Reflections on Monitoring the Implementation of Court Orders in Class Action Lawsuits

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Alexis de Tocqueville observed in the 1830s, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question” (cited in Baker, 1945). De Tocqueville would likely have felt further vindicated in his observation had he witnessed the modern explosion of class action litigation that ventures beyond private commercial disputes and into the domains of traditional governmental functions. Such lawsuits have sought judicially imposed equitable remedies rather than money damages in actions challenging governmental policies and practices that are alleged to adversely affect members of a defined class of people. Usually such actions are brought to address serious and intractable long-standing problems that are alleged to cause significant harm to members of the plaintiff class and that have been impervious to other attempts at remedying them. Examples include class actions seeking to end racial segregation of school students; to remedy overcrowding, understaffing, abuse, and neglect in prisons, jails, state mental institutions, and juvenile detention facilities; to ban discrimination in access to public housing or segregation on the basis of disability; and so on. If the plaintiffs prevail in their case, the resulting equitable remedy, whether imposed by the court itself or agreed upon between the parties in a Consent Judgment, may require complex and time-consuming actions by the defendants to address the underlying grievances. Often, either at the inception or subsequently during the remedial phase, the court appoints a court monitor or special master to assist the court in supervising the implementation of the remedy.

In this article I discuss my experiences with such class actions while playing a variety of different roles in the legal system. These include working as a law clerk in appellate courts, dealing in part with judicial decisions about public agency compliance with legal obligations; serving in the office of counsel to the governor of New York, helping to defend the state in class action lawsuits against the state mental health and prison systems; running a state agency responsible for monitoring mental health and mental retardation systems in New York as well as administering the Protection and Advocacy system that brought litigation against state agencies for violating the rights of service recipients; serving in various roles in monitoring compliance with court orders in several states in class action cases involving large systems of human services; and consulting with the United States Department of Justice in cases under the Civil Rights of Institutionalized Persons Act (1997). Over the approximately 40-year period covered by this article, acceptable terminology has changed from mental retardation to developmental disability and currently to intellectual disability. In this article I have used the prevailing terminology during the periods of time discussed.

In a number of these cases, I served as a member of court monitoring bodies, including the Wyatt v. Stickney litigation in Alabama (a substantial part of the early history of this case in recounted in Wyatt v. Rogers, 1997) originally commenced in 1970; the Willowbrook litigation in New York commenced in 1972 (New York State Association for Retarded Children, Inc., v. Carey, 1975); Gary W. v. State of Louisiana (1976) in the 1980s; Evans v. Williams in Washington, DC (the history of this litigation is summarized in Evans v. Fenty, 2007), which has been going on since the mid-1970s; CAB v. Harvey in Maine (the history of this litigation is summarized in Consumer Advisory Board v. Harvey, 2010), which is about the same age; and in the Blackman v. District of Columbia special-education litigation in the District of Columbia (2006), which has been going on for approximately 10 years.
In examining a number of such cases, which have been open for a long time, it seems that they all run through a fairly typical lifecycle. In part due to the structural problems, the difficulty and complexity of the implementation process, and differing expectations of the parties, decrees usually go through several phases:

**Typical Life Cycle of a System Reform Case**

**Stage I: Euphoria**

Everyone is delighted that they were able to find a legal solution to seemingly intractable problems of running a mental health system, prison system, or a school special education system. There is a honeymoon period that may last a year or two and a degree of goodwill between the parties as the work of implementation gets underway with high hopes for success. Typically, the lawsuit brings political attention and an infusion of new resources and unusual administrative flexibility, for which the institutional defendants are grateful.

**Stage II: The Morning After**

Usually, within 18 months to 2 years into the implementation process, and maybe sooner, the defendants realize that the job is much harder than anticipated, that the crisis that created an expectation of flexibility has given way to bureaucratic resistance to reforms agreed upon by attorneys or policymakers or political leaders. Unless the plaintiffs’ lawyers have had significant governmental experience, their failure to foresee this development is understandable. For experienced attorneys and policymakers on the defendant’s side, however, this failure to anticipate is more perplexing and in some cases borders upon “a willing suspension of disbelief.”

In the Willowbrook Consent Decree in New York, for example, there were a number of things the state agreed to do within 6 and 13 months of signing. In hindsight, it seems clear that the parties negotiating the Consent Decree did not fully appreciate the complexity of the tasks they had agreed upon or the time involved in making fundamental changes in public policy, let alone implementing them in a very large, complex, and decentralized service environment. In reality, not much was actually accomplished in this short time because a new administration was going through its formative stages and taking the steps needed to prepare for implementation. Also, as time passes, newer crises draw the attention of political leaders and the favored status of the defendants in the settled case begins to fade and is replaced by newer priorities.

Also, as time passes, newer crises draw the attention of political leaders and the favored status of the defendants in the settled case begins to fade. Usually, in this stage the defendants discover that implementation of reform needs the buy-in of a host of actors not covered by the court orders (e.g., legislatures, independently elected officers like the Attorney General or the Comptroller or other officials involved in the timely processing of state contracts, personnel agencies that need to create and classify positions, labor unions, local governments, private providers, local zoning boards, state licensing boards). Defendants also become more aware of the level of opposition to the agreement they have reached by other groups vying for the covered services but who are not members of the protected class and, therefore, disadvantaged. Often, in this period, the first signs emerge that the parties have differing expectations about the implementation of court orders and may view compliance issues very differently.

**Stage III: Resentment/Resignation/Resistance**

Two or more years into the implementation process, and sometimes sooner, these divergent expectations can lead to resentment of the decree and the relentless pressure from plaintiffs and the court to comply. Defendants discover that the plaintiffs do not have much sympathy or understanding about the struggles they are going through to implement the agreement. Agency heads begin to feel pressure from the governor’s office, which in turn may be feeling pressure from the legislature as well to account for all the additional money that has likely been pumped into the system of services. The defendant agencies may also experience a lack of support from other agencies whose help they need but who resent their favored status in the budget and political process.

Defendants may also begin to believe that the amount of time devoted by plaintiffs’ attorneys to tracking and enforcing compliance with court orders is motivated, at least in part, by the availability of attorney’s fees that are awarded to prevailing parties. Particularly in times of budget cuts and economic distress, they may perceive such
fee payments as a disincentive for the plaintiffs to acknowledge progress that might lead to an end to the case. Regardless of whether there is any actual basis for such a perception in a particular case, it can lead the defendants to resent the plaintiffs’ attorneys, especially if the amounts being paid out in legal fees are substantial while defendants themselves work under stringent limits. (The legal costs incurred by defendants for their own actions tend to be less easily transparent and quantifiable as a part of the Attorney General’s budget.)

Usually, in this stage some of the key actors on the defendant’s side leave their jobs or there is a governmental reorganization and new people come in who do not have the same degree of understanding of the issues or commitment to the goals of the judgment. They were not involved in the negotiations and may not have the same personal relationships with the plaintiffs. Armed with an appreciation of the difficulty of achieving compliance, they often wonder about their predecessors: “What were they thinking when they signed this agreement?”

Stage IV: More Litigation

Eventually, this resentment may ripen into opposition to the judgment, to continued judicial oversight of compliance, and a resignation to new litigation. This may happen either because of a frontal challenge by the defendants on the original judgment, a motion to modify it due to a claim of impossibility or changed circumstances, or a motion by the plaintiffs for a finding of contempt or enforcement of specific provisions. Less frequently, there is a motion for a determination of substantial compliance that tests the differing expectations of parties.

Perhaps because of the length of time the litigation process takes, and the years of effort it takes to transform complex systems of services, it is likely that somewhere along the line a new administration has come in and thinks they can solve the problems that have eluded their predecessors and do not want to spend the time and money on continuing the litigation. Often, this ends up with a new consent decree or settlement agreement, and the whole process and cycle starts again. Due to staff turnover in key leadership positions in the defendant’s agencies, and the political tendency to fire agency heads when progress does not occur fast enough, learning from this experience is limited. Institutional memory is often lost with the departing leaders.

In Maine, the Pineland Court Orders of 1978 were replaced by the Community Consent Decree of 1994, and a new round of litigation has just been completed regarding compliance with this decree (Consumer Advisory Bd. v. Harvey, 2010). In Washington, DC, Evans v. Fenty has had at least 5 sets of orders, 4 mayors, and 14 agency directors and has recently ended a round of litigation commenced by Plaintiffs to seek additional judicial remedies, with a new consent order (Evans v. Fenty, 2007). The Blackman Jones special education Consent Decree in 2006 has already had one Alternative Dispute Resolution agreement that added a series of obligations that were not in the Consent Decree and is in the midst of another Alternative Dispute Resolution process. In some cases, like Wyatt v. Stickney in Alabama (compare with Wyatt v. Sawyer, 2004), there have been four to five such cycles over the three decades the case had been in existence, spanning from Gov. George Wallace, his wife Lureen, four other governors, and countless commissioners. In most of these cases, the primary source of stability and continuity during the long implementation process is the court and, sometimes, the plaintiffs’ attorneys.

The Challenge of Managing Systems Change

The complexity of these cases and the changing legal, political, and public policy environment in which implementation takes place makes them particularly tricky to manage. In the mental health and intellectual disability cases in particular, this has been a problem because the field has changed dramatically over the past 40 years. In cases that were brought to address problems of overcrowding, abuse, and neglect in institutions, which had initial remedies focused on better institutional conditions, better staffing, and more treatment, litigants were still struggling to achieve these goals when professional opinion and public policy shifted to emphasize services in the community rather than continued investment in institutions. This movement gained significant impetus with the passage of the Americans with Disabilities Act of 1990, and the decision of the U.S. Supreme Court in Olmstead v. L. C. (1999), which ruled that the unnecessary segregation of people with mental
disabilities in closed institutions is a form of discrimination on the basis of disability. In the Wyatt case, in an attempt to improve institutional conditions, the state of Alabama passed a substantial bond issue and rebuilt virtually all of its institutions and then had to deal with the political challenge of closing them when public policy and legal goals changed to require community services. The changing directions and priorities make it especially difficult for defendants to sustain the type of administrative and political effort that is usually required to achieve compliance with court orders that are directed at broad goals, such as protection from harm or the provision of services that are least restrictive of liberty.

**Measuring Compliance**

One of the fundamental problems in implementing court orders in institutional reform cases is that the plaintiffs and defendants seek compliance in very different ways usually because consent decrees, especially those entered into in the 1970s and 1980s, were not very explicit about how compliance was to be measured and how the parties would know when the case should end. In the absence of such clarity, the parties tended to have fundamental differences of opinion.

For the purpose of this discussion, it is useful to think about compliance from two different perspectives. On the one hand, there is structural compliance, which refers to creating the conditions that are necessary for compliance to occur. Generally, these are the inputs into the system: employing and training adequate staff; adopting policies and procedures; and establishing case management and other staffing ratios, funding levels, and the like. Defendants generally emphasize this because these are things over which they have better control. Court orders can also be more specific about these types of obligations. Although these structural elements are generally necessary preconditions for compliance to occur, they are not by themselves sufficient. Decrees that focus solely on inputs may result in achieving compliance with those measures while leaving the underlying problem substantially uncorrected.

Another way of looking at compliance is actual compliance, or achieving the outcomes that were sought by the plaintiffs in bringing the lawsuit, such as safe conditions of confinement, protection from harm, adequate medical and mental health care, individualized treatment, least restrictive environment, nondiscrimination. These are more complex goals, not easy to measure, and subject to many influences that the defendants do not directly control or do not completely control. Plaintiffs generally emphasize outcomes for their clients because this is why the lawsuits were brought in the first place. But, paradoxically, court orders are often much less specific about how the achievement of these objectives should be measured. In the Consent Decree in the Pineland case in Maine, for example, there was only one specific number—a case management ratio. All the other standards of compliance were much more open to debate.

This dichotomy between structural and actual compliance exists not only in litigation, but it also explains why an institution could be accredited by the Joint Commission on Accreditation of Health Care Organizations or certified for Medicaid purposes (e.g., structural compliance issues) and yet be found by the Department of Justice in a Civil Rights of Institutionalized Persons Act (CRIPA) investigation or by a federal court to be violating constitutional rights of patients. The latter are looking at actual service delivery and examining things like cases of abuse and neglect, physical injuries, deaths, restraint and seclusion usage, and medication errors—all of which can exist despite the best policies and procedures and resources sufficient to meet standards.

These differing perspectives of the parties on what compliance is also affect what they think is relevant evidence of compliance that court monitors ought to be assessing. Generally, defendants want the monitors to consider the policies and procedures they have adopted, usually with input from plaintiffs and other stakeholders (e.g., in a mental health case, policies addressing abuse and neglect, restraint and seclusion, individualized treatment plans, discharge planning); staffing levels, staff training, staff qualifications, and perhaps their documentation practices and quality assurance program as evidence of internal accountability mechanisms.

Plaintiffs, on the other hand, want the monitors to make direct observations of conditions; to interview patients and staff; to observe the type of programming delivered and medication administration practice; and to look for evidence of outcomes—actual implementation of treatment plans, progress being made by patients, reduction in the use of restraints and seclusion and PRN (as needed) medications, reduced rates of abuse and
neglect incidents; and quick and effective preventive, corrective, or disciplinary actions when incidents occur; reduced rates of injuries and so on.

The Role of Court Monitors and Special Masters

As noted earlier, in many of these class action systems reform cases, courts appoint judicial agents of various types to assist the court in the remedial phase in monitoring and facilitating the implementation of court orders. Sometimes, these appointments are made in the first instance when the court order is issued or a consent judgment is reached. In other cases, such appointments occur later, when a period of time has elapsed and the defendants have failed to achieve the degree of compliance expected, and the case has gone through one of the lifecycles described above.

It is evident from the previous discussion that such monitors can be caught in the crossfire of differing understandings and expectations of the parties in these types of cases. In part, this is because over the relatively long time span that implementation usually takes place, circumstances can change, and new methods may be discovered that are equally or more effective in achieving the desired goals than the specific steps that were identified in the court order. As noted earlier, however, putting all the structural pieces in place is not the same as achieving the outcome, and that is why evidence of achievement of the outcomes is also highly relevant. As a general rule, the relative value of different kinds of evidence of performance from the strongest to the weakest can be assessed as follows:

- Outcome measures (e.g., reduction in uses of restraints, decline in rates of suicides/_attempts, decline in incidence of injuries, increase in development and implementation of individualized treatment plans)
- Direct observation of conditions and processes by monitors (e.g., medication administration, programming)
- Client and staff interviews about conditions
- Chart reviews and documentary evidence of compliance
- Staffing levels/staff training
- Policies and procedures

The preference should be for examining outcome indicators to the extent that is feasible.

If monitoring of the outcome indicators finds problems in particular areas that should prompt inquiry into the cause of the deficiencies—whether it is staffing, staff training, processes, or other “inputs” into the system. Barring some evidence of a problem, a special master or monitor would not generally need to examine instrumental aspects of the decree (e.g., training of staff).

Keys to Successful Implementation

First, perhaps the clearest fundamental reality I see, after over 30 years of experience with this type of litigation, is that institutional reform will not happen unless the defendants understand and accept the need for the reforms and internalize the values that the court orders seek to realize. Courts can issue orders and can punish the defendants for noncompliance, but they cannot instill competence where it is lacking. Further, courts themselves lack the institutional competence to manage executive agencies, and this is plainly not their role in our constitutional system of government, except in extraordinary circumstances when there is no short-term alternative. Even when courts have taken the extraordinary step of appointing receivers or similar officers, the record of success is decidedly mixed and the courts face the eventual challenge of returning control to the executive, which still has the responsibility for competently managing the system. The best chance of success is when the parties and the court monitor can establish a constructive working relationship, despite their different roles in the litigation.

The second key to success is beginning to think about the exit as early as possible. If the parties have not already done so, part of the job of a court monitor/special master is to help develop a consensus about expectations early in the process, while the parties are still in the honeymoon stage; to develop reasonable yardsticks to measure compliance as well as mileposts along the way, when compliance is going to be a time-consuming process. From experience, it is clear that the problems in these cases are usually not at the broad policy level—after all, many of these cases are settled by consent of all parties—but in the nitty-gritty details of implementation, which is far more complex and difficult.

A court monitor or special master can play a role as a mediator in bringing the parties to the lawsuit together to mutually specify their expectations of compliance, to develop measurable exit
perspective: Monitoring implementation of court orders

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A New Approach to Determining Compliance

The lessons described below are not merely theoretical or academic; they reflect real experiences drawn from the context of real cases. I applied these lessons to a case in Maine while serving as special master to bring the state into compliance with a set of court orders that required the closing of the state’s only mental retardation institution, placing 1,500 residents into the community and enabling them to be integrated into the life of the communities in which they lived.

The goal should be “no surprises,” with the monitoring standards and methods transparent enough that the defendants’ quality assurance system can use them for self-examination of progress. Without this, monitoring itself can become a bone of contention between the parties and, rather than assisting the court, can create an additional set of problems for the judge to manage and resolve.

A court monitor or special master can play a key role in successful implementation of court orders by creating or facilitating a momentum towards compliance. This requires breaking up the large job of institutional reform into measurable tasks with reasonable and achievable time frames and establishing measures to assure both internal accountability within government for achieving these tasks and external accountability to the court through the office of a court monitor or special master. Properly structured, this strategy creates a dynamic of “progressive realization,” similar to the way that international human rights law deals with economic and social rights that require large governmental efforts to implement (Rosenthal & Sundram, 2002). In theory, the parties ought to be able to perform these functions themselves, but experience suggests the need for a trusted and respected neutral party to mediate and facilitate their agreement.

The parties’ disagreements about how to measure compliance often leads to efforts to restrict the plaintiffs’ access to information—to people, places, and documents. Sometimes, these efforts extend to the monitor/special master as well. If successful, such efforts impair the effectiveness of the monitor/special master. What distinguishes a monitor/special master from other monitoring bodies, such as institutional boards of visitors, family groups, peer advocates, staff committees, and even accrediting agencies is that a court officer should have free and unfettered access to information required to perform the monitoring duties. This includes the ability to make unannounced inspections, to speak to staff and patients privately and confidentially, and to review any relevant documents without restriction. Monitors/special masters need to be assertive in protecting the prerogatives of their office and should not tolerate any restrictions on access to relevant information required to perform their monitoring duties, and they should seek the assistance of the court to remove unwarranted barriers to access to the required information. This right of access is closely related to both the fact-finding and evaluation functions the monitor performs.

Under the best of circumstances, independent monitors will create tension because the parties do not control the monitors who report outside the bureaucratic chain of command. Their findings can have a serious impact on complex systems. There can be political fallout and people may lose their jobs due to a court monitor/special master’s report. Plaintiffs may find their litigation strategies undermined by findings of the monitor/special master that are favorable to the defendants. This position of trust and responsibility creates concomitant duties for monitors/special masters in self-governance and fidelity to their purpose. The ultimate test is maintaining the respect of the parties and the court for both the fact-finding and evaluative judgments of the court monitor/special master.

The issues of self-governance can be particularly tricky when the monitoring responsibility is assigned not to a single individual but to a panel or committee of several people chosen by the parties and allied with one side or the other. There are many such models that involve full- or part-time paid monitors, a volunteer panel working alone, a volunteer panel with paid professional staff, and some combinations. These structures can inject additional complexity of trying to achieve consensus among members of the monitoring body and staff who may have significant differences of opinion and approach among them. In such cases, it is particularly important for the court to provide clear direction and maintain regular contact with monitors who derive their authority from the court order.
Develop consensus on common expectations. This did not happen in 1978 when the first consent decree was entered, leading to later litigation on whether the consent decree had been properly terminated (Cab. v. Glover, 1994). A second consent decree was entered in 1994, but again there was no consensus developed on how to measure compliance. One of my tasks when appointed as special master in August 2000 was to work collaboratively with the parties, to take the legalese drafted by lawyers and to organize it thematically into 11 discrete program areas (e.g., person-centered planning, adult protective services, case management, crisis services). Doing so provided the defendants with clear programmatic goals that they had to achieve. This division into discrete subparts was essential to the later effort to measure compliance for each subpart, but the difficulty of doing so should not be underestimated. The various provisions of lengthy and complex institutional reform court orders are often inter-related and finding clear lines for separation is more art than science.

Identify reasonable and measurable yardsticks of compliance. For each of these 11 areas, as special master I, in collaboration with a working group of plaintiffs’ and defendants’ representatives, developed observable indicators of compliance. In this process, I provided guidance to the parties on the types of evidence of compliance that would be most probative on the issue of compliance. Doing so enabled the defendants to understand very clearly how their efforts would be judged.

Make implementation process predictable. Instead of looking at compliance for everything all at once, I established a schedule for assessing compliance with each of the 11 areas individually. In the first of two rounds of compliance assessment, the first of these submissions by the defendants was due in June 2004 and the last in June 2005. This process allowed the defendants to achieve success in some areas, while providing more time to labor on other areas that were more complex or simply required more work.

Support defendant’s internal management and quality assurance processes. The development of these outcome measures, and specifying the types of evidence required and the schedule in which it would need to be produced, gave the defendants a clear roadmap around which they could organize their implementation efforts and enabled them to use their quality assurance system to assess the strength and weaknesses of their accomplishments.

Create a momentum towards compliance. If compliance was measured across the board, the defendants would have continually failed the test, being dragged down by their weakest sector despite strong performance in other areas. By looking at compliance more discretely, I was able to recognize and reinforce their accomplishments and narrow the areas that required additional attention. This, in turn, helped focus their management efforts while enabling them to report back to the governor and the legislature on the successes they had achieved as a result of the budgetary and political support they had received.

Break implementation effort into interim goals with timeframes. This process created interim goals and timetables, all of which helped make the work of achieving compliance with the court orders more manageable and provided regular information to the plaintiffs and the special master about the rate of progress.

Eventually, there is a need for an orderly process for assessing the status of compliance. Although this can be done by a motion for a finding of substantial compliance and to vacate or dismiss the related orders of the court, this option is burdensome to the court, which may not want to be involved in piecemeal litigation. As noted earlier, however, such periodic assessments and judicial acknowledgment of progress are important for sustaining the momentum for compliance and important to governors and legislatures that must support implementation efforts over a multi-year time span. In Maine, this process was formalized by creating an alternative to filing a motion for a finding of compliance with the court orders. The alternative to motion practice is a system for Certification of Compliance by the named defendant in the case. The process essentially works as follows:

The special master works with the parties to develop a certification procedure. This was accomplished by August 2003. The certification procedure incorporates a grouping of court orders into discrete subject matter areas that can be assessed independently of one another. For each subject area, the certification addresses the specific outcomes that are required by the exit plan or the court orders. The agency head submits a Certification of Compliance on a schedule established by the special master in consultation with the parties.
Although it is the obligation of the defendants, who have the burden of proof of compliance, to determine what evidence of compliance they will submit, the certification aids this process by identifying the types of evidence the parties mutually agree is the most relevant and persuasive.

For each outcome with which the defendants cannot certify compliance, the certification document must provide reasons why compliance has not been achieved and a specific plan to achieve compliance, identifying the steps, the resources required, the persons responsible for implementation, and the date by which compliance will be achieved. The defendant’s certification is accompanied by a summary of the evidence supporting each outcome. The procedure requires service of the certification upon the plaintiffs, who have timely access to any evidence relied upon by the defendants in making the certification, and plaintiffs may seek, through the special master, access to any other evidence that is relevant to the certification. In Maine, plaintiffs were granted liberal access to information they required pertaining to class members, including access to computerized databases maintained by the defendants.

Within 60 days of the filing of the certification, the plaintiffs must file with the special master a written statement containing any objection to the defendant’s certification, stating with particularity the basis for the objection. The special master is required to review the certification and summary report of the evidence and, within 30 days of the plaintiff’s response, submit a report to the court with findings of fact and conclusions of law regarding the defendant’s compliance with the relevant provisions of the court orders. If the special master concludes that there is not compliance with any provision of the Court Orders that is the subject of the certification, he or she may issue a recommendation addressed to each area of noncompliance and require the defendants to prepare and implement an action plan as described above.

The experience with this process has demonstrated that it is an effective way of moving the defendants towards compliance with court orders. The staggered deadlines for the submission of evidence of compliance with discrete sections of court orders create a sense of urgency and provide a focus for implementation efforts while also making the workload manageable. The periodic external evaluation of their progress reinforces internal management and quality assurance processes to achieve and document compliance and, as time goes on, builds confidence in the plaintiffs and the special master in the quality of the information that is produced.

Although the process requires work by the defendants, plaintiffs, and the special master, it reduces the workload of the court, and the flexibility and informality of the fact-finding process supervised by the special master helps move the case forward with minimal involvement of the court and with less effort and expenditure than typical motion practice. By way of a rough comparison between two very similar cases, in Evans v. Fenty, discussed above, where the plaintiffs filed a motion for the appointment of a receiver, the legal fees claimed by the plaintiffs for the 4-year period of the contested litigation were settled for $4 million (Evans v. Fenty, 2011). By contrast, in the Cab v. Harvey litigation in Maine over a 9-year period from August 2000 to October 2009, the amount paid out in plaintiffs’ attorneys’ fees was about 38% of that amount at $1,540,350 (Cab v. Harvey, 2009). As the certification process proceeded in Maine, the areas of concern grew larger and larger, and the areas of compliance grew smaller and smaller until the special master was able to report to the court that the defendants were in substantial compliance with the court orders (Final Report of the Special Master, 2009). The defendants in this case were particularly appreciative of the clear direction they received with respect to their implementation efforts and the positive reinforcement that it provided along the way. The certification reports that were filed with the court were available to the legislative oversight committees and the governor’s staff to provide them with external validation of the success being achieved.

Although this approach in Maine helped the state to achieve substantial compliance with the court orders, this process may not work in every environment. The adversary process of litigation sometimes creates relationships between the parties that are so toxic that it may not be possible to do the type of collaborative work that plaintiffs and defendants were able to achieve in Maine during most of my tenure. If that is the case, every certification can become a battlefield between the parties that further damages relationships and simply creates another forum for protracted litigation. This certification process also requires a high level of professional competence and integrity among attorneys on both sides of the litigation.
and key players responsible for defendants’ implementation efforts. Defendants, in particular, have to be capable of overcoming the normal defensiveness in reacting to criticisms of the state of the service system and objectively confronting conditions that require correction and improvement. Maine benefited by having stable leadership and consistency in the key personnel responsible for implementing court orders during the certification process, which was an important ingredient for success. Changing complex systems of human services does not usually occur quickly, and the effort requires steady hands on the levers of government. Most important, there must be a reasonable belief that compliance is achievable within a reasonable timeframe. Absent that, this process could prove to be enormously frustrating and ultimately counterproductive if the defendants are not able to demonstrate steady progress in achieving compliance with the court orders.

The certification process also needs the support of the supervising judge and comfort with the delegation of significant responsibilities to the special master to manage the process up to the point of submitting a report and recommendation to the court for its review and approval. If there is a strong relationship of confidence and trust between the court and the special master, and a conviction that the special master will adhere scrupulously to the scope of responsibility entrusted, the certification process can work as a flexible alternative to the usual motion practice and, ultimately, save the court’s time while also reducing litigation expenses for the defendants.

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