue is markedly lower than in the somewhat analogous Pennsylvania procedure which differs from the auditor plan in not informing the jury of the prior findings.

(6) In Suffolk County 18 auditors spent about 8,350 days on the cases they processed, at a cost to the county of $376,415.

From these and various of the subsidiary findings appearing earlier certain conclusions flow with regard to the auditors' contributions and costs. At an apparent direct expense to the public of about $90,000 a year, they reduced the Suffolk court's business burden by the equivalent in work of 1 to 2 judges for each of the 4 years surveyed. In a court with a complement of 15 judges, this works out to an increase of about 7-13\% in judge power.

While the direct costs of the auditor system, about $90,000 a year, are not strikingly low when set against the judges' work spared, sponsors of the system rightly point out that auditors do not have to be continued in office beyond the emergency period as judges would doubtless be if new judgeships had been created at equivalent cost.

It seems to us that the auditors were a factor of limited importance in causing the dramatic drop in trial delay experienced by the Suffolk court beginning in 1957. Without detailed studies of the impact of each of the other remedies concurrently introduced, it would be idle to attempt a definitive estimate of the relative contribution of any particular measure. However, there is some evidence that the use of district court judges helped significantly, inasmuch as when their use was discontinued, there was a sharp drop in the number of dispositions.\textsuperscript{140} Since auditors disposed of only about 1,200 cases a year, they made only a partial contribution to the 4,000-case increase in the court's dispositions.

\textsuperscript{139} This figure includes the estimated 400 cases which were actually retried during the survey period, and the estimated 174 cases which will have been retried when the remaining 1,537 referred cases, see notes 79, 80 supra and accompanying text, are finally disposed of.

\textsuperscript{140} See note 82 supra.
One factor limiting the effectiveness of the auditors as judge timesavers stands out in the contrast between the 4,000 pretrial conferences they spared the court, and the 136 trials they saved. Since trials make the major demands upon judicial time, for maximum effect a remedy must curtail the trial burden. The evidence is that in actual practice the auditors did not do this, either by reducing the number or the length of the potential court trials.

Reaction from the bench and bar to the effect of the auditor system on the cases it processes is by and large very favorable from the standpoints of dispatch in reaching a hearing and convenience at the hearing. But the figures on jury-auditor disagreement in retried cases suggest that in a significant percentage of cases the auditors' determinations may have been different from those that would have been rendered by juries. The major difference is that juries are more favorable to plaintiffs than auditors on the liability issue. It is not known whether the auditor-processed cases that were not retried would produce rates and types of disagreement similar to those shown by the retried cases.

There are morals in this study with regard to method and technique and these have substantial meaning. Despite long and earnest attempts by the staff of the Columbia Project for Effective Justice, there are gaps in the study. These cannot be closed, either because needed data cannot be retrieved or reconstructed or because the absence of controls obscures the answers to various important questions. An example is the intriguing matter of whether differences result in auditor dispositions compared with those which would have been reached in court trials of the same cases. Lack of data on that subject is particularly regrettable, for if anything is clear it is that, whatever the efficiency of a procedural device in the administration of justice, it should not be adopted unless it leaves the results of litigation substantially intact; or unless, if it changes the results, the extent and manner of the changes are known and acceptable as a price to pay for added efficiency. For the answer to difficult questions of that kind, the need is for better judicial statistics and for bolder administration of new procedures, with built-in controls that permit reliable evaluation.