Symposium on Judicial Administration Research

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Research in Judicial Administration:
A Judge's Perspective

Roger J. Miner*

Those who gather for this international conference on judicial administration research share a common objective — the improvement of judicial administration through scholarly and scientific investigation and inquiry. The conference is designed specifically to advance that objective by providing the opportunity for an interchange of ideas among scholars from a variety of disciplines. This interchange will be fostered by the presentation and discussion of commissioned papers dealing with selected areas of judicial administration and by the review of previous research as well as proposals for future research in these and other areas.

Wherever serious scholars gather to address a subject of common concern, there also will disputation abide. It should be no different here. Even before this conference has begun, I have heard arguments about whether judicial administration research in the 80s measures up to that of the 60s and 70s; about the relevance of some of the past studies; about whether academic researchers and researchers employed by court systems are sufficiently independent of their employers; about who should define the course of future undertakings; about what the research should cover; about methodology; and, yes, even about what really qualifies as an improvement in court administration. Out of this scholarly contentiousness will come, I would hope, some consensus regarding the future direction of the enterprise, as well as some new ideas and new strategies that will be of benefit to judicial administrators as they prepare for court management in the twenty-first century.

More than twenty-five years ago, after my graduation from law school but before I was commissioned as an officer in the Judge Advocate General's corps, I held the rank of private while undergoing basic training in the United States Army. One day during the course of basic training, First Sergeant Cordero (I still remember his name) told us that our company soon would be subject to an inspection by our commanding general. The sergeant told us that the general might ask us some questions while we were standing at attention during the inspection. He said: "Don't worry about the questions. The general will not

* U.S. Circuit Judge, Court of Appeals, Second Circuit.

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ask you about generals' things. He only expects you to know about privates' things." Bearing in mind the message underlying Sergeant Cordero's reassurances, I shall restrict my observations and remarks to judges' things. I intend to focus on three particulars: first, my own use of the fruits of court administration research (I believe that scholars would call this anecdotal evidence of the relevance of their work); second, my perception of the need for closer cooperation between judges and researchers; and third, because I am unable to resist the temptation in the presence of such a distinguished captive audience, some areas of court administration I consider worthy of future investigation.

My interest in court administration and case management came late in my career as a New York trial judge. In the state court where I served, a master calendar system prevailed, motions were heard at designated special terms, and trial terms were four weeks in duration, with judges rotated at the end of each term. After about five years on the court, I began to think that there must be a better and more efficient way of dealing with the caseload. The assignment of upstate trial judges to New York City, where no cases awaited them for trial, the processing of hundreds of motions at special terms, the frequent need for numerous judges to familiarize themselves with each case, the inefficient utilization of jurors, and the instability of the ready calendar were only some of the administrative problems that became increasingly apparent to me in the latter days of my state service. The New York court system only now is beginning to benefit from some important changes in these areas (Wise, 1986).

Appointment to the federal trial bench after five and one-half years on the state court provided me with an opportunity to address some of the inefficiencies that had begun to plague me in the state court. It has been suggested that the tradition of independence and a consequent unresponsiveness to centralized administrative authority is the reason that judges "historically ... have been little concerned with the overall performance and the administrative problems of the system of which they are a part" (McConnell, 1974). I disagree. It seems to me that the lack of interest of judges in matters of management is a function of the frustration encountered in being part of an inflexible process. The frustrations are greatest in those jurisdictions where experiment and innovation are unwelcome and where centralized authority is a problem rather than a solution. In my day, New York was such a jurisdiction.
The fiercely protected independence of federal trial judges finds some expression in the wide latitude available for calendar management under the individual assignment system. Shortly after my appointment to the federal trial bench, my court abolished the master calendar and adopted the individual assignment system, presenting me with an opportunity to deal with some of the problems I had recognized in the state court. Charged for the first time with the responsibility of maintaining my own calendar from the very inception of a case, I went about accumulating some of the research literature on this subject.

One of the first studies I found was "Case Management and Court Management in United States District Courts" (Flanders, 1977). I was impressed by its finding "that a court can handle its caseload rapidly only if it takes the initiative to require lawyers to complete their work in a timely fashion" (12). My own experience has since convinced me of the absolute validity of that conclusion. The appendix to the study included some sample scheduling and pretrial orders that I used as a basis for the development of my own scheduling system, which I modified from time to time in light of further experience. My orders came to be fairly detailed, and provided for specific dates for the completion of the various stages of pretrial proceedings. They specified the manner for resolution of discovery disputes, listed the various documents required for trial and the dates for filing them and fixed a time for a final pretrial conference. These orders enabled me to seize the initiative and monitor the continuing progress of all cases assigned to me from the time of filing. Some time after I began my scheduling program, the Federal Rules of Civil Procedure were amended to require the trial judge to issue a scheduling order within 120 days after the filing of the complaint (Fed. R. Civ. P. 16(b)). I was very much interested in a recent paper evaluating the implementation of that amendment through the adoption of local rules (Weeks, 1984).

Because of constitutional and statutory speedy trial requirements, there is even greater reason for the use of pretrial orders in criminal cases. It was a simple matter to adapt my civil orders for criminal cases, and I developed the practice of issuing scheduling orders in criminal proceedings at the time of arraignment. By fixing a cutoff date for motions and pretrial hearings as well as dates for the submission of trial papers and for final pretrial conferences, both pleas and trials were expedited. I have found that the pretrial order is a formidable weapon for striking down the barrier of delay sometimes erected by the "local legal culture," a term defined in some of the research literature by which I was guided (see Church, 1982).
Discovery and motion practice probably are the greatest bottlenecks with which a trial judge must deal in the course of litigation. After consulting some literature on alternative procedures for the handling of motions (Connolly and Lombard, 1980), I established a motion day process requiring oral argument and establishing filing deadlines sufficiently in advance of the motion day to enable me to make most motion rulings from the bench. Published works relating to discovery control (e.g., Cohn, 1979; Connolly et al., 1978) led me to the promulgation of a rule that all discovery problems be resolved by an informal chambers conference or by telephone (see Meierhoefer, 1983) after advance notification of the problem by letter. My survey of the research convinced me that no rule of procedure, no local court rule and no judge’s order can be effective unless the judge requires strict adherence. Sanctions as well as the threat of sanctions for nonadherence are necessary to assure compliance. Of course, studies of the use of sanctions by other judges were very helpful to me (e.g., Miller, 1984; Rodes et al., 1981; Symposium, 1983).

The inefficient use of jurors is a disservice to the courts, the public and the jurors themselves. Statistical data on jury utilization made me aware of the need for efficient use of jurors’ time in my court (see Administrative Office of the U.S. Courts, 1985; Bermant, 1977, 1982). Much of the material in which I was interested as a trial judge dealt with the experience of other trial judges and evaluations made in light of those experiences. I was particularly interested in voir dire and jury challenge procedures employed by other trial judges, and I modified some of my own procedures in light of a comparative study in this area (Bermant, 1982). A concern for efficient jury utilization prompted me to include in my scheduling order a notice that an unreasonably withheld settlement entered into after the jury had arrived at the courthouse would result in the imposition of the costs of summoning the jury upon the party unreasonably refusing to settle. Particularly illuminating for me were some experiments conducted in my own circuit relating to the improvement of the work of jurors (Committee on Juries, 1984).

In spite of the tight control I exercised over my calendar and the resultant increase in the rate of disposition of cases, dramatic filing increases in the district caused an increase in my calendar to more than 850 cases. Although there is some meritorious evidence that there

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is no litigation explosion in the United States (Galanter, 1983), that
evidence was not apparent in the trial court in which I served. Accord­
ingly, I began to examine some studies of alternate forms of dispute
resolution — court-annexed arbitration (Administrative Office of the
mediation (Shuart, 1984; Tegland, 1984), summary jury trials (Jac­
oubvitch and Moore, 1982), and minitrials (Green, 1982). My investiga­
tions persuaded me that an experiment in court-annexed arbitration
should be attempted in my court. I was in the process of drafting a
proposed rule to be adopted for that purpose when the call came to
serve as an appellate judge. A recent issue of *Judicature* was devoted
entirely to the subject of alternate dispute resolution and, what is most
pertinent here, one of the articles called for an expansion of the
present limited understanding of the field through continued experi­
mentation and research (Goldberg *et al.*, 1986; Miner, 1985a).
Alternate dispute resolution procedures, dealing as they do with the
disposition of cases without trial, are closely related to techniques
employed by trial judges in the settlement of civil cases. Along with
most, but certainly not all, judges, I have been interested in literature
pertaining to the judge's role in settlement (Bedlin and Nejelski, 1984;
Will *et al.*, 1977). As a district court judge, I was influenced by a
number of other research projects affecting my work. Studies relating
to the assignment of various responsibilities to magistrates (Seron,
1983, 1986), the procedures for observation and study of offenders in
criminal cases (Horney, 1985), the regulation of attorneys' fees
(Shapard, 1984; Willging, 1984a), the management of asbestos litiga­
tion (Willging, 1985) and of protracted trials (Bermant *et al.*, 1981), bail
guidelines (Goldkamp and Gottfredson, 1984), the imposition of partial
filing fees in prisoner litigation (Willging, 1984b), and the deterrence of
abusive litigation (Olson and McConnell, 1985) all have been of
assistance to me, and there have been others as well.
Since my appointment to the appellate bench, I have turned to
studies affecting appellate courts and judges, an area certainly worthy
of further examination and inquiry. I am pleased to note that one of
the papers to be presented at this conference is devoted to that subject.
Since I have been concerned for some time with unpublished and
uncitable opinions handed down in the Second Circuit, I found most
interesting a recent survey of the policies of other courts relating to
those matters (Stienstra, 1985). Because my circuit is the only one in
the nation to allow oral argument in all cases upon request, I also have
found food for thought in an examination of appellate decision making
without argument (Cecil and Stienstra, 1985). A comparative study of appeals expediting systems (Cecil, 1985; Farmer, 1981), an evaluation of the functions of circuit court executives (Macey, 1985), and studies of settlements at the appeal stage under civil appeals management plans (Goldman, 1977; Kaufman, 1986; Partridge and Lind, 1983) all have influenced my thinking in relation to judicial administration at the appellate level.

When I first became aware of the benefits of judicial administration research, I labored under the naive assumption that judges were the primary beneficiaries of the enterprise. I since have become aware of the broad implications of the work and how it extends beyond the special interests of courts and judges. Now it is clear to me that research in court administration is of enormous interest not only to court administrators and judges but also to political scientists, sociologists, economists, practicing lawyers, and to elected and appointed officials charged with the responsibility for cost-effective government (see Levin, 1981). In the final analysis, the public itself is the most important beneficiary of the research. None of us should make the mistake of underestimating general public interest in the selection and evaluation of judges, the budgeting and expenditure of funds to support the judicial system, the pace at which disputes are resolved, the operation of the criminal courts, the expense of litigation and fairness in the adjudicative process.

In spite of this universe of interest, I think that judges rank among the most important consumers of research, and I perceive the need for a much closer relationship between judges and researchers than has been the case in the past. I believe that judges should attend and participate in conferences of this kind. Likewise, researchers should be present whenever judges gather. I intend to propose that members of the research community be chosen to participate in each annual conference of the Second Circuit. This will enable those representatives to report on the current status of their work on a regular basis and to have an interchange with all the trial and appellate judges of the circuit. I think that it is essential for all federal judges to have an up-to-date picture each year of the status of judicial administration research as it affects them. It is just as important for the research community to receive regular, institutionalized input from the judges. I firmly believe that when judges gather in conference to address matters of mutual interest, court administration research should be an item on their agenda.
Contrary to what some may think, judges are interested in new techniques in judicial administration and may even have some ideas in that direction. As in my case, judges frequently implement strategies suggested by the research and, from time to time, they have been known to ask for studies of innovative procedures they have instituted on their own. It would seem to me that before embarking on a project affecting the work of courts and judges, a court administration researcher might derive some benefit from judicial input as to the validity of the inquiry. I suggest that circulation to judges of a topic proposed for examination might result in some interesting responses. Similarly, before establishing any new processes, it might be appropriate for a judge to consult with the research community.

It frequently happens that judges find problems in the administration of their courts but are uncertain how to go about developing appropriate solutions. Here, too, researchers can assist by suggesting pertinent study methodologies. The process of experimentation provides another area for cooperative effort. In my experience, most judges are very happy to participate in experimental projects, but those involved in such undertakings must always be mindful of the ethical constraints in this area (Federal Judicial Center, 1981).

Judges of course have an interest only in certain kinds of judicial administration research. They generally are not concerned with sociological, economic or psychological studies in court administration, and they regard the statistics and methodology sections of research reports as unnecessary appendages that should be separately published for the benefit of others. Neither of these considerations should be permitted to impede effective cooperation between judges and researchers, however, because recognition and encouragement of the interdependence is mutually beneficial. To demonstrate that judges do have some ideas and can be effective partners in this effort, I offer some topics of interest to me as possible areas for inquiry and experimentation.

The time has come for a full-fledged experiment on the effect of the so-called English rule shifting the responsibility for attorneys' fees to unsuccessful litigants. Although there has been some preliminary investigation in this area (Shapard, 1984), it is essential that a rule be established in a jurisdiction in order to facilitate some kind of comparative study. Since my days as a trial lawyer, it has seemed to me a matter of fundamental fairness that all costs and fees be awarded to the prevailing party. Apart from this, I am most interested in whether
a general fee-shifting rule will expedite settlement or influence cases in other ways.

During my service as a prosecutor I saw the fear, the expense, the loss of time, and the many other inconveniences visited upon victims and witnesses as a consequence of the detection and prosecution of criminal offenders. New legislation, as well as heightened sensitivity on the part of law enforcement officials, has resulted in increasing interest in the protection and compensation of those involuntarily caught up in the criminal justice system (see Miner, 1985b; Finn, 1986). These concerns for victims and witnesses are long overdue. What has been their effect on the criminal justice system? I suggest that the answer to this question should be pursued as a research project.

Also ripe for study, in my opinion, is a subject I soon will be writing and lecturing about — the expansive growth of federal criminal jurisdiction. The growth to which I refer has been of geometric proportions, and there are many aspects of the subject to be investigated: What is the extent of the duplication of state prosecutions? What have been the demands upon the federal courts? Can some federal crimes be prosecuted in state courts? What then would be the effect on state courts? I would like very much to participate in defining the terms of a study in this area.

The rule of finality is most important to those concerned with appellate jurisdiction. In the federal system, there are a few statutorily created exceptions, as well as some judicially created exceptions, to this rule (see, e.g., 28 U.S.C. §1292; 18 U.S.C. §3731; Fed. R. Civ. P. 54(b); United States v. Tbm, 1986). In some jurisdictions, such as New York, interlocutory appeals appear to create a great barrier to the progress of litigation (Bellacosa, 1986). An examination of the delays occasioned by interlocutory review should be undertaken. I think that such an inquiry would be of special interest to legislators responsible for establishing statutory standards for appeals.

Judicial administration policies have been defined as those "designed to enable courts to dispose — justly, expeditiously, and economically — of the disputes brought to them for resolution" (Wheeler, 1979). The general public obviously has a tremendous interest in these policies, and a two-way flow of information between the courts and the public is essential. It should be an important function of judicial administrators to tell the public what the courts are doing and to find out from the public what is wanted of the courts. Ongoing research must be undertaken to promote and measure this two-way information flow. A
national survey of public attitudes and perceptions involving the courts was undertaken in 1977 (National Center for State Courts, 1978), but current analysis is sorely needed. Court administrators need to learn how to deal with the press and to develop a public relations capability (see Denniston, 1981; Fretz, 1981; Meador, 1975; Wapner, 1986). They must be brought to the understanding that the “appearance of justice” is a desirable goal (see Offutt v. United States, 1954). Similarly, administrators must develop a sensitivity to public expectations of the courts and of judicial administration policies. It is essential that researchers contribute their talents to these important goals, because in a democratic society it is the public that pronounces final judgment not only on the courts but also on the enterprise of judicial administration research.

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