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Judicial Administration—The Human Factors

*Howard T. Markey**

It is tough enough for a judge to “do” justice in every case. Yet a judge is also expected by many to “administer” justice, to “manage” his or her caseload and calendar, to “take charge” early, often, and with thoroughness in every civil case. In that view, regardless of whatever staff and machine aids may be provided, the judge cannot escape the central role in what is rightly called judicial administration—a role and responsibility that comes with the territory. Delegation of individual chores may save time, but the ultimate responsibility of seeing that justice is administered correctly and in accordance with law is and must remain fixed upon the one considered the central actor in the drama—the judge. Although these statements may be widely viewed as truisms that are centuries old in their fundamentals, the modern flood of civil litigation highlights the need for their careful, contemplative consideration by every judge.

It is easy to write articles about the administrative responsibilities of judges. It is another thing for trial judges, operating on the battle’s front line and confronted with an avalanche of civil litigation, to meet those responsibilities in a varied and monstrous milieu of other duties.

Much is available in the way of tools and “how to” knowledge, including the Federal Rules of Civil Procedure. There is also a growing intellectual acceptance of the need for judges to take charge. This need has been prompted by widely lamented horror stories about pretrial abuses such as delay, harassment, unending interrogatories and evasive answers, extended and numerous depositions, and proliferating motions and supporting papers—all of which contribute to outrageous costs. There is enough blame to go around, and a good share of it is attributable to discovery-abusing lawyers who fail to balance their duty to a client with their duty as officers of the court. More and more, however, those concerned with the condition of the American

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justice system have recognized that one of the major stumbling blocks to improvement is the administratively passive judge.

If the know-how, the tools, and the intellectual acceptance of the need for judges to assume case-management responsibilities exist, whence the complaint about passive judges? Why does it appear that among our major tamers of system-abusing lawyers—our judges—there may be some who do not exercise that responsibility? Why doesn't every judge conduct repeated, scheduled, thorough pretrial conferences in chambers in every case, ruling on almost all pretrial matters at the conference, setting dates of the next pretrial conference and for trial, dictating a short memo on those rulings and dates, and announcing the judge's ready availability for a conference at any time requested by the lawyers?¹ This procedure has been described as the simplest, quickest, and most efficient way for judges to exercise their management responsibility. It is done by most if not all of our most experienced and respected judges. That it is not universally being done may be a phenomenon caused by certain human factors.

As humans, judges are certainly subject to all the temptations and frailties of the race. Temptations to succumb to laziness, arrogance, pride, or similar shortcomings, or to overemphasize popularity with the bar, are ever present. Nevertheless, the vast majority of judges have successfully avoided those pitfalls; their record, both historically and currently, confirms an outstanding performance of judicial duties.

Judges have been dedicated from the time they donned their robes to a desire that haunts their dreams—a desire to decide every case correctly and fairly, to do justice in every case. This essay looks at some human factors in judicial administration which make the fulfillment of that dream at times elusive. This is not an attempt at remote psychoanalysis of judges. The human factors of concern here, those that appear to contribute to judicial passivity, are more in the nature of long and uncritically accepted ideas and subconscious notions.

Among the possible causal factors for a passive judicial approach to pre-trial case management are (1) the idea that counsel have the right to conduct their cases, (2) a subconscious fear

1. There may well be other ways of carrying out the duty of case management. For example, Judge Thomas Lambros of the Northern District of Ohio has initiated a "summary jury trial" process.

of judicial embarrassment, (3) the reluctance to step into all cases when "ninety percent will be settled anyway," (4) the press of other duties, and (5) an over-readiness to surrender to problems created by the geographical remoteness of counsel.

I. RIGHTS OF COUNSEL

That counsel have a right to conduct their *trials* is unquestioned. Judges should limit interjections from the bench in all trials, and particularly in jury trials, to instances of necessity. But no basis exists for transferring all of the same considerations to the period before trial. The public has an interest, a vital interest, in that period. The public has a right to pretrial periods that neither extend a day longer, nor cost a dollar more, than necessary.

The moment a complaint is filed, *i.e.*, the moment a citizen elects to employ the judicial process to achieve his ends, his case becomes the public's business. The public pays for the functioning of the judicial process, and often pays for corporate litigation costs through increased prices. Beyond monetary considerations, the public is severely injured when deprived of the efficient administration of justice. Such deprivation, if widespread and long continued, could become the death knell of a free society.

There is no necessary conflict between efficiency and justice. On the contrary, "inefficient justice" may be a contradiction in terms. Nowhere is it ordained that due process must be sloppy process.

Because all matters preliminary to trial affect the administration of justice, those matters cannot be the private fiefdom of the lawyers, to do with as they wish. Every case must be managed in the public interest, and in many cases the only one who can perform that management job is the judge.

Part of the reason for the existence of a rights-of-counsel syndrome may lie in the laudable judicial desire to remain above the fray, to maintain a clear and true image of objective impartiality. Maintenance of that image may appear easier for the judge who manages passively rather than actively. Yet the choice is not Draconian. There is no real conflict between the necessity to be and appear indifferent to the outcome on the one hand and refusal to be indifferent to abuses of the judicial process on the other hand. The choice need not be between an appearance of favoritism and a turning of the judicial back on pretrial abuses. Active, vigorous enforcement of the Marquess of Queensbury

Rules is imperative to a fair bout, not an indication of favoritism toward either boxer. Indeed, in managing the pretrial period, the passive can paralyze and only the firm can be fair.

Lawyers can become mesmerized by the ancient injunction, "The client's interest is paramount," if they fail to ask the obvious question, "Compared to what?" Certainly the client's interest is paramount to that of the lawyer, but is it paramount in all cases to the public interest in the efficient and just conduct of the judicial process? Those mesmerized lawyers who view the law as a sport, who operate on a winning-is-the-only-thing theory, can be expected to engage in all of the dilatory, harassing, and expense- and fee-generating tactics available under the discovery rules. Those lawyers prefer a passive performance from the bench. Disdaining the natural desire for popularity, demanding instead respect for the judicial process, the judge, and only the judge, is positioned and empowered to control and channel those tactics toward prompt, just, and less costly resolution of the dispute. Non-mesmerized lawyers, who give the judicial process at least equal billing with the client's interest, and who give thought to their roles as officers of the court, may make the judge's management job easier, but the job remains that of the judge in every case.

If the black mark on the administration of justice represented by abuses in pre-trial activities is to be removed, the right of counsel to conduct their cases must, when necessary, give way to the duty of the judge to administer justice.

II. EMBARRASSMENT

That judges don't know all the law is another truism honored more in repose than in recognition.

Some inexperienced lawyers may think judges know it all, but many lawyers, including the experienced who know better, pretend that judges know it all. Presented day after day with that apparent belief of counsel, often expressed in admiring, even cloying, phrases, judges are subjected to a subtle pressure to join the charade. They are surrounded with the important and necessary trappings that belong to justice (not to the judge, to whom they are merely loaned), including the title, the robe, the raised bench, and the required respect. A judge is thus constantly and properly reminded of the prestige and importance of his or her office. Even among judges who remember that they were appointed, not anointed, it is an easy step from mainte-

nance of a well-founded image of integrity and impartiality to a subliminal acceptance of a false image of omniscience.

A judge actively managing each case from its filing date will be denying discovery in certain areas, vacating certain interrogatories, limiting evidence and issues, and ruling on various motions. Fair disposition of many of those matters will require some knowledge of the law involved in the case. A judge whose law practice had been limited to probate, for example, may fear that active engagement in repeated pretrial conferences involving other legal fields would undercut the judicial image, because the lawyers would detect the judge's limited knowledge. Unlike the medical intern, who would not think (or be permitted) to attempt brain surgery, the judge who is new or inexperienced in a particular field of law feels compelled to try every case assigned, however complex it may be. Unwilling or unable to see the case transferred to a more experienced judge, he or she struggles through. Concerned not so much with personal embarrassment as embarrassment of the office, the judge's "solution," in far too many instances, has been to require everything in writing, to study the writings, and to then issue an order, resolving doubts in favor of "letting it in for what it's worth." But that approach, with its delays, mounds of paper, and consumption of judicial time, is part of the problem, not the solution.

The solution to the embarrassment problem lies in those three magic words of judicial salvation: "I don't know." The wise judge knows that the greater embarrassment, albeit unspoken, redounds upon the office when a judge feigns a non-existent knowledge. The wise judge knows that it is neither required nor possible for all judges to know all the law. The wise judge also knows that most lawyers study the judge and are fully aware of the true state of affairs. Most lawyers will welcome a judge's candid admission of limited experience and knowledge in the law of the case, and the judge will be made happier by the welcoming.

There is no danger in the judge's saying, "I don't know," for those words will be quickly followed by, "So educate me, as you are being paid to do. Let's get on with it, here and now." After all, legal advocacy, whether in chambers or in court, is definable as an effort to so educate a decisionmaker as to produce a favorable decision. Concerning pretrial activities, a judge may need to learn only so much of the involved law as may be needed to fairly decide the specific pretrial issues presented. Yet, if pre-

trial activities are to be controlled at all, that much of the law must be learned. The only question is whether it is to be learned face-to-face in a pretrial conference, or more slowly and laboriously from reams of papers studied in chambers.

There will be some motions and other pretrial matters that may absolutely require the filing of affidavits, briefs, and memoranda. But most, if not all, of those that would constitute an abuse of the judicial process can be identified and eliminated at a pretrial conference. To do that often requires some judicial knowledge of the involved law, but that knowledge can and should be gained from the lawyers in conference by a candid and unembarrassed judge.

III. SETTLEMENT

With 187,000 cases filed last year in the courts of some 500 federal district judges, and the number of filings increasing yearly, it is at least a surface blessing that about ninety percent are settled before trial. In each year of the past decade, an essentially fixed number of federal district judges tried more cases than the previous year, with trials numbering over 20,000 last year. Considering all of the nontrial duties imposed on judges, that is a tremendous accomplishment. It is understandable that a judge importuned to conduct pretrial conferences in every case should ask for reasons for doing so when most will be settled anyway.

There are a number of reasons for conducting pretrial conferences despite the high settlement percentages. First, without early and frequent pretrial conferences it cannot be known how many cases were ultimately settled solely because of unnecessary, process-abusing delays and expense. Elimination of inappropriate settlements forced by the ability of a lawyer "to tie you up in court for ten years" is devoutly to be desired. A judge's active conduct of pretrial conferences, beginning promptly after filing, can unearth and preclude potential injustices in such cases.

Secondly, far too many otherwise appropriate settlements occur far too late in the process. Obviously, a party expecting to lose at trial (particularly if the money owed is daily earning more interest than the court is permitted to award) loses nothing (and may gain) by delay. Moreover, parties intending to settle are sorely tempted to employ pretrial maneuvers as tools to encourage a more favorable settlement on the eve of trial. Early

and frequently scheduled pretrial conferences, aiming at early and established trial dates, can result not only in more settlements, but, equally important, in much earlier settlements.

Every case settled reduces the number of pending cases, but settlement after a first or second early conference removes a case which would have otherwise remained on the pending case backlog for three to five years. In virtually every crowded docket of pending cases lies a large number that would be settled in two weeks if an actively managing, fair-and-impartial-but-no-nonsense judge were to announce a pretrial conference at which a firm trial date would be set.

In one such instance, a collection of ten separate cases involving a particular legal specialty had been pending for from four to six years. No two of the ten cases involved the same parties or lawyers. When a judge committed to case management was assigned and promptly scheduled pretrial conferences, five cases were immediately settled by stipulation without a conference and three were settled at the first conference. The remaining two were tried on the same day, after pretrial conferences had reduced and clarified the evidence and the issues. The entire process consumed only five hours of judicial time in conferences and one day of trial time. The judge, educated at the conferences and at trial, rendered judgments with opinions within a week after trial. The entire process, from assignment of the ten cases to the judge to their final disposition, took less than six weeks. Not all sets of backlogged cases would fit that scenario, but none will even approach it if judges passively disregard the opportunities for earlier settlements and reductions in trial time inherent in a universal pretrial system.

Thus, a recognition that many cases will be settled does not argue for judicial passivity; it highlights the opportunity for judicial management of the pretrial period. It dramatizes the chance for avoiding unfair settlements, achieving fair settlements earlier, and reducing both trial and decisionmaking time.

IV. OTHER DUTIES

Contrary to public perception, judges have many duties beyond presiding at trial. The hectic schedule of today's trial judge includes numerous nontrial proceedings in court, such as arraignments, sentencing, and argument of motions. It includes numerous in-chambers matters, such as conducting *in camera* proceedings, researching the law, writing opinions, and manag-

ing a personal staff. It includes out-of-chambers matters, such as attendance at committee meetings with other judges and court administrators. Though not exhaustive, that list renders understandable a judge's hesitancy in accepting the suggestion that pretrial conferences be conducted in every case.

It should be pointed out, however, that judicial management through pretrial conferences in every case actually reduces the total workload of the judge. The work of deciding whether certain interrogatories must be answered, whether certain failures to admit are justified, or whether a certain deposition should be ordered must be done. The active conference system of judicial management involves the same judicial chores as a passive paperwork system; it just enables the judge to accomplish those chores in less time. It is in most cases easier, and infinitely quicker, to decide a pretrial question in conference, after opposing counsel state their positions, than it is to decide that same question after weeks or months of briefs and memoranda, answering briefs and memoranda, and reply briefs and memoranda, all of which must be read and digested. It is infinitely more efficient to require that motions first be made orally at a conference, and that only those found incapable of decision at conference be granted a briefing schedule.

The workload reduction does not stop there. As indicated above, pretrial conferences can lead to earlier settlement. Where settlement is not reached, early and frequent pretrial conferences can so reduce and clarify the issues as to eliminate days or weeks of unnecessary trial time. Finally, such conferences can so reduce the size and complexity of the record as to facilitate the judge's post-trial decisionmaking.

When asked why they conduct pretrial conferences early and often in every case, experienced judges have responded: "Because I can't afford not to," and "Because I haven't time to do it any other way."

It is true that the judge-manager must fit into a busy schedule the time necessary for pretrial conferences. The scheduling will vary from judge to judge. Some might schedule one hour every day for that purpose; some might set up a two-hour period on Mondays, Wednesdays, and Fridays; some might devote one full day a week. For maximum benefit, every schedule should include a flexibility feature whereby the judge is available at almost any time to meet in chambers with the lawyers at their request.

A formerly passive judge undertaking an active management role will require time to convince the bar that he or she means business and means to eliminate abuses of pretrial processes in his or her court. Once so convinced, the lawyers will find it both comforting and in their interest to contribute to that goal. Thereafter, with a reduced backlog and cooperating counsel, the judge's management chore will be greatly eased. Once it gets rolling, a pretrial conference system of case management makes the judge's overall job easier, not harder.

To the judge hesitant about adding to a busy schedule a system of conferences in every case, the predictably safe assurance might be, "Try it—you'll like it!"

V. REMOTENESS OF COUNSEL

It is easy to visualize frequent conferences of judge and counsel in a large metropolitan area, where the courthouse may be a short walk from the principal lawyers' offices. In less populated areas, or when principal counsel are based outside a metropolitan area, the courthouse may be hundreds of miles from the principal lawyers' offices. Although that circumstance may require special steps to facilitate a judge's responsibility for case management, it is not a reason to disregard that responsibility.

The local rules of every federal district court require an appearance of local counsel. Local counsel may come to a noticed pretrial conference prepared to discuss the case, the pending discovery problems, the evidence, the basic issues, and the potential for settlement. If an area is uncovered in which local counsel require instructions from lead or principal counsel, the conference may be adjourned for receipt of those instructions. The adjournment may last only long enough to complete a phone call or only for a few days, depending on the issue involved. It is recognized that a desire to avoid increased client costs has often led to engagement of local counsel only to watch the calendar and shuffle papers. Nonetheless, it should be possible in many cases to involve only local counsel in at least the earliest pretrial conferences and in those devoted to relatively simple pretrial questions. In those instances in which local counsel's fee for education on the case and participation in the conference is substantially less than the combined cost of principal counsel's travel and participation fee, involvement of local counsel alone in a pretrial conference would appear to reduce client costs. In any event, the important thing is the conference and the rulings

made there to advance the administration of justice.

When participation by principal counsel is required in a pretrial conference, and the cost of travel is unwarranted, a conference call can be arranged. With or without local counsel present, a judge can conduct a pretrial conference with both principal counsel on the phone almost as well as when talking face-to-face with them. Chief Judge Jack Weinstein of the Eastern District of New York has announced that judges of that court will hear motions and other applications by telephone, and has authorized the taking of testimony by closed-circuit television. Someday, closed-circuit television or "phonevision" may permit face-to-face pretrial conference with the judge in Omaha chambers and opposing counsel in their respective Los Angeles and New York offices. Indeed, the need for overcoming the cancerous growth of pretrial abuses would appear to warrant investigation right now of what such electronic pretrial conferences might cost and a comparison of those costs with all of the costs generated by present abuses.

Geographical remoteness of principal counsel does represent an obstacle to judicial case management through conferences. By employing desire, ingenuity, and modern communications systems, however, judges can overcome that obstacle to the efficient administration of justice.

VI. CONCLUSION

Judicial administration entails, and the public interest requires, fair and impartial management by the judge of all pretrial events. Frequent conferences with counsel constitute a major management mechanism. Human factors, such as the idea that counsel have a right to conduct their cases, judicial fear of displaying limited knowledge of the law involved, reluctance to deal with cases likely to be settled, judicial concern for other duties, and an overemphasis on geographical remoteness of principal counsel may contribute to passivity about pretrial events on the part of some judges. If so, those judges may wish to consider whether the public interest, the value of candor, the encouragement of earlier settlements, and the reduction of overall workload are goals sufficient to overcome human factors that can serve as obstacles to the administration of justice.