

1986

Research in Judicial Administration: A Judge's Perspective, Conference on Judicial Administration Research

Roger J. Miner '56

Follow this and additional works at: http://digitalcommons.nyls.edu/fed_courts_admin

 Part of the [Courts Commons](#), [Judges Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Miner '56, Roger J., "Research in Judicial Administration: A Judge's Perspective, Conference on Judicial Administration Research" (1986). *Federal Court System and Administration*. 2.
http://digitalcommons.nyls.edu/fed_courts_admin/2

This Article is brought to you for free and open access by the Speeches and Writings at DigitalCommons@NYLS. It has been accepted for inclusion in Federal Court System and Administration by an authorized administrator of DigitalCommons@NYLS.

Roger J. Miner
U.S. Circuit Judge
Court of Appeals
Second Circuit
Albany, New York

Keynote Address
Conference on Judicial Administration Research
Rockefeller College
State University of New York at Albany
June 16, 1986

Research in Judicial Administration: A Judge's Perspective

It is most fitting that this international conference on judicial administration research be convened by the Court System Management Program of the Rockefeller College, State University of New York at Albany. In my opinion, the Program provides not only outstanding graduate education in court administration as a sub-field of public management; it also serves very successfully as a center for research in judicial administration, an enterprise to which it has made some important contributions. Neither pride of place nor my association with the Program colors my opinion in any way, of course.

Those who gather for this conference 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 '80's measures up to that of the '60's and '70's; 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 21st 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 ask you about General's things. He only expects you to know about Private's things." Bearing in mind the message underlying Sergeant Cordero's reassurances, I shall restrict my observations and remarks to Judge's 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 co-operation 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.¹

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."² 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." I was impressed by its finding "that a court can handle its case load rapidly only if it takes the initiative to require lawyers to complete their work in a timely fashion."³ My own experience has since convinced me of the absolute validity of that conclusion. The appendix to the study included some sample scheduling and pre-trial orders that I used as a basis for the development of my own scheduling system, which I modified from time to time in the light of further experience. My orders came to be fairly detailed, and provided for specific dates for the completion of the various stages of pre-trial 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 pre-trial 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 a complaint.⁴ I was very much interested in a recent paper evaluating the implementation of that amendment through the adoption of local rules.⁵

Because of constitutional and statutory speedy trial requirements, there is even greater reason for the use of pre-trial 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 cut-off date for motions and pre-trial hearings as well as dates for the submission of trial papers and for final pre-trial conferences, both pleas and trials were expedited. I have found that the pre-trial 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.⁶

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,⁷ 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 control⁸ led me to the promulgation of a rule that all discovery problems be resolved by an informal chambers conference or by telephone⁹ 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 non-adherence are necessary to assure compliance. Of course, studies of the use of sanctions by other judges were very helpful to me.¹⁰

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.¹¹ 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 the 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.¹² 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.¹³ Particularly illuminating for me were some experiments conducted in my own circuit relating to the improvement of the work of jurors.¹⁴

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 is no litigation explosion in the United States,¹⁵ that evidence was not apparent in the trial court in which I served. Accordingly, I began to examine some studies of alternate forms of dispute resolution -- court-annexed arbitration,¹⁶ mediation,¹⁷ summary jury trials,¹⁸ and minitrials.¹⁹ My investigations 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 the Journal of the American Judicature Society was devoted entirely to the subject of Alternate Dispute Resolution,²⁰ and, what is most pertinent here, one of the articles called for an expansion of the present limited understanding of the field through continued experimentation and research.²¹

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 judges' role in settlement.²² 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,²³ the procedures for observation and study of offenders in criminal cases,²⁴ the regulation of attorneys' fees,²⁵ the management of asbestos litigation²⁶ and of protracted trials,²⁷ bail guidelines,²⁸ the imposition of partial filing fees in prisoner litigation,²⁹ and the deterrence of abusive litigation³⁰ 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.³¹ 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.³² A comparative study of appeals expediting systems,³³ an evaluation of the functions of circuit court executives,³⁴ and studies of settlements at the appeal stage under civil appeals management plans³⁵ 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.³⁶ 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. 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 own 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 well 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 co-operative 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.³⁷

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 co-operation between judges and researchers, however, because recognition and encouragement of the interdependence is mutually beneficial.

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.

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.

I think that 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,³⁸ it is essential that a rule be established in some 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 and in any other influences such a rule might have.

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.³⁹ 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.⁴⁰ In some jurisdictions, such as New York,⁴¹ interlocutory appeals appear to create a great barrier to the progress of litigation. 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."⁴² 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 1977,⁴³ but current analysis is sorely needed. Court administrators need to learn how to deal with the press and to develop a public relations capability.⁴⁴ They must be brought to the understanding that the "appearance of justice" is a desirable goal.⁴⁵ 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.

FOOTNOTES

1. See N.Y. Uniform Rules § 202.3 (McKinney 1986); see generally, e.g., Wise, Final Judgment Entered for 'Special 1,' N.Y.L.J., Jan. 6, 1986, at 1, col. 2.
2. E. McConnell, The Improvement of the Administration of Justice 14-21 (5th ed. 1971), quoted in D. Nelson, Judicial Administration and the Administration of Justice 841 (1974).
3. S. Flanders, Case Management and Court Management in United States District Courts 12 (Federal Judicial Center 1977).
4. Fed. R. Civ. P. 16(b).
5. N. Weeks, District Court Implementation of Amended Federal Civil Rule 16: A Report on New Local Rules (Federal Judicial Center 1984).
6. Church, The "Old and the New" Conventional Wisdom of Court Delay, 7 Just. Sys. J. 395, 401 (1982). In his article, Professor Church poses the interesting question whether cost-benefit analysis should be applied to efforts to reduce delay.
7. P. Connolly & P. Lombard, Judicial Controls and the Civil Litigative Process: Motions (Federal Judicial Center 1980).
8. E.g., P. Connolly, E. Holleman & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery (Federal Judicial Center 1978); Cohn, Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules, 63 Minn. L. Rev. 253 (1979).
9. See B. Meierhoefer, Business By Phone in the Federal Courts (Federal Judicial Center 1983).
10. E.g., R. Rodes, K. Ripple & C. Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure (Federal Judicial Center 1981); A. Miller, The August 1983 Amendments to the Federal Rules of Civil Procedure (Federal Judicial Center 1984); Sanctioning Attorneys for Discovery Abuse

-- The Recent Amendments to the Federal Rules of Civil Procedure: Views from the Bench and Bar, 57 St. John's L. Rev. 671 (1983).

11. See G. Bermant, Jury Selection Procedures in United States District Courts (Federal Judicial Center 1982); G. Bermant, Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges (Federal Judicial Center 1977); Administrative Office of the U.S. Courts, Statistical Analysis and Reports Division, 1985 Grand and Petit Juror Service in United States District Courts (1985).

12. G. Bermant, Jury Selection Procedures in United States District Courts (Federal Judicial Center 1982).

13. Cf. Fed. R. Civ. P. 68; Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Proposed Rule 68 (Committee on Rules of Practice and Procedure of the Judicial Conference of the United States) (August 1983).

14. Committee on Juries of the Judicial Council of the Second Circuit, Report on Seven Experiments Conducted by District Court Judges in the Second Circuit (1984).

15. Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and think we know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4 (1983).

16. Administrative Office of the U.S. Courts, Report of the Proceedings of the Judicial Conference of the U.S. 49-50 (1984); E.A. Lind & J. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts (Federal Judicial Center 1981); Nejelski & Ray, Alternatives to Court and Trial, in The Improvement of the Administration of Justice 263 (F. Klein ed. 1981).

17. K. Tegland, Mediation in the Western District of Washington (Federal Judicial Center 1984); K. Shuart, The Wayne County Mediation Program in the Eastern District of Michigan (Federal Judicial Center 1984).

18. M. Jacobovitch & C. Moore, Summary Jury Trials in the Northern District of Ohio (Federal Judicial Center 1982).

19. Green, Growth of the Mini-Trial, Litigation, Fall 1982, at 12.

20. 69 Judicature 252 (Feb.-Mar. 1986).
21. Goldberg, Green & Sander, ADR Problems and Prospects: Looking to the Future, 69 Judicature 291 (Feb.-Mar. 1986); see also Miner, A Judge's Advice to Today's Law Graduates, N.Y. St. B.J., Nov. 1985, at 6.
22. See H. Will, R. Merhige & A. Rubin, The Role of the Judge in the Settlement Process (Federal Judicial Center 1977); Bedlin & Nejjelski, Unsettling Issues about Settling Civil Litigation: Examining "Doomsday Machines," "Quick Looks" and Other Modest Proposals, 68 Judicature 9 (June-July 1984).
23. C. Seron, The Role of Magistrates in Federal District Courts (Federal Judicial Center 1983); Seron, Magistrates and the Work of Federal Courts: A New Division of Labor, 69 Judicature 353 (Apr.-May 1986).
24. J. Horney, Observation and Study in the Federal District Courts (Federal Judicial Center 1985).
25. J. Shapard, The Influence of Rules Respecting Recovery of Attorneys' Fees on Settlement of Civil Cases (Federal Judicial Center 1984); T. Willging, Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial (Federal Judicial Center 1984).
26. T. Willging, Asbestos Case Management: Pretrial and Trial Procedures (Federal Judicial Center 1985).
27. G. Bermant, J. Cecil, A. Chaset, E. Lind & P. Lombard, Protracted Civil Trials: Views from the Bench and the Bar (Federal Judicial Center 1981).
28. J. Goldkamp & M. Gottfredson, Judicial Guidelines for Bail: The Philadelphia Experiment (U.S. Department of Justice, National Institute of Justice 1984).
29. T. Willging, Partial Payment of Filing Fees in Prisoner In Forma Pauperis Cases in Federal Courts: A Preliminary Report (Federal Judicial Center 1984).

30. Olson & McConnell, Deterring and Defeating Frivolous and Abusive Litigation, For the Defense, Jan. 1985, at 16.

31. D. Stienstra, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals (Federal Judicial Center 1985).

32. J. Cecil & D. Stienstra, Deciding Cases without Argument: A Description of Procedures in the Courts of Appeals (Federal Judicial Center 1985).

33. J. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project (Federal Judicial Center 1985); L. Farmer, Appeals Expediting Systems: An Evaluation of Second and Eighth Circuit Procedures (Federal Judicial Center 1981).

34. J. Macey, The First Decade of the Circuit Court Executive: An Evaluation (Federal Judicial Center 1985).

35. J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (Federal Judicial Center 1977); A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan (Federal Judicial Center 1983); Kaufman, Must Every Appeal Run the Gamut? - The Civil Appeals Management Plan, 95 Yale L. J. 755 (1986).

36. See Levin, Research in Judicial Administration: The Federal Experience, 26 N.Y.L. Sch. L. Rev. 237 (1981).

37. Federal Judicial Center, Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law (1981).

38. J. Shapard, The Influence of Rules Respecting Recovery of Attorneys' Fees on Settlement of Civil Cases (Federal Judicial Center 1984).

39. See Miner, Victims and Witnesses: New Concerns in the Criminal Justice System, 30 N.Y.L. Sch. L. Rev. 757 (1985); Finn, Collaboration Between the Judiciary and Victim-Witness Assistance Programs, 69 Judicature 192 (Dec.-Jan. 1986).

40. See, e.g., 28 U.S.C. § 1292; 18 U.S.C. § 3731; Fed. R. Civ. P. 54(b); United States v. Tom, 787 F.2d 65 (2d Cir. 1986).

41. See Bellacosa, Why O.C.A. Supports Curb on Interlocutory Civil Appeals, N.Y.L.J., April 22, 1986, at 1, col. 3.

42. Wheeler, Judicial Reform: Basic Issues and References, 8 Policy Studies J. 134, 135 (1979).

43. See National Center for State Courts, State Courts: A Blueprint for the Future (1978).

44. See D. Meador, Consumers of Justice: How the Public Views the Federal Judicial Process (Federal Judicial Center 1975); Wapner, How We Can Develop a Better Working Relationship with the Press, Judges' J., Winter 1986, at 6; Fretz, Relationship Between Courts and the Public: A Judge's Point of View, in The Improvement of the Administration of Justice 303 (ABA 1981, F. Klein ed.); Denniston, Relationship Between Courts and the Public: A Newsman's View, in The Improvement of the Administration of Justice 321 (ABA 1981, F. Klein ed.).

45. See Offutt v. United States, 348 U.S. 11, 14 (1954).