

ASSIGNING CASES TO JUDGES IN MASSACHUSETTS: LAWYERS' PERSPECTIVES

Matthew Lee

I. INTRODUCTION

This paper explores the assignment of cases to judges in the state of Massachusetts. Its principal focus is Massachusetts trial attorneys' personal views and opinions on what they consider to be the most important aspects, factors and issues concerning case assignment systems in Massachusetts state courts and the United States District Court, District of Massachusetts. The goal of this paper is not to offer an ultimate suggestion or critique the current systems in place. Instead, it seeks to contribute to the pool of scholarly analysis regarding case assignment by presenting a case study of the various perspectives of actual practitioners and identifying some of the factors that may be considered in analyzing Massachusetts' current systems of assigning cases to judges. In order to obtain data for this study, I interviewed Boston area lawyers with various levels of trial experience and recorded their responses, hoping to highlight any common themes or notable differences. I also researched scholarly sources to supplement the data obtained in the interview process and to provide additional depth and insight into identified concepts and themes.

Beginning in Part II, this paper frames the specific scope of its study and addresses potential limitations of the data collected. Part III presents the rules guiding case assignment at the state and federal levels and briefly notes relevant aspects of the current systems. In Part IV, it discusses the methodology used to conduct this study and outlines the data gathering process. Part V summarizes the interview results and organizes them based on the questions asked in the interview process. Part VI then discusses common themes identified in the interview responses and highlights the notable differences within these common themes that are specific to the

Massachusetts state or federal district court systems. Additionally, this section identifies scholarly literature related to the common themes and applies it to the analysis of the interview responses. Finally, in Part VII, this paper concludes and summarizes its findings.

II. SCOPE & ACKNOWLEDGMENT OF DATA LIMITATIONS

The study and analysis contained herein does not seek to provide specific recommendations or suggest a specific course of action. It also does not seek to critique the current systems in place in Massachusetts state courts and Massachusetts federal district court. It is best framed and most useful as a controlled case study of a group of attorneys that represents a wide array of practice areas and trial experience in Massachusetts. Its ultimate goal is to contribute to the study of and the scholarly discourse surrounding case assignment in Massachusetts state and federal courts. Initially, the focus of the study was to critique the current systems in place and seek out suggestions but the interview results yielded a collective call to maintain the status quo. Despite the fact that the initial survey results presented little to no recommendations, the data gathered did yield significant insight into the factors and issues that the surveyed lawyers found to be the crucial to case assignment systems. Accordingly, the scope of this paper was narrowed to focus on surveyed lawyers' personal views and opinions on what they consider to be the most important aspects, factors and issues with regard to case assignment systems in Massachusetts state courts and the United States District Court, District of Massachusetts.

Framing the study with reference to the Massachusetts state and federal district court systems allowed respondents to draw analogies to their experiences in those courts and consider factors that may be unique to Massachusetts in providing their responses. It also provides readers with relevant insight into the interview responses. However, this paper does not intend

to carefully analyze the precise mechanics of every Massachusetts court assignment system. It instead takes a higher level approach that is more appropriate for the scope of its study.

I acknowledge that the data gathered from a small sample of interviews is unlikely to represent the collective views of all lawyers in the Boston area. As a result, I sought out attorneys that represented as varied of court experiences as possible, both with regards to practice area and experience with Massachusetts state and federal district case assignment systems. Although the interview responses and the themes drawn are based on this relatively small sample, I believe the quality of the responses is high because the interviewees are considerably experienced and knowledgeable, and I believe that they were truthful—especially once their anonymity was openly discussed and ensured. Ultimately, I believe the data gathered was sufficient to serve the narrow scope of this paper, and successfully provides insight into the minds of attorneys who are apt and able to comment on the specific systems in question.

I additionally acknowledge that the scholarly literature cited may not be reflective of the whole body of study. However, I believe it is successful in its purpose of adding depth to the comments made by the respondents. Finally, it is important to note that this paper exclusively focuses on the assignment of cases to judges, and does not touch upon the the official procedures under which judges transfer cases or recuse themselves.

III. RULES GUIDING CASE ASSIGNMENT IN MASSACHUSETTS

The governing state rule is Rule 40¹ and finds its federal counterpart in Rule 40.1.² The state rule reads, in relevant part:

¹ Massachusetts Civil Procedure Rule 40: Assignment of Cases for Trial (1974).

² Local Rules of the United States District Court for the District of Massachusetts, Rule 40.1. Assignment of Cases (2015).

“(a) Assignment of Cases for Trial. Cases may be assigned to the appropriate calendar or list for trial or other disposition by order of the court including general rules and orders adopted for the purpose of assignment. Precedence shall be given to actions entitled thereto by statute.”

The governing federal rule is divided into civil and criminal sections and cases are divided into categories based on the nature of the suit or type of crime alleged. These categories are utilized to differentiate the types of cases to be assigned to judges. For civil cases, Rule 40.1(A)(3) states:

“(3) *Assignment*. The clerk shall place a case in one of the three categories described in subsection (A)(1) [*Categories of Cases*] and, unless otherwise ordered by the Court, assign it by lot among the judges of the court in active service at their respective duty stations in accordance with this rule in such manner that each such judge shall be assigned as nearly as possible the same number of cases in each category. A senior judge may limit the category of case and nature of suit assigned to that judge and, within the categories of cases or suits that senior judge will accept, assignment shall be by lot in accordance with this rule.

The assignment provision for criminal cases is stated in Rule 40.1(B)(3) and is essentially the same as the provision for civil cases, with a few differences:

“(3) *Assignment*. The clerk shall place a case in one of the three categories described in subsection (B)(1) and, unless otherwise ordered by the Court, assign it by lot among the judges of the court in active service at their respective active duty stations within the divisions of the court in accordance with this rule in such manner that each judge shall be assigned as nearly as possible the same number of cases in each category. A senior judge may limit the category of cases or types of alleged criminal offenses assigned to that judge and within the categories of cases or offenses that senior judge will accept, assignment shall be in accordance with this rule.”

Rule 40.1, similar to Rule 40, does not precisely lay out a specific process. As the interview responses reveal, Massachusetts state courts apply procedures in accordance with this rule but the internal processes are not completely known by lawyers and vary depending on the court. Based on the survey respondents’ descriptions, Massachusetts state court systems utilize a docket system that puts cases on a list pursuant to the unique docket number that each case is given. This list, to some extent, is used to determine when a lawyer will appear in court and also

which judge will be assigned to their case. However, this system results in lawyers being unaware of which judge will be assigned to their case until the day they are required to appear. Typically, lawyers will not know which judge is assigned to their case until they walk into the actual courtroom. Although different courts utilize different mechanics to disperse lawyers pursuant to a docket and other rules as prescribed in Rule 40, the reality for practitioners is that judges rotate from county to county at the state court level and lawyers cannot look to a calendar to predict which judge will be assigned to their case. In most courts, even if a lawyer is aware of which judges are sitting in the courthouse, he or she typically will not be able to predict which one will be assigned to their case.

In Massachusetts federal district court, according to the interviewees, there is a single system. Judges are assigned to cases at “random” by the clerk’s office, subject to the requirements of Rule 40.1. Similar to the district and superior court systems, attorneys practicing in Massachusetts federal district court do not know who will be assigned their case prior to it occurring. However, a significant difference in federal district court is that judges typically keep the cases they are assigned to the end. In state court, cases are regularly reassigned to different judges at different stages.

IV. METHODOLOGY

A. Interviews

The interviews gathered data from a select group of Massachusetts trial attorneys and were conducted by phone or in person.³ The attorneys were chosen with the intention of being representative of the trial lawyer population as a whole. To that end, I sought out attorneys that had tried cases at the state and federal levels, and also attorneys who had experience at both. I

³ Interview transcripts are available upon request.

also chose attorneys that represented a wide range of practice areas including civil litigation, bankruptcy, criminal law, probate and family law. The attorneys interviewed also represented both public service and private practice and experience in a wide array of cases ranging from high-profile criminal charges to divorce proceedings to small civil suits.

I presented each attorney with a uniform list of questions that were initially oriented to obtain their personal opinions on case assignment generally and how they would change the systems if they so desired. After the first few interviews, I received very little material on the issue of changing the case assignment systems, but noticed I gathered a great deal of insight into what attorneys felt were important when it came to these systems. As a result, I changed the interview questions to focus more on the factors and issues that attorneys found to be significant. First, I asked each interviewee about their job, the cases they had tried and the courts that they had appeared in. In the second set of questions I asked each attorney to briefly describe in their own words how the courts they were familiar with assigned cases to judges. Third, I asked them to list what they believed to be the most important aspects and factors of a case assignment system. Fourth, I asked them to state specific issues that they had encountered in a case assignment system. Finally, I asked them how they would design a case assignment system, and why. I believed these questions would properly orient the interview discussions and address the topic of this paper while also providing the interviewees with the freedom and opportunity to take the questions in different directions.

At the outset I stated to each interviewee the purpose of my paper and that it would be written for U.S. District Court Judge William Young's Judging in the American Legal System course. I then asked the interviewees if they requested anonymity in their responses. All but two

requested that their responses remain anonymous⁴ and one interviewee requested that I do not attach a single identifying description. I believed the anonymity of the interviewees would allow for more critical comments and superior insight. I interviewed seven⁵ lawyers total:

1. Attorney “MT” has tried civil litigation and bankruptcy cases in the United States District Court, District of Massachusetts, and also at the state level in Suffolk County Superior Court, Norfolk County Superior Court and Boston Municipal Court.
2. Attorney “TA” has tried cases in the United States District Court, District of Massachusetts.
3. Attorney Jason Chan is a partner at a criminal defense firm in Brighton and has tried over 80 cases at the state level in Suffolk, Norfolk, Middlesex, Worcester, Hamden and Plymouth County. He also previously served as a district attorney.
4. Attorney “KC” is a criminal defense attorney in the Boston area who has tried over hundreds of cases at various Massachusetts state courts. KC also has experience as a prosecutor.
5. Attorney “BL” has experience practicing at the state level, but now primarily focuses his practice in family law.
6. “ES” is on the faculty of a local Boston law school and over the course of his career has tried cases in all of Massachusetts’ state courts and the United States District Court, District of Massachusetts. He has litigated cases in a number of civil law areas.
7. Professor David Rossman teaches at Boston University School of Law and is director of BU Law’s Criminal Law Clinical Programs. He has represented criminal defendants for over three decades at all state and federal court levels.

⁴ Arrangements can be made to confirm the participation of attorneys if requested, in a manner that would ensure that their remarks would not be attributed to them.

⁵ The group of interviewees breaks down into: 4 with federal and state experience, 3 with only state; 4 with public and private sector experience, 2 with only private experience, 1 with only public experience; 1 with criminal and civil experience, 3 with only criminal experience, 3 with only civil litigation experience.

B. Scholarly Research

I first analyzed the interview responses and identified common themes before beginning my research. My goal was to create a more thorough analysis of the interview results, so I focused my research on scholarly literature that addressed the points made and themes identified in the responses. I sought to identify literature that would add depth and insight to supplement their responses. To conduct my research, I utilized the Westlaw and Lexis legal databases and searched through cases, statutes, regulations and secondary sources.

V. INTERVIEW RESULTS

A. Assigning Cases in Massachusetts State Courts

1. What are the most important aspects and factors of a case assignment system?

Responses to this question essentially center on how a case assignment system at the Massachusetts state level should be applied neutrally, but should afford benefits that experienced lawyers could take advantage of. To the respondents, a neutral plan equates to one that was “random.” Specifically, they explain that a system should be random in the sense that lawyers will not know the judge that will be hearing their case until they actually arrive at the courtroom. Attorney KC notes that this random docketing system was present in the state courts he practices in, and it provides him with opportunities that would not be available if judges were assigned and expected to sit on their cases to the end. He says that on the days he goes to court, “knowing who’s at the court [and sitting as judge] is very important.” He continues, “If someone is assigned, then you have to be in front of them the whole time and you don’t have a prayer.” KC states that he likes “how in state court you can play around and get it out of someone’s hand [and] you always have an opportunity to make something happen if it’s not assigned.” ES

echoes the same sentiment, stating that “if you don’t like that judge [that has been assigned to your case], it’s better to have more flexibility.”

Some of the respondents note that a random assignment method can be beneficial when it comes a lawyer’s performance relative to their peers. KC believes that the state random docketing system allows him to “perform his craft” better than other attorneys. He continues, “Know[ing] how a judge stands on something” can be used to his advantage, and “[the current system] allows attorneys to separate themselves from other attorneys by knowing how to play it.” Additionally, it is “important to know the tendencies of a judge so you can give the best advice to your client.” He notes that “you have to be a good lawyer but also have to know who’s who and have to know how the game is played and play it to judges’ preferences.” He believes that there is more opportunity for lawyers to utilize their experience in a system that assigns judges at random.

Attorney Chan supports this notion, stating that “you have a lot of the same judges, [so] there is some predictability there [because] then you know what they will do in the arraignment or pretrial [stage].” Chan notes that any downsides to a random initial assignment in state cases are balanced by the possibility that “judges may maintain jurisdiction over a case and some judges do like to keep the most complicated case.” He adds that the current state system can account for some inefficiencies this way by preventing lawyers from repeatedly having to make the same complex arguments. Overall he thinks an important aspect of assigning cases to judges is random assignment, even when cases are being reassigned. However, he also thinks an important aspect is the opportunity for judges to keep cases they are initially assigned or reassigned when it would be more efficient. This, he states, can also be helpful at times because “if you get a judge that is good for your case, you can ask him to work on the case.” Chan,

however, does note that a request for a judge to keep the case does not always work and that this is likely an important factor of a system, because if one attorney wants a specific judge, opposing counsel might feel the opposite way.

Some of the respondents note that a state system of assigning cases to judges needs to provide flexibility. Attorney MT comments that “[i]n state court, you have the ability to pick your location a little more easily because of venue statutes” [and] “geographically, [it can be] something more convenient for you.” She continues, “you can pick what town you want to be in, what county, [and] have a little more control of how you want to file [and this] gives parties flexibility.” She and others note that this flexibility is an important aspect for them and can be more convenient and practical.

2. *What are some specific issues you have encountered in a case assignment system?*

Despite the views of several respondents that the uncertainty of judge assignment could work to their advantage, the most commonly cited issue that respondents stated was regarding assignment of cases to judges that rotate through counties. Specifically, how judges would rotate even after initially being assigned an interviewee’s case for arraignment or pretrial. Attorney MT states that a negative to any system of case assignment is that all judges are not alike and therefore the initial assignment of cases to any particular judge will raise different considerations for an attorney. She states, “judges have their viewpoints [and] some might view things in a certain way [that’s different from another judge].” At the state level, however, she notes that this is exacerbated by the fact that the judge who first hears your case at arraignment or pretrial may not be the one who presides over the the ultimate trial. In fact, she states, “It’s even worse [at the state level] because judges rotate every few months.” KC adds, “[the state court system] feels a little more random.” It is “less of a coherent system [than the federal district court system]

because judges are constantly changing” and “in some cases ... the lifespan can extend for years.”

Attorney ES mentions another issue with assigning cases to a rotating group of judges, noting that “being able to present motions to the same judge is helpful” and how that does not always happen in state court. He goes on to say, “If you have a complex fact pattern, it helps for the judge to learn that fact pattern once—to the extent you’re trying to educate the judge to your view of the law in particular.” ES notes that in state cases, this ideal scenario isn’t always possible.

Attorney BL also touches on what he views as a potential deficiency in assigning cases at the state level. When it comes to specialized courts such as the probate and family law courts which employ a small number of judges, he notes, “Some judges are more expert in certain things and you might want them [to try your case].” BL explains that there is a learning curve that some judges face when they become judges and “some have to learn” specific areas of law. Using his specific practice area as an example, he states, “It would be nice if the former probate court practitioners tried the probate cases” instead of the judges whose backgrounds are primarily in family law and have little probate court experience. He stresses that is an issue that should not result from a case assignment system.

Interviewee responses also note how a state court system can be a challenge if, as ES states, lawyers “typically won’t know what judge [they’re] going to get.” Chan adds that a negative to any random state court system of assigning cases is that “you won’t be able to know what judge has the case until you actually get to court.” Although KC noted previously that this can be beneficial for some attorneys who are more familiar with judges, Chan highlights the non-ideal situation presented when preparing for a case without knowing who the judge will be prior

to arriving to court. Preparation, the respondents note, can therefore be an issue in the state systems.

Respondents also mention that a state system of assigning cases to judges must not fail to be conscious of its effects. KC notes that the courts' utilization of a docket system can be "frustrating [because] sometimes you have eight trial dates on the same day and sometimes it takes a few months [between cases]." ES notes that in some cases, a judge may "try and forecast" pretrial and indicate how they are likely to rule on certain issues to encourage settlement. However, in state court, the initial judge can leave and although the parties are often aware of this, ES explains that parties may "los[e] the benefit of the prediction of the first judge, and that happens a lot." KC and ES state their beliefs that a state system should not eliminate benefits it aims to create, nor should it fail to account for the practical considerations that many attorneys face.

3. *How would you design the case assignment system, and why?*

When asked about how they would design a state system of assigning cases to judges, respondents were generally wary of making specific recommendations. Most, such as KC, made reference to the state court systems they were familiar with when responding to this question. He notes, "I don't think there is a perfect system" and "[t]his is the way it works."

Professor Rossman, however, expresses very specific views on how he would design a case assignment system at the state level. He believes the current system lends itself to "manipulation" by lawyers, and "lawyers can do things to manipulate the process to get the case before a judge they like or dislike." He does however, note that this issue can be seen in two ways. He explains, "As a lawyer, I prefer a system where I can take advantage of the possibilities and use the inefficiency of the system to work to the advantage of my client,

[however], as a professor it makes no sense.” What he suggests is a system that does not rotate judges through counties, as this practice can result in the same case being assigned to multiple different judges. Rossman states, “I don’t know if it makes continued sense to do that... It’s a historical anomaly, a leftover of the way things were.” He contends that it would be “more efficient for judges to stay in one county” instead of having some judges rotate, and some not. Rossman recommends that at the state court level, “they really should adopt a system that assigns responsibility for a case to a [single] judge,” adding, “It makes a lot more sense.”

Chan, however, acknowledges that although it is not ideal for judges to constantly be reassigned and to be unaware of who your judge will be until you get to the courtroom, “It is difficult for every case to be assigned [to a specific judge] because there is such a high volume.” MT adds, “I don’t think it’s possible for judges to be on top of everything” while Chan notes, “there’s no way the same judge can hear every case it is initially presented with.” Ultimately, they do not see a way to effectively implement the changes that Rossman suggests.

BL offers a specific suggestion with regards to assigning cases in state courts that specialize, such as the Probate and Family Court which employs a small group of judges. As he stated above, some judges are better prepared to deal with specific issues than other judges. He notes that “[w]e all know some judges judge differently and some judges have different idiosyncrasies.” Therefore, BL believes, some state systems may want to consider assigning former practitioners in certain legal areas to the cases that arise in those areas.

Some interviewees had little to say about any potential changes, but stressed the importance of maintaining the “random docketing” element of case assignment in the state court system. MT acknowledges that although random docketing may not always be ideal because “[y]ou will get different [judges and, consequently, different] outcomes, ... it is balance[d] [by]

being random.” She states, “That’s part of the beauty of the system.” With regard to the different viewpoints that judges may have and that may ultimately affect a case as she noted previously, she states that “there’s really nothing you can do about that except knowing your judge.” She believes that developing an understanding of the various judges one might encounter is the way to balance the unknown that comes with different judges, and is not likely something that can easily be implemented into a rule. She notes that an ideal system would have inherent balances such as this.

ES also touches on the notion of flexibility in offering his thoughts. Although he states that “[t]he more certainty, the better, of knowing who the judge is,” he does not “want to recommend anything that would unduly interfere with the courts ability to be flexible, [at least with regard to] the pretrial stuff.”

B. Assigning Cases in the U.S. District Court, District of Massachusetts

1. What are the most important aspects and factors of a case assignment system?

The survey responses to this question indicated that those with federal experience thought that the current Massachusetts federal district court system was an ideal system. Most of the responses to this question were either conceptual or focused on the benefits afforded by judges keeping the cases they were assigned. For instance, Attorney MT, who has tried cases in both state and federal district court, said she “would take federal [over state] any day of the week.” She states that she “prefer[s] federal because it seems like [judges] have more time to invest in cases and know the parties and the facts of the case better.” She attributes this to the fact that “[t]heir dockets are not as congested” and judges are typically assigned a case through its life. MT, therefore, believes that an ideal aspect of a system would be one that provides similar results. ES adds the federal system provides an “advantage for bigger cases, especially if the

judge comes to [understand it],” since the judge that is assigned to the case will typically see it through. ES also states that at the federal level, when judges “try to forecast,” as noted above, and indicate how they are likely to rule on an issue to encourage settlement, parties can retain the “benefit of the prediction” because the judge likely will not change. ES stresses the benefits that judge certainty can have on a case.

From a conceptual view of the system, MT finds positives in the random method in which cases are assigned and states her belief that it is “pretty much the only way to ensure some type of fairness.” She believes that fairness, as an integral part of the justice system, can be achieved through randomness in an assignment system. Attorney TA echoes this sentiment, stating, “If [the system] actually is random, it would be a good system ... a justice is blind kind of thing.” Both MT and TA specifically note the importance of fairness as an aspect of a case assignment system.

2. *What are some specific issues you have encountered in a case assignment system?*

All but two respondents had difficulty pointing to any concrete issues they had seen in their experiences in federal district court. The issue cited was with regards to the transparency of the assignment system and, as a result, whether the system was actually as neutral and as fair as its process suggests. TA states that although the public position is that cases are assigned randomly, “most lawyers do not believe that” and “patterns have emerged over time.” She continues, “This is the big mystery in federal court [and] the clerk’s office will not tell you how they [assign the cases].” TA notes that if the system was “truly random, some judges could get overloaded.” Additionally, she recalls that certain types of cases would regularly be assigned to a specific judge and contends, “It couldn’t have been random.” ES even went so far as to say

that sometimes “the clerk’s office manipulated the assignment of judges to achieve an end.” He ultimately felt that a case assignment system should not be operated in this manner.

Therefore, according to TA and ES, transparency is an issue in the Massachusetts federal district court system of assigning cases to judges. The issue is of increased importance because TA “thinks judges express preferences for certain cases ... and some judges might say they don’t like certain cases,” potentially influencing the types of cases they are assigned. According to TA, “a lot of judges have particular views about different things [and] this permeates almost every practice area.” She worries that judges may want certain cases to be assigned to them so they could share or spread these particular views. For example, “some judges are anti-police, and they may want to take cases where there are suppression issues.”

3. *How would you design the case assignment system, and why?*

ES believes an ideal case assignment system would be mindful of the balance that exists between the institutional interest of the justice system and the interest of litigants. He thinks that the best way to balance these issues is the system in place, which he “treat[s] as the luck of the draw.” He cites an example when he was trying a case in federal district court and the judge that was assigned to his case “had already established himself as a judge who handled [his type of case],” and for his party “was the best judge we could probably get in the country.” Although he asks himself, “Was it just dumb luck?,” he also recalls the instances where his party was assigned a judge that was probably worse for his case than others. The random assignment of the federal district court system justifies his acceptance of “the luck of the draw,” and he thinks this is the appropriate mentality for a case assignment system.

TA also supports the idea of random assignment, stating that she thinks the system “should be totally blind draw [and] judges can reject assignments or recuse themselves if they

can't be fair." She believes that "[i]t's the way to prevent judges who have certain political views from garnering cases where they want to mix their politics with judicial decision-making."

Rossman also notes that overall, he would recommend using a truly random assignment system. He "think[s] [cases] should be assigned randomly" and that "[r]andomness is a truly important feature." If he had to implement a specific change, he would modify the random assignment to take into consideration the respective workloads of each individual judge.

Rossman states, "If some judge is on a case that lasts a long time," you might have to take them "out of the rotation" depending on their workload. In order to accomplish this, Rossman notes, the created rule must be "neutrally phrased." TA shares the notion of accounting for workload, stating that it may potentially be beneficial to "parcel out" cases "to the extent that [they are] complex and non-complex." She says to imagine "a judge has 10 cases, which are very sophisticated, big paper, lots of defendants and very time consuming and another judge has 10 small cases." TA makes the case that "[t]heir work is not going to be equitably balanced."

VI. COMMON THEMES & SCHOLARLY LITERATURE

In their responses to the interview questions, the respondents touched on several common themes including random assignment, the issues presented by different judges, attorney effectiveness and skill, judge workload and maintaining the status quo. The themes cut across both the state and federal district systems, but there are also notable differences within. The themes and differences are discussed below, and are supplemented by scholarly research that addresses them.

A. "Random" Assignment

All the respondents touched on the concept of "random" assignment in case assignment systems. It is important to note that the survey responses addressed two different conceptions of

“random.” In state courts, lawyers are aware that cases are distributed based on a docket list and calendar among a “random” group of judges who are sitting in the courthouse on the day the lawyers arrive. These lawyers are then “randomly” assigned to a judge in that courthouse. In the federal district court context, lawyers are unaware of how specific categories of cases are divvied up and the “random” process in which these cases are assigned to judges.

Another notable difference was that some respondents with experience in federal district court questioned whether the system was in fact random while attorneys with state court experience did not appear to be concerned whether their system was truly random. ES thinks the federal district court system is “a modified randomness” and that “[i]t probably isn’t completely random.” He stated that he was sure that “within the clerk’s office ... it’s a negotiation between the Chief Judge and the assigning clerk.” Fortunately, however, scholars believe that among chief judges, “Manipulation of case assignments ... is likely rare.”⁶

TA also noted how she found it hard to believe that the cases were assigned to judges at random, based on past experience and “patterns.” ES and TA’s fears are not unique to them and such claims have also been made in the United States Court of Appeals for the Seventh Circuit.⁷ The survey results indicate that the respondents with state court experience were not overly concerned with whether the judges were actually randomly assigned to the courthouses because the state system provides them with opportunities to get the case into another judge’s hands. Nonetheless, based on the collective responses it seems that in both systems random assignment has not resulted in an uneven balance. As some scholars note, this should be the case as

⁶ Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 32 (2008).

⁷ Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 705-06 (1994).

“[r]andom assignment across a sufficient number of cases should equalize unaccounted for variables.”⁸

Despite such differences in thoughts regarding the the application of randomness, each interviewee indicated that the “random” aspect was vital to an ideal case assignment system. Some noted in their responses that it provided a balance and ensured fairness while others suggested there was no way to have a system without it. As Adam Samaha notes, “randomization has one particularly special feature: it represents a certain version of equal opportunity.”⁹ This sentiment was evident in many of the interview responses.

B. Issues Presented by Differences in Judges

Every respondent except for one noted that different judges presented different issues and this was relevant to thinking critically of case assignment systems. Most of the interviewees already assumed and accepted as common knowledge that judges can affect the outcomes of any given case. Scholars agree, and some note that “[b]ecause adjudicators vary in competence and ideology, randomizing their case assignments will effectively randomize outcomes....”¹⁰ Specifically, some respondents noted that some judges are not as knowledgeable in certain areas while others are experts. Others stated that cases needed to be tailored in accordance with a judge’s personal views and idiosyncrasies. Therefore, the responses made clear that case assignment to any given judge has particular importance.

With regards to a potential federal district court assignment system, respondents placed great emphasis on how judges’ personal political agendas or views could not only greatly affect the outcome of a case, but also the initial assignment of the case itself. There is support for this

⁸ Adam M. Samaha, *Randomization in Adjudication*, 51 Wm. & Mary L. Rev. 1, 23 (2009).

⁹ *Id.* at 15.

¹⁰ *Id.* at 2.

claim, such as the existence of an “attitudinal theory [that] proffers that judges are political actors who make decisions that will maximize their policy preferences.”¹¹ The interviewees with federal experience all noted that the only way to account for this perceived reality was to implement a system that was truly random and therefore neutral. According to Jonathan Entin, however, this issue may also be counteracted by the notion that “[j]udges are sensitive to the appearance of impropriety that might be inferred from unusual assignment procedures.”¹²

Some note, “Random case assignment ignores important differences among judges....,” and this thought was also apparent among interviewees in the state court context.¹³ With regard to the state court assignment system, respondents such as KC commented that the assignment of judges could be outcome determinative for their case. However, those surveyed noted that this issue was not as significant as it could be because the state system would provide opportunities to have their cases reassigned. They noted that this feature was an important aspect of their system.

The responses show that the assignment of cases to judges must take into consideration the fact that judges do or are at least perceived to have different effects on determinations of law and fact, and that a proper system will have to address the associated fears of the lawyers who try cases that are subject to that system. Samaha supports this claim, noting “because the pool of decision makers differs in competence and ideology, random case assignment will influence an untold number of case outcomes.”¹⁴ Therefore, as BL suggested, “support for randomization should partly depend on the mix of characteristics among judges.”¹⁵ He stated that the

¹¹ George & Yoon, at 4.

¹² Jonathan L. Entin, *The Sign of “The Four”: Judicial Assignment and the Rule of Law*, 68 MISS. L.J. 369 (1998).

¹³ Samaha, at 6.

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 77.

differences presented by judges should potentially be utilized in assigning them, at least to the extent that their counterparts may not be adequately knowledgeable about an area of law. Entin notes that in addition to specialization, a system may want to consider the nature of the case and how that may impact judges differently. He writes, “some difficult or sensitive cases might be better handled by more experienced judges.”¹⁶

The interview responses showed that attorneys are conscious of the impact that assignment of a particular judge can have on their cases. However, the survey respondents indicate that they can live with being assigned a judge that is bad for their case as long as the process underlying the assignment is fair.

C. Attorney Effectiveness and Skill

The survey responses also indicated that the way cases are assigned to judges can impact attorney effectiveness and potential systems should be mindful of this reality. Attorney effectiveness and skill, as shown through the survey responses, can be impacted in different forms. For some respondents at the state level, finding out who a judge is the moment they walk into a courtroom can help give them an advantage if the other party is not familiar with that judge or less experienced. For others subject to the state court assignment system, the uncertainty of who their judge would be is seen as a disadvantage because it affects their preparation and ultimate effectiveness as an advocate.

Respondents noted that the system in place in state court provided attorneys with a better stage to showcase and utilize their skill, in the sense that an attorney must be able to react quickly and effectively to changing circumstances. As David Abrams and Albert Yoon note,

¹⁶ Entin.

“Experienced attorneys achieve substantially more favorable outcomes for their [criminal defendant] clients than less experienced attorneys.”¹⁷

Additionally, the docket system sometimes allowed respondents to get different judges that would be more favorable to them, ultimately increasing their effectiveness. The impact of a judge on attorney effectiveness is more evident when considering there are “well-documented efforts [or lawyers trying] to evade customary procedures for assigning cases to judges.”¹⁸ What is ironic, however, is that “[c]ourts use the random assignment of cases to prevent attorneys from selecting their judges.”¹⁹ Perhaps the leeway in state court to impact judge assignment is necessary to balance the difficulties that arise from cases constantly being reassigned.

In federal district court, interviewees noted that assigning a single judge to a case could enhance an attorney’s effectiveness if the judge was familiar with the type of case and had a political stance favorable to their case. Respondents noted that this element of a system would balance itself because attorneys would sometimes get judges who are not favorable to their positions. Respondents also noted that in federal court, judges were generally more knowledgeable about their cases because they typically keep the ones they were assigned to their end. Some attorneys saw this as a benefit that ultimately made them more effective advocates because the judge would be less likely to misunderstand the issues and their arguments. Some note that the federal system also impacts attorney effectiveness to the extent that it limits litigants “attempts to game an otherwise random assignment system.”²⁰ The interviewees’ collective

¹⁷ David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. Chi. L. Rev. 1145, 1150 (2007).

¹⁸ Entin.

¹⁹ Theresa Rusnak, *Related Case Rules and Judge-Shopping: A Resolvable Problem?*, 28 GEO. J. LEGAL ETHICS 913, 916 (2015).

²⁰ Samaha, at 49-50.

responses further cement that an important consideration for lawyers when thinking about an assignment system is how it can impact their effectiveness as advocates.

D. Judge Workload

The respondents noted that it was important to consider the workloads of individual judges when assigning cases. This concern manifested itself in different forms in the state and federal district contexts.

In the state court context, respondents generally accepted the fact that it would not be feasible for all judges to see every case through due to the volume of their dockets. This consideration generally made them further support the system already in place. In the federal district court context, the interviewees noted that judges had smaller workloads, and this reinforced their support of the federal district system because to them it made sense for judges to maintain a case all the way through so there would be more certainty and judges would have better understanding of their cases.

The issue of judge workload also appeared in the context of potential suggestions for the federal district court case assignment system. At the federal level, two interviewees noted that case assignment systems should take into account the workloads of individual judges so that judges are not assigned an unbalanced share of cases. As Tracey George and Albert Yoon note, “judges desire to move cases off the docket and have a sense of control over workload.”²¹ This brings up the consideration that a judge’s overloaded docket may not just be inequitable, but could impact how they try cases and ultimately counteract the fairness that comes from a random assignment system. The surveyed attorneys believe that some consideration must also be made to account for the fact that some cases are more complex and time consuming than others, and

²¹ George & Yoon, at 19.

that it would not be ideal for cases to be assigned without this consideration in mind. This recommendation is reinforced by the views of scholars who believe that “cases are not equivalent [and] some are easy and some are hard [and] some will go to trial ... some will attract widespread public attention [and some will not].”²²

E. Maintaining the Status Quo

All but one of the seven lawyers interviewed expressed general satisfaction with the current state and federal district court case assignment systems and a preference to maintain the status quo. The single attorney suggesting change recommended modification of only the state court system to mirror the federal district practice of assigning cases to a judge that will not move from courthouse to courthouse and will remain on the case to which they are assigned. Two attorneys expressed that they supported the system as is, but if they had to change one thing they would recommend adding a neutral, “modified random” rule that would account for the complexity of cases and judges’ individual workloads when assigning cases. A state court practitioner expressed that he believed the state court system was fine, but with regard to cases arising in specialized courts such as Probate and Family Court, he would prefer if judges did not try cases in probate if they were primarily family law practitioners and vice versa.

The interviewed attorneys cited various reasons to support the systems in place while some simply could not think of an alternative. Others thought that the systems in place were the best balance of competing interests while others thought that they were most fair.

The idea of balancing various factors was noted by several respondents and influenced their opinions. They noted that the current case assignment system in Massachusetts state courts effectively balanced the competing interests of moving cases along in the justice system with

²² Entin.

litigants' desires to know who they will be dealing with. Additionally, respondents cited the balance struck between the difficulties of being unaware of their judge until the day they appear before them and the types of benefits attorneys gain as a result of this system. Interviewees further commented on the inherent, natural balancing within the current systems themselves and cited it as an important reason to maintain the current systems. At the state court level specifically, they noted that although they may be assigned a judge that is bad for their case, it is balanced by the fact that the judge was assigned at random. To respondents at both the state and federal levels, the idea of unfairness that results from having a potentially biased judge can be lessened by the fact that attorneys adapt to different judges over time and by accepting that a random draw can lead to a poor result as much as it can lead to a favorable one.

The abundance of factors cited in support show that there are likely several factors that went into establishing the systems currently in place. As scholars note, the current systems and their reliance on randomization, embodies a “combination of judicial position.”²³ Therefore, it is important to understand that the current status quo was likely the byproduct of several levels of conscious decision-making. Discussion of the factors relevant to the respondents reveal parallels in the policy-making context, as scholars note that a system based on “randomization represents a form of equal opportunity [so] it can be a logical response from decision makers confronted with equally plausible courses of action.”²⁴

The majority of respondents may have had difficulty suggesting changes to the current systems not only because they supported them, but because, “[a]lthough randomization has been around for many centuries, there seems to be no precise and concise restatement of when it is

²³ *Id.* at 52.

²⁴ Samaha, at 18.

normatively superior to alternative decision strategies.”²⁵ Therefore, the interviewees support of maintaining the status quo may be a byproduct of uncertainty as much as it is of discernible factors.

VII. CONCLUSION

This paper presents a case study with the narrow scope of detailing the aspects, factors and issues that are important to Massachusetts trial lawyers when they analyze the case assignment systems currently employed in Massachusetts state courts and the United States District Court, District of Massachusetts. In order to carry the study, I interviewed a carefully chosen group of Massachusetts lawyers who had the experience necessary to provide thoughtful insight into the state and federal court systems. I used the respondent’s experiences in the Massachusetts state and federal district courts as a backdrop to inform their responses and provide an analytical foundation. I then analyzed their responses to a carefully selected group of questions to identify common themes and notable differences when it came to the issue of case assignment. The common themes identified were random assignment, issues presented by different judges, attorney effectiveness and skill, judge workload and maintaining the status quo. Once common themes and notable differences were identified, I applied scholarly literature that develop the analysis of the interview responses.

This study found that all respondents were generally satisfied with the systems that assigned cases to judges at the Massachusetts state and federal district courts in which they had experience. Although they noted key differences between the state and federal district systems and cited various influencing factors, their responses ultimately identified several commonalities that were essential in forming their opinions. The surveyed attorneys found that the aspect of

²⁵ Samaha, at 17.

“random” assignment was essential to an ideal system. They also noted that systems must consider the direct impacts that assignments of judges can have on the outcomes of their cases and their effectiveness as advocates. Additionally, the respondents indicated that successful systems must consider the workloads of the judges who are assigned their cases.

Ultimately this paper hopes to contribute to the body of research on the topic of case assignment to judges. It provides, within its narrow scope, pertinent information regarding case assignment systems in the courts of Massachusetts from the perspectives of lawyers who have worked within these systems firsthand.