Adjudication By Deadline

*David Crump**

Courts and rule makers impose time limits on many attorney actions.[1] The variety of these deadlines is broad, ranging from pleading and discovery cutoffs to trial settings.[2] Deadlines seem to have increased significantly in recent years. The effect, one can infer, is sometimes to increase the cost of litigation in little cases and indeed to drive smaller claims from dockets, as attorneys spend more and more effort on scheduling, time management systems, and catch-up when deadlines loom.[3] And yet there are reasons for imposing deadlines.[4]

A missed deadline often means that the attorney's desired action is no longer permissible. The sun rises on a given day; it sets; and with no proceedings necessary, a potentially valuable right is lost.[5] It is as if every case had a whole series of statutes of limitations. The resulting phenomenon can be called "adjudication by deadline."

This Article is an effort to describe, evaluate, and critique adjudication by deadline. Part I provides context by describing several horror stories—cases in which adjudication by deadline apparently resulted from inadvertence or action of a kind that is easily forgivable. Part II addresses the policy conflict inherent in adjudication by deadline: the clash between the policies served by deadlines and the contrary factor of dismal cases in which a missed deadline results in the loss of rights. Part III considers potential solutions that might avoid inadvertent or unpreventable causes for adjudication of this kind.

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* John B. Neibel Professor of Law, University of Houston Law Center. A.B. Harvard University; J.D. University of Texas School of Law. AV-Premiere, Martindale-Hubble; author or co-author of nine law school teaching books, eight published novels, and many articles in highly ranked journals.

[1] *See generally infra* Part I (providing examples).

[2] *See infra* Part I.

[3] *See* DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE app. at 885–87 (7th ed. 2019) (discussing time management).

[4] *See infra* Part II.A. (discussing reasons for deadlines).

[5] *See infra* Part I (providing examples).

Finally, Part IV develops the author's conclusions, which include the possibility that some missed deadlines might be forgiven in a system that still preserves enforcement of time limits.

I. SOME DISMAL EXAMPLES

A. *The Karubian Case: The Client Who Lost After the Clerk "Goofed"*

Karubian v. Security Pacific National Bank[6] was a dismal consequence of the docketing system in Los Angeles. That system is set up for the purpose of rationing and delaying jury trials, since Los Angeles County has trouble providing trials at all.[7] The court of appeals explained the system, apparently without any recognition of how bad it was:

> [T]he California Rules of Court basically establish a three-step procedure for setting cases for trial in Los Angeles County. That procedure is set in motion by the filing of an "at-issue memorandum." A "civil active list" of cases in which the "at-issue memorandum" has been filed is periodically created by the superior court. The moving of a case from the "civil active list" to the "trial ready list" requires the filing, by a party, of a Certificate of Readiness.
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> Since the state of the calendar in Los Angeles County is such that a case cannot be brought to trial within 6 months after the filing of a Certificate of Readiness, the rules provide that the Certificate of Readiness cannot be filed before receipt of notification from the clerk of eligibility to do so.
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> If, after a notice of eligibility is issued in each of two months, no Certificate of Readiness is filed the case is removed from the "civil active list" and is not restored thereto until a new "at-issue memorandum" is filed and served.[8]

The Rules also required that trials be completed no later than five years after filing.[9]

In *Karubian*, counsel filed an at-issue memorandum a year after they filed suit. Then a second counsel was substituted, and later, a third.[10] The acting counsel waited to receive a notice of eligibility from the clerk, as the Rules required. But the clerk's office made a mistake and sent the notice of eligibility to original counsel, who was long gone

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[6] Karubian v. Sec. Pac. Nat'l Bank, 199 Cal. Rptr. 295 (Cal. Ct. App. 1984).

[7] *See id.* at 297–98.

[8] *See id.* (citations omitted).

[9] *Id.* at 297.

[10] *Id.*

from the case.[11] Original counsel "inexplicably" did not forward the notice.[12] As a result, no Certificate of Readiness was filed. The clerk removed the case from the civil active list.[13]

The unfortunate sequel to this Byzantine process was that the now-acting counsel sought to specially set the case for trial and discovered these facts as a result.[14] The Rules allowed for extra time to file. But, even with the five-year deadline looming, the trial judge denied the plaintiff's attorney's motion to set the case for trial and denied a motion to reconsider because there was not enough time left to try the case before the five-year deadline.[15] The court of appeals then had to decide whether to reverse this determination, which it said depended upon whether counsel was diligent.[16] No, said the court:

> [This case presents] the question of whether a plaintiff, or his or her counsel, can be considered diligent in continuing to rely on official duty being performed after the passage of an amount of time sufficient to indicate to a reasonably knowledgeable attorney that official duty was *not* going to be performed and that the public official had obviously "goofed."
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> It seems to us that, even under circumstances where reliance on the performance of official duty is initially justified, there comes a time when plaintiff can no longer be considered to be "diligent", and entitled to claim impossibility, impracticability or futility in moving the case forward, without at least taking some action to call the matter to someone's attention.[17]

Thus, an attorney who followed the rules as written, and who was aware that the policy in Los Angeles County was set up for the purpose of delaying and discouraging trials because they could not be provided, was in effect sanctioned for following those rules. Adjudication by deadline was the consequence. Even if counsel "goofed" by following the rules and by depending upon a public servant who also "goofed," it seems harsh to deny counsel and the client the opportunity of a trial setting.

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[11] *Id.*

[12] *Karubian*, 199 Cal. Rptr. at 297.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] The court listed a set of prior cases that had set this standard. *Id.* at 298.

[17] *Id.* at 298–99.

It should be added that attorneys are busier than ever. Many have scores or even hundreds of pending cases. This ruling can only cause California attorneys to run scared—to devote extra effort to the time question—lest they become victims of government functionaries who "goof."

And it should be added that clerks make mistakes frequently.[18] I once had a case in which it was important to determine whether the judge had signed a particular document. Both parties together went physically to the clerk's office and searched the file, one document at a time. The document at issue was not there. But this event was a powerful illustration of clerical mistakes because we found documents from four different cases that had been misfiled in the file for this case. The phrase "close enough for government work"[19] was invented for situations like this one.

B. *Kantsevoy v. LumenR LLC: A Scheduling Order Disaster*

In *Kantsevoy v. LumenR*,[20] the plaintiff asserted multiple tort and contract claims against a medical device manufacturer arising from an alleged contract for work done in developing a tissue retractor.[21] The case was unusually contentious. The court characterized the litigation as "scorched-earth style" and added that it contained "thousands of pages of vitriolic submissions."[22] The trial court issued a scheduling order that provided cutoffs for joinder of new parties, amendment of pleadings, discovery, dispositive motions, and other proceedings.[23] Federal Rule of Civil Procedure 16 requires that the court issue such an order.[24] The effect of these deadlines, of course, is similar to the imposition of multiple statutes of limitations, all in sequence.

After the deadline for amending pleadings, LumenR sought to add a third-party beneficiary claim to its pleadings. Kantsevoy opposed

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[18] I handled the case many years ago. It was settled during mediation and has disappeared from any available source.

[19] I have been surprised to see that my students do not always recognize the meaning of this phrase. This phrase is a pejorative suggestion that government work is not very close. Besides, your case is not the clerk's case, who has a lesser incentive to be careful about such matters than you do.

[20] Kantsevoy v. LumenR LLC, 301 F. Supp. 3d 577 (D. Md. 2018).

[21] *Id.* at 583–84.

[22] *Id.* at 583.

[23] *Id.* at 587.

[24] FED. R. CIV. P. 16 (setting standards for pretrial orders, including scheduling orders).

the change on the ground that LumenR had not shown "good cause." LumenR then supported its amendment by citing Federal Rule of Civil Procedure 15.[25] The court described that rule as follows:

> A complaint may be amended "once as a matter of course" within twenty-one days of service of a defendant's answer or . . . motion [directed to the pleadings], "whichever is earlier." . . . "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." . . . However, the court "should freely give leave when justice so requires."[26]

But the trial court pointed out, correctly, that the Rule 15 standard did not apply. Although Rule 15 does provide for leave to be "freely given," this situation required good cause, just as Kantsevoy argued.[27] In fact, Rule 16 does provide that a scheduling order "may be modified only for good cause and with the judge's consent."[28] Thus, to prevent adjudication by deadline of its added claim, LumenR was required to show good cause. And that showing is more difficult than it might at first blush appear:

> In order to demonstrate good cause, the party seeking relief must "'show that the deadlines cannot reasonably be met despite the party's diligence,' and whatever other factors are also considered, 'the good-cause standard will not be satisfied if the [district] court concludes that the party seeking relief (or that party's attorney) has not acted diligently in compliance with the schedule.'"
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> In determining whether the moving party has met its burden to show good cause, a court may consider "whether the moving party acted in good faith, the length of the delay and its effects, and whether the delay will prejudice the non-moving party." If the movant "'was not diligent, the inquiry should end.'" . . . [*S*]*ee, e.g.*, *CBX Techs., Inc. v. GCC Techs., LLC*[29] (denying motion to amend the complaint because the plaintiff's "failure to anticipate" its needs was "of its own doing and not the fault of any other entity").[30]

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[25] *Kantsevoy*, 301 F. Supp. 3d at 587.

[26] *Id.* at 588 (quoting FED. R. CIV. P. 15(a)).

[27] *Id.*

[28] FED. R. CIV. P. 16(b)(4).

[29] CBX Techs., Inc. v. GCC Techs., LLC, No. JKB-10-2112, 2012 WL 3038639, at *3–4 (D. Md. July 24, 2012), *aff'd*, 533 F. App'x 182 (4th Cir. 2013) (per curiam).

[30] *Kantsevoy*, 301 F. Supp. 3d at 588 (citations omitted).

The court cited numerous cases in support of this holding, all of them suggesting a high standard for a showing of diligence.

LumenR then attempted to show diligence (and good cause) by arguing that it had only recently obtained the evidence that made it "appreciate" the merits of its third-party-beneficiary amendment. In other words, it had recognized no proof of the claim that was to be added until just before LumenR sought to add it.[31] The court, however, rejected that reasoning too:

> "[T]he fact that [LumenR] may not have had sufficient evidence to prove [its] claim before the deadline for the amendment of pleadings had no bearing on [its] ability to *plead* [its] claim in a timely manner." This suggests a lack of diligence on LumenR's part, and diligence is the focus of the Rule 16(b) inquiry. [32]

This part of the opinion has to be read to be believed. It flatly undermines an important rule separate from Rule 16, specifically, Rule 11. That rule, Rule 11, which the court did not consider, requires counsel to conduct a reasonable inquiry into all pleadings.[33] And the reasonable inquiry must inform counsel that:

> (2) the claims, defenses, and other legal contentions are warranted by existing law . . . ; [and]
> (3) the factual contentions have evidentiary support . . . . [34]

By signing pleadings, counsel certifies to this requirement.

Rule 11 is there because we do not want lawyers to haul off, act precipitously, and file groundless suits that are without evidentiary support. The court's statement that LumenR "may not have had sufficient evidence to *prove* its claim," but that this lack of evidence "had no bearing on [its] ability to *plead* [its] claim," is a blow directly in the teeth of Rule 11. That rule is designed to prevent exactly what the *Kantsevoy* court was urging counsel to do. In other words, *Kantsevoy v. LumenR* is the wrong signpost in the wrong direction.

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[31] *Id.* at 589–90.

[32] *Id.* at 590 (citations omitted).

[33] FED. R. CIV. P. 11(b) (providing standards and sanctions applicable to documents filed).

[34] FED. R. CIV. P. 11(b)(2)–(3). There are exceptions to both of these numbered paragraphs, but they are not in issue here.

C. *The Diligence Standard: A Major Cause of Adjudications by Deadline*

There are many cases, like *Karubian* and *Kantsevoy,* that feature adjudication by deadline through imposition of a diligence standard. These cases show that the standard is high. In fact, findings of diligence are rare.

One example of success in showing diligence is *De La Torre v. Ryan*.[35] The plaintiff was an inmate who sued the prison system for its refusal to provide him with a diet that he claimed was required by his religion.[36] He missed all of his case deadlines because, he said, the FBI had seized all of his papers, which were "only recently" returned to him.[37] "The court granted an amendment of the scheduling order because, under these conditions, plaintiff was able to show diligence."[38]

But findings of diligence remain rare, and contrary findings often are followed by adjudications by deadline.

D. *The Wide Variety of Adjudications by Deadline*

1. A Deadline Enforced because Congress Had Enacted It

The variety of adjudications by deadline is potentially infinite, and not all of them can be excused—even by diligence. *Bowles v. Russell*[39] is a horrible example. There, the trial court acted to extend the time for the defendant's appeal. The applicable rule empowered the judge to provide a fourteen-day extension, but "inexplicably," the judge set a date that was seventeen days away.[40] Whether the judge made a mistake in counting the days or thought that his authority included this power is unclear. Understandably, counsel for the defendant followed the court's order and filed a notice of appeal within seventeen days—but not within fourteen.[41] The court of appeals dismissed the appeal.[42]

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[35] De La Torre v. Ryan, No. CV-17-01230-PHX-JJT, 2018 WL 1664179 (D. Ariz. Apr. 6, 2018).

[36] *See* CRUMP ET AL., *supra* note 3, at 536 (explicating this case).

[37] *See id.*

[38] *See id.*

[39] Bowles v. Russell, 551 U.S. 205 (2007).

[40] *Id.* at 207.

[41] *Id.*

[42] *Id.* at 207–08.

The Supreme Court of the United States affirmed the dismissal, quoting previous decisions that had held the time limit to be "mandatory and jurisdictional."[43] Congress, in passing a statute, had actually set the governing rules, and the Court evidently felt that this factor especially required it to follow them rigorously.[44] "[T]his Court has no authority to create equitable exceptions to jurisdictional requirements," said the five-justice majority. If the rules seemed inequitable, "Congress may authorize" courts to create exceptions.[45]

Bowles is an unusual case of adjudication by deadline, prompted by the Court's interpretation of an act of Congress. And one can imagine the next step for the disappointed defendant: he could now seek relief in habeas corpus by accusing his lawyer of incompetence of counsel—incompetence consisting of conforming to a court order.

2. Deadlines Created Retroactively by Courts

Sometimes adjudication by deadline occurs not from a direct rule violation, but from a retroactive trial court decision that counsel simply has taken too long to do something in relation to a deadline. *Harriman v. Hancock County*[46] is an example. The plaintiff was an inmate who claimed to have been beaten by guards in his cell.[47] There was little question that something had happened to him because of his injuries, but unfortunately for him, he emerged with no memory of the incident.[48] The officers explained that he had injured himself by hitting the cell itself. One had actually seen him repeatedly hitting it and finally passing out in his own urine.[49]

The County moved for summary judgment after Harriman's initial disclosures, which identified fourteen witnesses, but identified none that could testify to a beating. But later in the case, after the discovery cutoff, Harriman identified a witness who could testify to hearing sounds of a beating and what seemed like alleged protests

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[43] *Id.* at 208–10 (citations omitted).

[44] *See id.* at 212–13.

[45] *Bowles*, 551 U.S. at 214.

[46] Harriman v. Hancock Cnty., 627 F.3d 22 (1st Cir. 2010).

[47] *Id.* at 24.

[48] *Id.* at 26.

[49] *Id.*

from Harriman.[50] An investigator, hired by Harriman's attorney, found the witness.[51]

The magistrate judge precluded the affidavit as a sanction for the failure to identify this witness earlier. She explained that Harriman's attorney had not "demonstrated a justification for his late disclosure (and tardy efforts to investigate)."[52] Thus, although the witness's affidavit would have required a trial, the magistrate recommended granting the motion for summary judgment.[53] The trial judge adopted the magistrate's report in full.[54] The court of appeals pointed out that another judge "might have selected a lesser sanction," suggesting that it found the result harsh. But it was not so "wide of the mark as to amount to an abuse of discretion," and thus the court affirmed.[55]

The outcome was not so unappealing as it may seem from this recounting. Harriman was arrested in the first place when he was in the hospital because he was drunk and causing a disturbance.[56] He fought with the arresting officer.[57] The timing and evidence were such that he obviously was still drunk when incarcerated. The witness who was advanced to salvage Harriman's claim was his spouse's cousin, who was in a position to hear because he too was in jail.[58] Counsel for Harriman had already missed another deadline, and the court forgave it.[59] But this was a case of adjudication by deadline in which no actual deadline existed, but in which the court recognized a deadline retroactively by determining that counsel's performance in the aftermath of a deadline—the time limit for required disclosures—was too late.

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[50] *Id.* at 26–27.

[51] *Id.* at 27. The investigator actually found two witnesses, but one was not relevant to summary judgment because her testimony only impeached the officer witnesses. *Id.* at 27–28.

[52] *Harriman*, 627 F.3d at 28.

[53] *Id.* at 27.

[54] *Id.* at 28–30.

[55] *Id.* at 30–32, 34 (quoting Macaulay v. Anas, 321 F.3d 45, 51 (1st Cir. 2003)).

[56] *Id.* at 25.

[57] *Id.*

[58] *Harriman*, 627 F.3d at 30.

[59] *Id.* at 27–28, 31.

II. THE CLASH OF POLICIES IN ADJUDICATION BY DEADLINE

These cases arguably show the disappointing aspects of adjudication by deadline. But what they do not show is the positive reasons for enforcement of time limits. Deadlines are like "little statues of limitations," and they serve many of the purposes of statutes of limitations.[60]

A. *Why Do We Enforce Deadlines?*

The requirement of a scheduling order in Federal Rule of Civil Procedure 16 is one of the most frequent triggering devices for adjudication by deadline.[61] But this requirement was added precisely because the Advisory Committee believed that it served positive purposes. The Committee said that:

> the fixing of time limits serves to stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material. Time limits not only compress the amount of time for litigation, they should also reduce the amount of resources invested in litigation. Litigants are forced to establish discovery priorities and thus to do the most important work first.[62]

In other words, deadlines focus counsel on what is important in the litigation. They reduce delays. They reduce costs, or so the Advisory Committee believed,[63] even though they sometimes do the opposite.[64]

Judging has changed gradually, but significantly, since thirty years ago.[65] That was when pretrial practice evolved to include active judicial case management not only of complex cases but of ordinary ones as well.[66] But the data also supported a cautionary approach. A study by the RAND Institute showed that judicial management actually

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[60] *See generally* David Crump, *Statutes of Limitations: The Underlying Policies*, 54 U. LOUISVILLE L. REV. 437 (2016) (describing policies underlying limitations periods).

[61] *See supra* Part I.B. (describing one such case).

[62] FED. R. CIV. P. 16 advisory committee's note to 1983 amendment (quoting REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 28 (1979)).

[63] *See id.*

[64] *See supra* notes 1–3 and accompanying text.

[65] *See generally* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010) (describing growth of managerial judging).

[66] *See id.* at 670.

increased costs unless the court included a shortened period for discovery.[67] At the same time, surveys showed that lawyers were convinced of the benefits of judicial case management.[68]

The reasons for statutes of limitation also underlie the phenomenon of adjudication by deadline. Specifically, time limits for filing suit are thought to reduce stale and ill-founded claims.[69] The little statutes of limitation set up by deadlines during the process of a case are thought to serve the same purpose by forcing counsel to focus on what is important and to omit what is not.[70] Statutes of limitation also guard against litigation based on lost or depreciated evidence.[71] So, arguably, do intra-case deadlines, because they tend to ensure that counsel learns the facts early and that opposing counsel is not faced, late in the case, with unexpected claims or evidence.[72]

Furthermore, one can infer that statutes of limitation reduce the tendency of lawyers to procrastinate. This is particularly true of short statutes, such as those allowing only one or two years before filing. Every time that counsel evaluates or re-evaluates a case to decide whether to file suit increases cost and delay. And the same consideration supports deadlines after suit is filed. The Advisory Committee expressly writes that its purposes include counteracting attorney "procrastination."[73]

Deadlines, then, are not a bad thing. Instances of adjudication by deadline occur in a minority of situations. But in the majority of cases, they are thought to serve positive purposes.

B. *But There Is a Downside to Strict Enforcement*

The downside is the phenomenon of adjudication by deadline. But that is not all. Attorneys are forced, today, to keep up with a burgeoning set of deadlines and to be certain they have reserved enough time before each time limit so that they can competently carry out the steps that are required before it passes. And the deadlines constantly change. The *Kantsevoy* case, described above, illustrates this

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[67] *Id.* at 681.

[68] *Id.* at 687–88.

[69] *See* Crump, *supra* note 60, at 440–44.

[70] *See* FED. R. CIV. P. 16 advisory committee's note to 1983 amendment.

[71] *See* Crump, *supra* note 60, at 438–42.

[72] *See supra* Part I.C (describing a case in which this difficulty was a concern).

[73] *See* FED. R. CIV. P. 16 advisory committee's note to 1983 amendment.

point because it involved several resets of the deadline that ultimately caused an adjudication.[74]

Calendaring systems are labor intensive. For one thing, they usually should involve what is called a "double entry tickler system."[75] An attorney does not put a file away without calendaring a "pull date," whether the file is contained in a physical file pocket or set out electronically (or both).[76] Another person in the office, often a secretary, also calendars the pull date.[77] The double entry system reduces errors of omission in revisiting the file.

An attorney following this kind of system has to first figure out when the pull date should be. For example, if facing a future deadline for adding parties or amending the pleadings, the attorney must estimate the time needed for completing the task and set the pull date accordingly.[78] Sometimes this kind of anticipation is difficult to perform accurately; for example, one can imagine the difficulty of calendaring the time needed for discovery, which best can be undertaken when the pleadings close, in a moderately complex case.[79]

An added difficulty is that the double entry feature does not and cannot eliminate all mistakes. I myself missed a deadline in the United States Supreme Court. My secretary and I both misread a letter that contained a reset date, and neither of us caught the error until after the date had passed.[80] I called the clerk's office and asked to speak to an attorney in that office. I obtained relief with unaccustomed ease: a kind of event that does not always happen with a missed deadline.[81]

The catastrophic specter of adjudication by deadline makes a lawyer pause at the door upon leaving the office at night and wrack his brain for a forgotten time limit. The possibility prompts a lawyer to put expense and effort into reviewing the calendar frequently. I have

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[74] *See supra* Part I.B (discussing the case).

[75] *See* CRUMP ET AL., *supra* note 3, app. at 887 (describing such a system).

[76] *See id.*

[77] *See id.*

[78] For instance, in the *Karubian* case, which is described in Part I.A *supra*, discovery of the need for setting a trial occurred too late for the trial to be scheduled.

[79] Undoubtedly, settings and resets of time to answer and dates for depositions will defy easy prediction.

[80] The case occurred many years ago and is long since forgotten.

[81] The lawyer said, "Oh, I'm not going to dismiss you for that," and I was able to file my brief. I wrote the lawyer to ask for a written order saying that my request had been granted. He sent me back my own letter with a marginal notation saying, "Granted"—an official order from the Supreme Court. New lawyers should be advised always to seek out a lawyer within the affected office in such a situation.

found that law students simply cannot imagine what a schedule of moving deadlines is like for an attorney who has over one hundred cases (of which there are some).[82] The cost increases. It may be manageable for a few large cases, but it is less so if there are many small ones.

III. CAN THIS DISMAL PICTURE BE IMPROVED?

The solution to this problem may seem too simple, but it could work. Rule makers could just build in an escape valve after a missed deadline based upon a standard that is intermediate between high and low, such as excusable neglect. Federal Rule of Civil Procedure 60[83] provides an escape valve with this language, and it is applied frequently to default judgments in particular. An example of the operation of this rule can be found in the case *Butner v. Neustadter*.[84]

There, the defendant was served with process from a California court while away from his home in Arkansas. He promptly contacted his attorney in Arkansas, who set about the business of hiring California counsel.[85] But the time limit for filing an answer happened to be ten days—an uncommonly short time—and before the defendant answered, the plaintiff had obtained a default judgment.[86] The defendant and his counsel arguably were neglectful but in an excusable way. The California attorney removed the case, and in the federal district court, he obtained relief from the default judgment under Rule 60 with the standard of excusable neglect.[87]

The varieties of excusable neglect are infinite. Hypothetically, one might imagine a case in which a default judgment results simply because the defense attorney puts the file in an unrelated stack of other papers and does not catch his error. Such a lawyer would be negligent, of course, but the possibility exists that his behavior amounted to excusable neglect, and that Rule 60 could be used to overturn the judgment.

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[82] An analogy helps: What if I were to appear on the date of your final exam and say, "Well, I'm putting it off for six months." And six months later, I put it off again. And six months later, I put it off yet again. And again. This is an accurate picture of what lawyers sometimes face.

[83] *See* FED. R. CIV. P. 60(b)(1) (providing for relief from judgments).

[84] Butner v. Neustadter, 324 F.2d 783 (9th Cir. 1963).

[85] *Id.* at 783–84.

[86] *Id.* at 784 & n.1, 786–87.

[87] *See id.* at 784–87.

Could the rulemaking bodies apply this kind of standard, excusable neglect or its equivalent, to deadlines and remove diligence as a condition for forgiveness? Perhaps.

A more forgiving standard would not generally remove attorneys' incentives to avoid missing deadlines. No one wants to be in a position where one must go hat in hand to a judge who can readily decide that his or her neglect was "not excusable." Even if the missed deadline is forgiven, the attorney has already faced several unpleasant duties. First, being a fiduciary, the attorney is required to notify the client promptly of the missed deadline.[88] "I'm sorry to have to tell you this, Mr. Client, but I missed a deadline that may cost you your ability to add a claim that I think would have been successful."

Next, there is the matter of notifying one's malpractice insurer.[89] "Dear Ladies and Gentlemen: I regret to inform you that I missed a court deadline for amending pleadings, and this error may result in my client's loss of a valuable claim." Then, there is the trip to appear before the judge—accompanied by opposing counsel—who may oppose the extension of time. Finally, the lawyer faces a special duty, now, to avoid missing other deadlines so as to placate the judge, who can consider past missed deadlines in evaluating future ones.[90] There may be (and probably are) some lawyers who are covered with tough-enough bark to perform these duties and not feel anxiety about them, but such lawyers will be rare.[91]

But there is a case to be made against softening the excuse standard after a missed deadline. A lesser standard than a requirement of diligence probably would result in lesser performance by attorneys in calendaring and following deadlines.[92] One can imagine a sloppy and unresponsive litigant who repeatedly violates the same deadline in

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[88] *Cf. In re* Deer, 19 So. 3d 653 (Miss. 2009) (holding that lawyer breached fiduciary duty by failing to notify client of his own disbarment. This case involved a different subject of notification, but the duty would also apply to missed deadlines).

[89] The typical insurance policy requires notice to the insurer.

[90] *See* Harriman v. Hancock Cnty., 627 F.3d 22, 30–32 (1st Cir. 2010), discussed in Part I.D.2., where a lawyer's missing of an earlier deadline was taken into account when considering a sanction.

[91] Such lawyers, nevertheless, are too plentiful and cause serious problems for the courts. *See* Muhammad v. Walmart Stores E., L.P., 732 F.3d 104, 105–06 (2d Cir. 2013) (adjudicating a sanction against a lawyer who was familiar to the courts because of a "long disciplinary history" and deciding that reversal of the sanction was required for procedural reasons).

[92] *See supra* Part I (describing cases of failure to follow deadlines).

spite of its resetting.[93] At some point, it makes sense for the judge to flatly deny an extension of time, even if the standard is a relatively forgiving one.

The requirement of diligence is not in the rules; it is a construct of the case law invented by judges.[94] And the argument for a high standard such as diligence may not be persuasive. One can doubt, for example, that the lesser standard of excusable neglect has increased the number of defendants who default. Perhaps if it were applied to scheduling orders, it would not appreciably increase missed deadlines.

IV. CONCLUSION

The dismal phenomenon of adjudication by deadline occurs when a litigant loses rights by mere inaction upon the passage of a prescribed date.[95] Today, one could conclude that it occurs more often than ever. The precipitating circumstances range from complex trial setting rules and scheduling orders to mistakes by judges and late discovery of litigation facts.[96] Adjudication by deadline is contrary to the usual policy that procedural rules should lead to the adjudication of cases on the merits and not by external considerations.[97]

And yet, deadlines serve positive purposes. They tend to produce case dispositions that are earlier and less costly.[98] They probably also avoid marginal claims or defenses, or arguments by counsel through thoughts that dawn late in the process and lack the merit of the party's central thrust.[99] These advantages suggest that deadline rules should continue to exist and that courts should enforce them. But arguably, there should be escape valves that create realistic ways to avoid adjudication by deadline in meritorious circumstances.

The most disappointing cases of adjudication by deadline occur in cases where counsel has acted in an understandably mistaken

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[93] Perhaps one like the litigant described in *supra* note 91.

[94] *Compare* FED. R. CIV. P. 16(b)(4) (calling for "good cause" without mentioning diligence), *with* such cases as Kantsevoy v. LumenR LLC, 301 F. Supp. 3d 577, 588 (D. Md. 2018) (requiring diligence and citing case decisions setting the diligence standard).

[95] *See supra* notes 1–5 and accompanying text.

[96] *See supra* Part I (describing different kinds of cases).

[97] *See* Allstate Ins. Co. v. O'Toole, 896 P.2d 254, 257 (Ariz. 1995) (stating the maxim that insofar as possible, procedural rules should lead to decisions on the merits).

[98] *See supra* Part II.A.

[99] *See supra* Part II.A.

manner but is nevertheless confronted by a missed deadline.[100] In many cases, there are escape valves, but they are narrow. In these cases, the courts have tended to established judicially made standards that require counsel to show that they acted with "diligence."[101] And a high requirement tends to define diligence.[102]

At some point, it makes sense for a court to impose serious consequences for a lax attitude toward deadlines. Otherwise, litigation might go on far too long. But in other contexts, such as setting aside default judgments, a lesser requirement than diligence in invoking an escape valve preserves deadlines and does not seem to increase the incidence of counsel who miss them. The standard for setting aside default judgments is "excusable neglect."[103]

This standard recognizes that even usually diligent lawyers can sometimes make mistakes. Hence it covers instances in which counsel is negligent.[104] But it also insists on an excusable kind of behavior. It does not tolerate serious misconduct. And it seems unlikely that it increases a lack of diligence in counsel. The replacement of the diligence standard with excusable neglect could be accomplished by amendments to rules, particularly Rule 16. Diligence would be a factor for the courts to consider in deciding whether the neglect can be called excusable, but it would not be the only factor. This kind of change would go a long way toward reducing the most dismal kinds of adjudication by deadline.

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100 *See supra* Part I.

101 *See supra* Part I.B for an example.

102 *See supra* Part I.B.

103 *See supra* Part III.

104 *See supra* Part III (discussing Butner v. Neustadter, 324 F.2d 783 (9th Cir. 1963)).