The judge's role in pretrial case process

A recent study of pretrial judicial involvement suggests that more active participation by judges in pretrial processing of civil cases would help speed disposition. But questions about the necessity and desirability of this change in the role of the judge still remain.

by Herbert M. Kritzer

In recent years, students of the judiciary have called for more active judicial involvement in pretrial processing of civil cases.¹ The impetus for part of the call for reform, or at least the increased level of current discussion, is the litigation explosion.² According to this line of argument the business of the courts is booming, judges and court staffs are overworked, and the quality of justice is deteriorating.

The advocates of more pretrial judicial in-
volvement believe that a relatively small amount (per case) of judicial attention at that stage will speed the disposition of many cases, either by encouraging early settlements or by moving the parties more rapidly to trial. The result will be speedier justice for litigants and more time for judges to devote to the cases that really need their attention. These proposals seem to call for a major change in the role of the judge in civil litigation. This is not the first time that critics have sought to implement court reform by proposing changes in judicial roles, but the current proposals for judicial involvement in management and settlement may portend major changes for the operation of our civil courts, particularly in the relationship between the trial judge and the parties.

In fact, the movement toward more judicial involvement in case management represents a reversal of a 40-year trend (at least in the federal system) toward turning control of the litigation process over to the parties and their representatives. Starting in the 1930s with the adoption of liberalized discovery and pleading practices through the Federal Rules of Civil Procedure, this trend tended to place judges above the day-to-day litigation process, and to

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3. Historically, one can identify a number of reforms that were accomplished by changing the judge’s job. Perhaps the most prominent example of this culminated in the Judiciary Act of 1925; over a period of years the job of the Supreme Court justice was changed from simply deciding the cases brought to the court to include deciding which cases to decide.
relegate them to formal adjudication of the issues in the primary dispute. The "changes" talked about today represent a fundamental shift in the role of the judge: from that of the formal "adjudicator" of "cases" to the informal "processor" of "disputes."

This article examines the current level of judicial involvement in pretrial case processing and the ramifications of possible changes. It seeks to examine (1) some of the empirical assumptions about what judges now do, (2) the possible effects of a major change in the scope of judicial action, and (3) the broader implications of the proposed reforms for the role of the courts in our society.

**The judge as bureaucrat**

The terms of this fundamental shift emphasize a movement away from formalism: The judge will not primarily decide cases but rather move the business of the courts; the "adversary" model where the judge sits as the umpire will change to a "processor" model where the primary concern is "management" and where the judge becomes in effect a state, or perhaps better, a "court" bureaucrat. This discussion suggests that proposals for the judge to become more actively involved in the nonadjudicative aspects of litigation would sharply alter the traditional role of the judge. But this assumes that the proposed changes do in fact represent changes.

Ryan et al.'s survey of trial judges suggests that judges may have always been processors, to a degree; 78.2 per cent of judges responding to the survey reported engaging in at least some activities directed toward expediting and/or settling cases. The problem with this figure is that the question upon which it is based gives only a vague idea of what form the judicial actions take, although we do know that few judges report using "direct pressure."

The current reformers' proposals envision an active level of judicial intervention. Whether that level of activity is reflected by how most judges responded to Ryan's survey ("subtle" intervention, "through the use of cues/suggestions") is not clear. Obviously if it is, then the ostensible change advocated by proponents of reform is not a change at all. On the other hand, if it does represent a departure from the current practice, proponents need to consider the broader ramifications of these changes. Furthermore, proponents of change need to be aware of any empirical evidence regarding the efficacy of the activities they want judges to undertake. If there is evidence that the proposed activities have no effect on the disposition of court cases, then there is no reason for judges to sharply modify their role.

Two important empirical questions about current proposals arise: (1) Do these proposals represent an actual change in what judges do, or are judges already, by and large, engaging in these activities? And (2) is there any empirical evidence that the kinds of activities included in the proposals have the desired effects? These questions deserve close examination.

**Surveying judicial intervention**

To answer the two questions, I turned to data on judges' intervention in pretrial case processing. These data are drawn from two separate surveys, one of judges and one of lawyers. 4

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4. Proposals to modify the judge's role in the judicial process also suggest an entirely different aspect of the judge's part in court reform. Court reform may be accomplished by significantly altering the judge's job (i.e., his or her "role" in the court process). As documented in Ryan et al.'s recent survey of American trial judges, the duties performed by judges involve a complex mix of adjudicative, mediation, administration, and general professional activities (e.g., reading journals and court decisions, attending professional conferences, public speaking, etc.); see Ryan, Ashman, Sales, and Shane-DuBow, American Trial Judges: Their Work Styles and Performance (New York: Free Press, 1980). Reforming the role of the judge would mean a substantial change in the mix of the day-to-day activities of judges, and possibly introducing new, specific duties not previously included within the judge's responsibilities.

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7. See Ryan, Ashman, Sales, and Shane-DuBow, supra n. 4 at 180.

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Importantly, both surveys were conducted in the same five federal judicial districts: Eastern Wisconsin, Eastern Pennsylvania, Central California, South Carolina, and New Mexico. And both asked the same general questions of the lawyers and judges. The survey of lawyers was part of the Civil Litigation Research Project (CLRP), a joint venture of the University of Wisconsin Disputes Processing Research Program and the University of Southern California Program of Disputes Processing Research, and asked the lawyers about their experiences in a sample of specific cases selected from the dockets of two or three courts in each district. The judges survey, commissioned by the Council on the Role of Courts (CORC), and conducted by Yankelovich, Skelly and White dealt more broadly with the judges’ perceptions of current problems and issues in civil justice.

Both the lawyers and judges were surveyed on how frequently they had encountered or performed, respectively, 10 specific activities that have been suggested as things judges could do to promote settlement:

- Setting and holding to a firm trial date early in the litigation (obviously this can also simply speed a case to trial);
- Refusing to grant postponements or recesses—once the day of the trial has been reached—to discuss settlement, unless the case takes an unexpected turn;
- Assessing the costs of empaneling a jury against parties or counsel who unreasonably delay settlement until the day of trial;
- Initiating settlement discussion once the parties have had an opportunity to evaluate the case;
- Discussing previously tried cases during settlement discussions as a device to put the current case in a better perspective;
- Undertaking an insurance-like analysis of liability and damages during the settlement discussions;
- Suggesting a fair settlement figure during

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9. One limitation of these data regarding judicial activity on settlement is that the relevant questions were asked only when a specific judge had been assigned to the case; typically this happens only in a court with an individual calendar system. Ryan et al. report that judges in master calendar systems express a willingness to aggressively intervene in the settlement process more often than judges in individual calendar systems (20 per cent compared to 9 per cent) supra n. 7, at 182.

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Proponents of reform need to consider the broader ramifications of changes in the role of the judge.

settlement discussions:
- Including the actual parties in the settlement discussions (along with the attorneys); and
- Meeting separately with each side to explore the possibilities and terms of settlement.

In addition, the judges alone were asked about their use of four specific techniques for expediting the processing of cases:
- Conducting a preliminary pretrial conference shortly after the case is filed,
- Establishing a time schedule to regulate and expedite the discovery process,
- Placing limits on the scope, duration, and extensiveness of discovery without waiting for requests for such action from the parties,
- Holding regular hearings or conferences to monitor the progress of the case.

In the CORC survey, judges were presented with the two lists of activities and asked to indicate on a 5-point scale ("never," "very seldom," "regularly," "almost always," and "always") how frequently they used each of the specific techniques. For the settlement-oriented activities, judges went through the list twice, first describing what they did in a case scheduled for a bench trial and then describing their actions for a jury trial. This distinction was made because a judge might feel that some activities would compromise his or her neutrality in bench trials. In the CLRP lawyer survey, respondents were asked about the specific actions of the judge assigned to the sampled case, indicating which, if any, of the 10 specific activities the judge had used.9
Table 1  Frequency of judicial intervention

<table>
<thead>
<tr>
<th>Site</th>
<th>Settlement</th>
<th>Case management</th>
<th>Lawyer report of settlement related action by judge</th>
</tr>
</thead>
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<tr>
<td></td>
<td>N</td>
<td>Average frequency of most frequent activity</td>
<td>Average frequency of most frequent activity</td>
</tr>
<tr>
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<td>94-95</td>
<td>4.65</td>
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<td>28</td>
<td>4.64</td>
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<td>4.65</td>
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<td>Wisconsin</td>
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<td>4.84</td>
<td>4.50</td>
</tr>
<tr>
<td>Federal</td>
<td>1</td>
<td>5.00</td>
<td>5.00</td>
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<td>State</td>
<td>15-18</td>
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<td>4.47</td>
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<td>3.84</td>
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<tr>
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<td>4.44</td>
<td>2.90</td>
</tr>
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<td>17</td>
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</tr>
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<td>4.33</td>
<td>4.33</td>
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<td>4/89</td>
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<td>df</td>
<td>1/94</td>
<td>1/92</td>
<td></td>
</tr>
</tbody>
</table>

See the text for a discussion of the construction of the scales. The "N" columns indicate the number of responses upon which the scores or percentages are based.

* These courts used a master calendar system, where we did not ask about specific judicial involvement.

From the survey responses, I constructed two sets of indicators of judicial intervention in pretrial processing. The first set included two scales intended to measure the frequency of judicial intervention. Both of these scales were computed from the judges survey. One measured the frequency of judicial intervention in settlement, and one measured the frequency of judicial efforts to manage cases on their dockets. Both scales registered simply the highest response (i.e., the response for the most frequent activity) in each of the two sets of activities. For example, if the judge reported that he or she used two of the case management techniques "regularly(3)," one of them "almost always(4)," and one "always(5)," then his or her score on "frequency of efforts" to manage cases would be (5); if the report had been two "regularly(3)," and two "almost always(4)," the score would be (4); and if all four were used "regularly(3)," the score would be (3).

The second set of indicators consisted of four scales designed to measure the intensity of judicial intervention: How hard do the judges push the lawyers before them, either toward trial or toward settlement (obviously these are not unrelated)? The intensity of intervention deserves special attention because highly intensive judicial actions would have an important impact on the court system.

One scale of intensity was computed from the lawyer survey, and consisted of the count of the number of specific activities the judge performed in the sampled case (as reported by the lawyers); this scale will be identified as the "judicial activity scale" in the discussion be-
The remaining three scales were created from the judges survey. Two scales (the "un-
weighted settlement scale" and the "case manage-
ment scale") were computed as the average
response to the appropriate subset of items; we
simply added up the responses (to the individu-
al items on the 5-point "never" to "always"
scale) and divided by the number of responses.
The last scale, the "weighted settlement scale,"
took into consideration the greater difficulty a
judge might have intervening in the settlement
process when a case was scheduled for a bench
trial; this scale was also the average response
to the settlement items, but counted the reports
of activities in bench trial cases twice as heavily as
the same activities in jury trial cases (i.e. bench
trial response values were doubled before being
summed with responses for jury trials, though
the divisor was the actual number of responses).

Frequency of intervention
How often do judges report any intervention in
civil cases? Recall that Ryan found 78.2 per cent
of sampled judges intervening in civil cases,10
but did not indicate how frequently (i.e., in
what proportion of cases). Table 1 shows the
results of the "frequency" analysis. Recall that
frequency of activity was measured on a one to
two scale with five indicating "always." As
shown by column A of Table 1, the most fre-
quently used settlement activity is used, on the
average, somewhere just short of "always." The
responses are quite uniform across the courts
and geographic areas (though New Mexico is
slightly lower than the other sites).
There is substantially more variation in the
response to the list of case management activi-
ties (see column B), and the overall average is
more than one point lower on the frequency
scale (between "regularly" and "almost al-
ways"). The variation in responses to the case
management items shows that federal judges
use the various management techniques more
frequently than do state judges. There are also
significant geographic variations, with judges
in Wisconsin reporting the most frequent
usage (the two Wisconsin means are higher
than any of the other means, though the
"mean" for Wisconsin federal judges is based
on only one respondent), and judges in New
Mexico reporting the least frequent usage
(though the single lowest mean is for Califor-
nia state judges).11

The last column of Table 1 shows the fre-
cuency of intervention as reported by lawyers
involved in specific cases. Note that we asked
only about judges assigned to the case, so we
have insufficient information for presentation
for state courts in Pennsylvania and Califor-
nia, where master calendars are used. The law-
yers' reports suggest substantially more varia-
tion in the frequency of judicial intervention,
ranging from a high of 91.5 per cent of cases in
the Federal District Court for Eastern Pennsyl-
vania to a low of 55 per cent for the Federal
District Court in New Mexico.

The discrepancy between judges' and law-
yers' reports and the differences in variations
may simply reflect timing differences and local
expectations. In one court judges may inter-
vene almost immediately, without waiting to
see if a case will settle quickly on its own. In
another court, however, the judges may hold
back to see what is going to happen. In this
latter situation, the judges' responses to ques-
tions about frequency of intervention may
refer only to cases that do not quickly settle on
their own accord.

Intensity of intervention
The frequency analysis makes it clear that,
least in the area of settlement, judges are quite
likely to intervene. However, what makes the
current proposals regarding judicial interven-
tion a potentially significant departure from
the traditional role of the judge is the intensity
Table 2  Intensity of judicial intervention

<table>
<thead>
<tr>
<th>Site</th>
<th>N</th>
<th>Unweighted settlement scale (range 0-4)</th>
<th>Weighted settlement scale (range 0-6)</th>
<th>Case management scale (range 0-4)</th>
<th>Judicial activity scale (range 0-10)</th>
</tr>
</thead>
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<tr>
<td>All sites</td>
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<td>1.92</td>
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<td>1/94</td>
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</table>

See the text for a discussion of the scales. The first three columns are computed from the judges' survey; the last is from the lawyer survey.

of the proposed intervention. Table 2 shows the results of the intensity analysis based on the four intensity measures we defined previously.

In some ways the intensity results shown in the table are consistent with those reported above regarding frequency of intervention: (1) Federal judges are more active in case management than their colleagues on the state bench; and, (2) New Mexico judges, both federal and state, are consistently lower than the judges from other states. Despite these similarities, it is the differences between Table 1 and Table 2 that are most striking, and those differences are important for the argument being developed here.

The clearest difference is the lower values of the intensity measures, as compared to the corresponding measures of frequency. While the frequency measure tended to be at the high end of their ranges, the intensity measures fall at the middle or low end. Looking behind the scale scores indicates that judges are using some low-intensity interventions frequently and seldom, if ever, using the more intensive types. This is true whether one looks at the judges' reports of their general behavior or the lawyers' reports of the judges' actions in specific cases.12

However, there are some notable inconsistencies between the rankings obtained by relying on the judges' self-reports, and by relying on the reports of lawyers who took cases into the various courts (these differences must be considered with some caution because of the small numbers of lawyer reports from courts employing a master calendar system). The most obvious inconsistency is the high average "activity"

12 In looking at the lawyers' reports, we find that in a third to a half of the cases judges did something like set a firm trial date, indicated a willingness to participate in settlement discussions, tried to initiate settlement discussions, or actually participated in such discussions. Lawyers reported the more specific, intensive activities in only one per cent to 21 per cent of the cases.

34 Judicature Volume 66, Number 1 June-July, 1982
score for federal judges in Pennsylvania (it is the highest average score) compared to their middle-range settlement scores. At the opposite extreme, the lawyers report very little intervention by Wisconsin federal judges while the one judge who responded claimed a fairly high level of intervention. Exactly what accounts for these inconsistencies is unclear (though in the Wisconsin example it may simply reflect peculiarities of the lone judge interviewed).

Despite these inconsistencies, there clearly are substantial variations in the level of intensity with which judges intervene in the nonadjudicative aspects of the dispositional process. At the same time there are some important consistencies as well. The most obvious consistency is the low ranking of New Mexico’s judges, both state and federal; clearly, there is something about the “legal or judicial culture” of New Mexico that predisposes judges against intervention. 13

In brief, the current proposals regarding judicial intervention would in fact constitute a major shift in the role of the judge. Judges do presently tend to intervene in the nonadjudicative aspects of case processing, but not in an intensive manner. The proposals for judicial intervention call for a much more aggressive stance. The implications of these proposed changes both for the judicial process as a whole and for the role of the judge in that process will be examined below.

Impact of intervention

Since current proposals regarding judicial intervention call for high intensity intervention, it is desirable to know whether the intensity of intervention makes any difference in the disposition of a case. This involves a look at the impact of the intensity of case management. The explicit goal of management is to speed the movement of cases through the system. Presumably, courts that are more intense overall in their use of case management techniques would move cases through the system more quickly. To test this argument I turned to the CLRP survey.

The information here on dispositional speed is based on the court records of approximately 150 cases from each of the 10 courts in the CLRP data base. 14 Because only one judge was interviewed in the Wisconsin and New Mexico federal courts, those courts were omitted from the analysis. Also, the Pennsylvania state court was omitted because the court was frequently not notified when a settlement was reached, and thus data on pace of settlement there were extremely unreliable.

To test the hypothesis that speed of disposition is related to intensity of case management, we computed a rank order correlation (Kendall’s tau) between the ranks for speed and the ranks for intensity of case management for the remaining eight courts. The resulting correlation was .14, which is not significantly different from zero. Thus we have no evidence to indicate that overall intense case management speeds cases through the system. 15

The goal of settlement, as opposed to management, activities is to move cases through the system by encouraging the parties to reach a settlement without having to wait for a trial. The impact of judicial settlement intervention shows through two indicators—first, the lawyers’ perception of the impact of things done by the judge.

A perceived impact score was created by categorizing lawyers into those who felt judges had had an impact on the case (scored as 1) and those who felt the judge had not had an impact (scored as 0). 16 This perceived impact score was then correlated with the judge activity scale

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14. Actual data were collected from 12 courts; for purposes of this analysis, two outlying courts in Pennsylvania and Wisconsin were combined with Philadelphia and Milwaukee; note that judges from these outlying courts were included in the CORC survey.

15. These results are consistent with the findings of the Federal Judicial Center’s District Court Study. That study found that the case management techniques which had important impacts were the more automatic procedures (e.g., mailing notices) that could be handled by support staffs. See Flanders, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 20-37, 42-43. (Washington: Federal Judicial Center, 1977). Nevertheless, our conclusion must remain very tentative because of the small number of “observations” and because of the potential for error in a crude analysis of this type, where we have not sought to introduce potentially relevant controls for other factors (e.g., “local legal culture,” see Church, supra n. 13, at 55).

16. Lawyers interviewed in the CLRP survey who reported that a specific judge was assigned to the case were asked the following question: “Did anything the judge do regarding settlement discussions have an effect on how the case was finally resolved?” Responses to this question were coded in simple “yes” and “no” terms.
and with the use of each of the specific activities. These correlations are shown in Table 3. They leave little doubt regarding the lawyers’ perception of the impact of judicial intervention in the settlement process. The correlation between perceived impact of the judge and intensity of judicial intervention is .56. This figure is not only statistically significant, but given the crudity of the measurement used here, it is also substantively quite important.  

There is a second item that further supports the argument that judicial encouragement of settlement works. In our court-records data set, we recorded mode of termination. While the court record usually did not directly indicate whether or not the case had been settled, it seems reasonable to assume that a termination by dismissal usually indicates that a settlement has been reached. Thus we can use per cent dismissal as an indicator of settlement rate. As with the case management scale, we ranked our indicator of impact (dismissal rate) and our measure of judicial intervention (the unweighted settlement scale) and then computed a rank order correlation between the two rankings. The resulting correlation, .36 (Kendall’s tau), is consistent with our findings based on lawyers’ reports. However, the correlation is too weak to permit us to draw a conclusion that the activity level of the judge affects the settlement rate.  

This examination leads only to a very tentative conclusion: the evidence does not contradict the view that judges can affect the pretrial processing of civil cases by intensively intervening in the management of the case and in the settlement process. Our evidence suggests that the greater the intensity of the intervention, the greater the likelihood of that intervention having an impact. This finding reinforces the importance of turning to the broader implications of a major change in the role of the judge.

### Table 3  Case level impact of settlement activities

<table>
<thead>
<tr>
<th>Judge activity level</th>
<th>.56</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge:</td>
<td></td>
</tr>
<tr>
<td>Participated in settlement discussions</td>
<td>.52</td>
</tr>
<tr>
<td>Expressed a willingness to</td>
<td></td>
</tr>
<tr>
<td>participate in settlement discussions</td>
<td>.51</td>
</tr>
<tr>
<td>Suggested a settlement figure</td>
<td>.50</td>
</tr>
<tr>
<td>Tried to initiate settlement discussions</td>
<td>.43</td>
</tr>
<tr>
<td>Tried to carry out an insurance-type analysis</td>
<td>.38</td>
</tr>
<tr>
<td>Discussed previously tried cases</td>
<td>.38</td>
</tr>
<tr>
<td>Requested that the clients be present</td>
<td></td>
</tr>
<tr>
<td>during the discussions</td>
<td>.26</td>
</tr>
<tr>
<td>Met separately with the two sides</td>
<td>.25</td>
</tr>
<tr>
<td>Threatened to hold the parties</td>
<td></td>
</tr>
<tr>
<td>responsible for costs</td>
<td>.07</td>
</tr>
<tr>
<td>Set a firm trial date early in litigation</td>
<td>-.01</td>
</tr>
</tbody>
</table>

N=423. For this size sample, a correlation of approximately .05 is statistically significant at the .05 level.

Note: Since some of the correlations with individual activities (e.g., participation in settlement discussion, .52) are almost as high as the correlation with the overall scale (.56), it is less clear whether it is the intensity of intervention or the mere fact of intervention that makes the difference. To clarify this, we correlated the “impact” question with a dichotomized version of the judge activity scale (no activity, versus any activity). This correlation was .38, which is significantly lower than the correlation with the original scale. A test for the difference between two correlations from the same sample yielded a total of 5.29; see Blalock, Social Statistics 425 (New York: McGraw-Hill, 1979).

We also computed a correlation between the impact question and the judge activity scale, omitting those cases where no judicial activity was reported; this correlation was still substantial (.46). (Because this correlation is based upon a subset of the sample used for the other tests, there is no easy test for comparing this correlation to the one for the entire sample.) It is worth noting that one activity that is widely touted as having an important effect on settlement (setting a firm trial date) has no apparent relationship with the lawyers’ perception of the judges’ impact on settlement.

### Considering major changes

At one level, to seriously consider the major changes being discussed, reformers need to consider the implications of such a change for the selection and training of judicial personnel. Judges are, by tradition, fiercely protective of their independence. Efforts to impose significant changes in the way judges carry out their day-to-day routines have often been met by substantial resistance. At the same time, the

17. Measurement error tends to make the relationship weaker than it really is. Thus, the actual relationship between intervention and perceived impact is most probably stronger than the .56 correlation suggests.

18. In other aspects of our analysis we sought to determine how often dismissals represented abandonment or some other non-settlement termination. We were able to find little evidence to support an argument that dismissals represented something other than settlement.

19. But see Flanders, supra n. 15, at 37.

20. See, for example, Sheskin and Grau, "Judicial Response to Administrative Reform," a paper presented at the 1980 annual meeting of the Southern Political Science Association, Atlanta, Georgia.
differences our analysis turned up between state and federal judges suggest that the socializa-
tion efforts for new federal judges carried out through the Federal Judicial Center (where the
importance of and techniques for intervention in settlement are discussed by experienced
judges) can have an important impact on the willingness of judges to actually engage in the
kinds of activities being considered. Nonetheless, in systems of judicial selection where per-
sonal qualifications are seriously considered, it may be worthwhile to take into account a can-
didate’s predilection for settlement and case management activities.

On another level there is the question of whether courts that strive not to adjudicate are
really courts? Obviously courts are complex political institutions that have long (if not always)
combined adjudicative and nonadjudicative modes of dispute resolution. Nonetheless, courts are normally defined in terms of their adjudicative function, such as the resolu-
tion of “disputes” or conflicts by the application of preexisting norms by an impartial third
party.

The various forms of newly advocated intervention depart significantly from this defini-
tion. To the extent that the legitimacy of adjudica-
tion by courts flows from the definition of adjudication, a departure may have serious con-
sequences for the public image of the courts. A recent analysis of the use of the courts
concluded with the suggestion that courts are in fact distinct among American political
institutions. To the extent that this distinctiveness is functional for the courts, anything
that takes away from the distinctiveness (such as more non-adjudicative judicial interven-
tion) might have long-run negative conse-
quences for the courts. On the other hand, if one believes that courts are simply another polit-
ical institution, then a shift to more interven-
tion may be a major step along the path of
doing away with the myth of distinctiveness.

Is change necessary?
What is probably the most interesting and
important question has been left to last: are the
types of changes being proposed really neces-
sary? The ostensible root of most of these
Proposals is the long court delays resulting
from a large backlog of cases, particularly large
numbers of complex cases requiring a lot of
time and attention from judges. But is this
image of the courts’ “problems” accurate? Are
we in fact designing a program of reform that
is unnecessary? We have no definitive answer
for this question, but we do have a growing
body of evidence that suggests consistent over-

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Constructive criticism should draw a distinction between the "mass production" case and the "difficult" or "extended impact" case. There are a few cases of such magnitude that they consume a lot of court resources, and capture the public's attention. However, these cases constitute a small fraction of the cases in the federal courts and an even smaller fraction of cases in the state courts.

Data collected through the CLRP interviews with lawyers indicate that the median case in the federal courts involves a median stake of $15,000, and a lawyer's fee of $2,000; in the state courts, the median stakes were $4,500 and the median lawyer's fee $780. This is hardly consistent with the image of a herd of elephants trampling down the courthouse door (though the number of mice might be creating management problems). If the bulk of litigation is really "small time," the major changes suggested by advocates of judicial intervention are probably unnecessary. The kinds of "lower level" management devices described by Flanders may be adequate for dealing with the problems that judicial intervention is intended to solve.

Furthermore, given that the proposed changes in the judge's role aim to increase the proportion of cases disposed of through settlement, and/or to speed up the settlement process, there are other techniques that might suffice without significantly altering the role of the judge. For example, one could manipulate the economic incentives of litigation to encourage the settlement of cases. One way of doing this would be to adopt a procedure similar to the "Filed Offer" system proposed by the ABA Action Commission to Reduce Court Costs and Delay. This process resembles the English procedure of "paying into court," but incorporates additional features as well. The essential economic incentives incorporated into this system involve "taxing" the defendant's costs and attorney's fees to the plaintiff if the plaintiff fails to win a set proportion of the defendant's filed offer; if the plaintiff wins substantially more than the defendant's filed offer, then the defendant would be taxed the plaintiff's costs and attorney's fees.

In fact, some elements of this system already exist in the Federal Rules of Civil Procedure (e.g., Rule 68 and Rule 54), though traditionally recovery has involved only "costs" (e.g., court fees, service fees, court reporter fees, witness fees, etc.) and has excluded attorneys' fees (see Delta Air Lines, Inc. v. August).

I am not trying to argue here that a rule reform would be better than role reform. Rather, I mean to suggest that we need a much better picture of the scope of the supposed "problem" before rushing headlong into changes that will substantially alter the nature of our court system or the role that actors play within that system. Do the "typical" cases in the courts "need" a high level of judicial intervention? What are the effects of the current economic incentive structure? Does filing a court case today bear any relationship to a perceived need for adjudication or is it simply a part of a ritualized form of negotiation that has evolved? We need answers to questions like these before initiating actual changes in our courts.

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25. Flanders, supra n. 15, at 18-43.
26. This argument is not meant to imply that small cases are necessarily uncomplicated; see Vingresso and Hennessey, Small Claims, Complex Disputes: A Review of the Small Claims Literature, 9 L. & Soc'y Rev. 219 (1975).
29. One institutional question that current proposals have not addressed is the "taxing" process. Who would police the claims for costs and fees? Would this be the judge's responsibility or would we establish a position comparable to the English "taxing master"?
30. In an early discussion with a lawyer specializing in personal injury cases, we were told that he always files a lawsuit because the insurance companies do not take him seriously until a suit is filed. Other discussions suggest that such practices are common.