REVIEW OF COURT RULES PERTAINING TO ALASKA STATE COURT SYSTEM AND RECOMMENDATIONS FOR RULES AND TRIAL DELAY

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Washington, D.C.

A Program of the
Office of Regional Operations
(Adjudication Division)
Law Enforcement Assistance Administration
U.S. Department of Justice

T/A Assignment #202

REVIEW OF COURT RULES PERTAINING TO ALASKA STATE COURT SYSTEM AND RECOMMENDATIONS FOR REDUCING TRIAL DELAY

September 1975

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LAW ENFORCEMENT ASSISTANCE ADMINISTRATION CONTRACT NUMBER: J-LEAA-013-76

TABLE OF CONTENTS

At the request of the Court Administrator for the Third Judicial District of Alaska, which includes the Anchorage courts, and the Administrative Director of the Alaska court system I undertook a study to identify critical problems facing the Superior and District Courts of Anchorage. My examination of the courts and their procedures began with the study of available statistical data on September 7th and continued from September 8th to the 19th in Anchorage. This report was prepared based on the data collected on the 20th and 21st of September.

Purpose of the Consultation

The purpose for the study was somewhat open ended. The Anchorage courts in the first half of 1975 were faced with increasing delays in the face of constant to slightly increasing case loads. The median time of a jury trial in criminal cases was 307 days which is far in excess of the Supreme Court's recorded goal of four months. Civil cases proceeded at the pace of the lawyers and reached disposition in civil damage cases at a median time of 263 days. Jury trials were subject to delays in excess of one year.

The purpose of the assistance was to identify causes and propose solutions to the case-flow problems. The assistance was thought to be particularly necessary to meet the System's cooperation with the Attorney General who has barred plea bargaining by the state prosecutors.

Method of the Consultation

The available statistical data was studied. The First Annual Report of the Alaska Court System was available and most thorough. It contained detailed data on the work loads of the Superior and District Courts including data from previous years.

All of the principal actors in the system were interviewed individually and in groups. The interviews were open-ended. An agenda was necessary only

to make sure that the participant covered similar data. An attempt was made initially to avoid questions which asked for solutions. As the consultation progressed, solutions garnered from the participants were fed back. My own emerging solutions were suggested in the final days.

From the beginning it was clear that some of the participants questioned the validity of the available data. I undertook to test the data and to collect data not otherwise available by conducting samples of information in individual files.

The following samples were taken:

1. Information regarding delay, types of cases, disposition rates and trial rates from a sample of 200 closed felony cases.

2. Information regarding the court time of Superior and District Court judges based on recording logs of individual judges -- 500 civil cases and 200 criminal cases.

3. An event frequency sample with judge time per event to establish a rough weighted case load for District Court.

Additional matters were sampled with help from Court and District Attorney staff. As the information tended to support, with only small differences, the available data of the courts, I did not pursue all efforts to a final conclusion.

The findings and recommendations which follow are based upon the investigations and study I made in Alaska coupled with a substantial experience from other courts systems. I started with the assumption that Alaska was different and that I must find the differences to be constructive. The differences are, however, not substantial. The Anchorage courts work on their cases with the same dispatch as most of the other courts I have studied.

There is, I believe, substantial agreement that a clearly defined solution is needed. Within the limits of time I have been specific about what needs to be done. A Task Group as recommended below must work out the details which specify the day to day operations of the program.

Generalities about Caseflow Management true in all courts:

1. Most cases are concluded without trial. (85% - 95% of all cases commenced are concluded without trial.)

2. Cases which conclude without a trial are concluded more often than not on the eve of the trial.

3. Efforts to conclude cases short of trial have usually consumed more time than the early conclusion warrants.

4. Lawyers on both sides of a law suit will take advantage of procedural technicalities to gain advantage for their clients.

5. Lawyers will accomodate each other out of comity where, other things being equal, they should not.

Many efforts have been made to bring about efficient court processes by forcing lawyers to settle or otherwise dispose of their cases at an early date. Some of these efforts have been successful, but high volume Courts cusch as we are concerned with here have brought about early settlements only at great cost in time and effort - usually more effort than has been saved by the resulting predictable trial calendars.

In very complex cases involving very long trials (more than 5 Court days) the predicability of the calendar is probably worth special efforts toward early disposition. The problem is sorting out the potentially long from the routine. Hopefully these cases can be identified in the processes which are proposed.

The assumption that lawyers will intentionally use delay to further the perceived interests of their clients is borne out by substantial experience. No known efforts can adequately distinguish between the genuine use of technical proceedings for a substantial purpose from the feigned.

The bases for the generalities stated above appear to be in full operation in Anchorage.

Findings:

1. The processes involved in getting both civil and criminal cases to a trial in Anchorage are so poorly connected as to be birtually uncontrolled.

a. A motion made can stop the process for 60 days with little effort on the part of the moving party.

b. There are multiple methods for getting continuances of a matter set for a specific time.

c. The chances that a matter will be heard when set is less than one in two.

d. The information necessary to control the process is not now being collected.

e. The Law Clerks act as an additional step in the process rather than as aids to the process.

f. Some lawyers have more work than they can properly handle and maneuver the process to pick and choose among their better cases, leaving the less valuable cases to languish (and the clients to suffer).

g. There are substantial numbers of inactive cases which should be culled from the files.

2. The Courts have not had the will to correct the abuses in the process and believe they are hampered in their attempts to be efficient by Supreme Court decisions:
   a. Which require the court to grant continuances in all cases where a party will not be prejudiced by the continuance;

   b. Which require the holding of oral argument on all motions on which a party wants oral argument;

   c. Which refuse to uphold the awarding of reasonable (full) attorneys' fees when discovery has been abused;

   d. Which reverse the valid granting of motions for Summary Judgment; and

   e. Which require the decision on the preemption of a judge to be made with substantial time to consider the choice.

3. Too many matters are brought before judges which should be handled as a matter of attorney discretion.

   a. The prosecutors fail to screen the cases adequately. They appear to accomodate police officers who have made a questionable arrest.

   b. Lawyers make motions on issues which have already been decided.

   c. Motions are made to compel discovery which should have been made as a matter of course.

4. Parkinson's First law is in full operation.

   a. The lack of significant work reached for trial makes time available for the fondling of motions and other routine matters which used to fill the time.

   b. Judges extend hearings, arguments and questioning in routine matters far beyond the subject matter considered.

   c. Voir dire of juries and other procedures are extended far beyond their proper lengths.

   d. The annual filings and dispositions of the Superior Court when compared with courts of nearly identical jurisdictions in other parts of the United States, are less than one-half than in such courts.

   e. The annual filings and dispositions of the District Courts, when compared with courts of similar jurisdictions in other cities of similar size, are about one-half of such courts.

Comment: The comparisons are not easy. Workloads are never identical. In view of the fact that matrimonial actions take relatively less time than the general run civil cases, the Superior Court in Anchorage has an even lighter load than the annual figures would indicate.

Los Angeles judges, where matrimonial runs only one-third, dispose of about 800 cases per judge per year. The range for courts of general jurisdiction is from 600 to 1000 depending mostly on whether the workload includes probate, matrimonial, and juvenile cases. When it does, the 1000 figure is common.

District Court workloads are more difficult to compare. With non-parking traffic cases included, it is not uncommon to run 10,000 to 20,000 cases per judge per year.

In studying Anchorage, I asked everyone who might know to tell me why the disposition rates should be lower. The answers were not supported by my inquiry and observation. The average judicial time taken per case was not greater than in the courts with which the data was compared, (Hearing were not longer.) I concluded that the low productivity of the courts is due to their lack of organization, the excessive time they consume on non-dipositive matters, and the unproductive time spent waiting for the cases.

5. The unification of administration of the Trial Courts has been successfully achieved.

6. The District Court lacks a central control over the allocation of judicial effort.

7. The administration of the courts at all levels responds too quickly to isolated complaints leading to as hoc and sometimes contradictory management.

The foregoing findings are a summary of the facts constituting the basic discontinuities in the Anchorage Courts. They ignore many things which are working well and some things which, though ineffective, are not directly related to the purpose of this consultation.

Several of the findings may need explanation. The conclusion that the processes are poorly connected is based upon the substantial maneuvering which goes on. If the processes were adequately connected, i.e., linked together for control, the room for maneuvering would be limited. Allegations made before one of the participants in the calendar process would have to be consistent with allegations made in other parts. Reasons for delay would be recorded and a consistent policy maintained. The lack of organizational consistency is the principal problem to be dealt with in any program.

The trial courts consistently blame the Supreme Court for their inability to cope. Inadequate sanctions are thought to be the cause of the abuse of discovery. A perceived requirement that continuances be granted in the absence of prejudice to one of the parties may cover up the trial courts' desire to be "good-guys" to the attorneys before them, but the trial judges do so interpret Supreme Court opinions. Right or wrong, the buck will be passed unless the Trial Courts are consistently supported in their efforts to control the system.

The clearest phenomenon to the outside observer of the Anchorage Courts is the full scale hearing and study of relatively minor procedural questions. Whether because too few cases reach trial in an orderly way or because motion practice has economic impetus for lawyers, the result is the expansion of tasks to fill an excessive amount of judicial time.

The consolidation of the administrative offices of the Superior and District Courts was a valuable step toward a unified process. The consolidation, however, left the District Court without judicial manpower to meet the needs of a high volume Court. Judges need to have their assignments shifted on a short-term basis. No mechanism exists for this kind of flexibility.

The recommendations which follow are based on these findings. If the connection is not clear, I would be pleased to expand upon their relationship.

Recommendations:

A. That the District and the Superior Courts organize their Case-Flow operations with a carefully monitored centrally controlled calendar.

   1. A calendar control judge for each court should be selected by the Presiding Judge. He should be the only person authorized to grant continuances of hearing dates. He should informed of any emergency absences of Judges and should be involved in the decision to permit any other absences.

   2. Information as provided in recommendation D, supra, should be collected and reported to the Presiding Judge and Court Administrator on a weekly basis. Inquiry should be made by the Presiding Judge of any matters which appeared to be too long under submission.

B. That the calendar should be managed by exception with trial dates ficed at the time of filing.

   1. The cases will be divided into four categories as they are filed: civil, criminal, domestic, probate and children.

   2. On the date a civil or criminal action is filed the trial date should be established by assuming that four judges will be engaged in trial each day of 48 weeks of the year and that ten percent of the cases will be tried within average trial time of two days.

3. Discovery will be completed sixty days after answer is filed, but in no event less than sixty days before the initial trial date.

4. Extension of the time to complete discovery will be granted on motions where good cause is shown but such extension will not alter the date fixed for trial.

5. Continuance of the trial date shall be granted only for good cause shown and should always be to a fixed date.

6. Default divorces where there are no children involved should be announced for a time, and, if no one appears in opposition at that time, the decree should be announced without more.

Comment: No purpose is served by having the judge read through the papers and ask questions of the petitioner. The paperwork should be carefully reviewed by a competent clerk who should advise the judge that the papers are in order. If the paperwork is not in order, the clerk should get it corrected before the date set for the appearance.

7. Attorneys who appear to ask for excessive numbers of continuances or who otherwise tend to delay the proceedings should be the subject of special attention.

Comment: The information to be provided under the recommendation D.11 of the report will provide the courts with information about repetitive lawyer behavior. Problem attorneys can be dealt with specially without taking up the time of all of the bar. At the first identification of a problem attorney, the presiding judge should call the attorney in and inquire as to his difficulty in meeting the court's schedule. A report of the inquiry should be made in writing to the Chief Justice. If the attorney persists in taking too many cases, or in other practices which consistently tend to delay the proceedings, the matter should be referred for normal disciplinary procedures.

8. Good cause can be shown for a continuance only be providing the court with sufficient information to evaluate the efforts of the attorney in getting the case ready and the efforts necessary to be ready on a new date.

Comment: The absence of a necessary witness should be evaluated. The time they left the jurisdiction, their whereabouts, and the time of their return should be made a matter of the record. Incomplete technical investigations

should be explained with a statement as to the efforts that will be necessary to complete such investigations. Where a case is on an expeditor's list, the expeditor should be authorized to follow up on the whereabouts of the witnesses, etc. Until the system is better disciplined than at present, the judge in charge of continuances should be quite skeptical and should cause an independent investigation to be made of some excuses. A highly effective practice is to require the attorney's client to sign the motion for continuance.

C. Motion practice should be reorganized to permit and provide for speedy decisions.

1. Rule 77 should be amended to provide for oral argument only when the Judge determines it to be necessary.

2. All motions should be decided within seven days of the day submitted unless circumstances explained to the Presiding Judge in writing justify a longer delay.

3. Motions should usually be decided within a twenty-four hour period after the oral argument.

4. Motions should not be submitted to a Law Clerk for review and memoranda unless they have been determined by the judge to represent a unique question for research.

5. Motions which must be heard should be scheduled before judges otherwise in trial at 9:00 a.m. and 4:00 p.m. The telephone should be used to minimize 4:00 p.m. conflicts. Where a trial ends at 3:00 p.m., the lawyers may be able to get in quickly. Where the trial runs to 4:30 or 5:00, they may be able to stay in their offices until later. The motions, even if late, should be heard on the day scheduled or submitted on briefs.

Comment: It is important that the court meet all expectations that a hearing will occur within very narrow tolerances. When the lawyer suspects that his matter might not be reached, he will not prepare, and therefore will need more time to prepare if his suspicion is not borne out. The result is a series of maneuvers to avoid the scheduled hearing.

The challenge of a particular judge should not be an excuse for delay. A backup judge should be available in any circumstance where a challenge might defeat a scheduled hearing. It is better to have a judge not fully scheduled in hearings than to have an attorney lose confidence that the hearing will be held.

D. That the processes should be monitored by gathering and reporting each week the following:

1. Number of motions under submission by judge and time since motion was made.

2. Motions decided during the week by judge and time since motion was made.

3. Number of motions where oral argument was required and length of hearings.

4. Number of continuances granted from all dates fixed for hearing.

5. Ratio of continuances granted in trials to trials scheduled and hearings to hearings scheduled.

6. Age of cases disposed by trial.

7. Age of cases disposed other than by trial.

8. Length of trials which last more than one-half day.

9. Number of trials which last more than one-half day.

10. The trial/disposition ratio by category of cases - civil, criminal, domestic, probate, children.

11. Reasons for continuances in the following categories:

    a. Court not available.
    b. Defense lawyer not available.
    c. Plaintifss/Prosecutor not available.
    d. Defense witness not available.
    e. Plaintiffs/Prosecutor witness not available.
    f. Expert witness not available.
    g. Defense lawyer not prepared.
    h. Plaintiffs/Prosecutor lawyer not prepared.
    i. Other.

E. That a category of cases for special handling should be created consisting of the following:

1. Civil cases needing crisis handling (more than one year from filing).

2. Criminal cases needing expeditious handling (more than four months from filing or arrest).

F. Cases in need of expeditious handling should be assigned to expeditors in the Calendar office with no more than one hundred cases to each expeditor.

1. The expeditor would collect information as to the names of all witnesses, attorneys, and special problems in the cases.

2. The expeditor would have authority to contact witnesses as to their availability and to fix a day certain for trial.

G. The Judges should establish their vacation times - and any other absences from the court - six months in advance of their departure (subject only to emergencies).

1. Vacation schedules should be subject to the prior approval of the Presiding Judge.

2. Absences from the court should be subject to the prior approval of the Presiding Judge who shall consult with the Calendar Judge in approving absences.

3. The Chief Justice should consult with the Presiding Judge before assigning any Anchorage Judge to other duty.

H. A Task Force Representative of the participants in the Court should be appointed by the Chief Justice after consulting with the Presiding Judge in Anchorage. The Task Force should be asked to report within 30 days on the following:

1. A time from within which to adopt a program based upon the foregoing recommendations.

2. A device through which the lawyers can be quickly advised of what will be expected of them.

3. An agreement as to the use of information gathered for the monitoring of the process.

4. A method of notices which will minimize the time consumed in preliminary matters.

5. Develop a court order governing the relation of the expeditors to the lawyers providing for the information which must be provided to the attorneys by the expeditors.

6. Develop a policy with regard to overburdened attorneys and case load restrictions which might be imposed if conflicting engagements of these attorneys delay the courts.

I. When the Task Force has reported Judge Sulmonetti of Portland, Oregon should be asked to help it resolve any perceived problems.

J. If the number of problem cases is not reduced below ten percent of the pending caseload within one year, the courts should shift to individual assignments with the monthly box score of filings and dispositions available for publication.

Comment: The operation of an effective master calendar is dependent upon the cooperation of all of the judges of the bench. If the cooperation is not forthcoming, the only solution is to single out the judges who are not carrying their load. The slow but competent judge just has to work longer. It is so with all other parts of human endeavor. The Judiciary should be no exception. The slow and inadequate judge should seek other pursuits. The courts are not run for the judges.

The program proposed is based on the assumption that the Court must take early control of each case and maintain constant control. At the same time, the Courts must recognize that their time is no more important to the system than that of the judges. The system proposed allows for flexible accomodation of the lawyers on a showing of necessity. The processes, however, are to be managed by exception, not by routine direction. Cases which meet a tight schedule will not be subject to other controls.

Necessity for a continuance includes a conflict in the schedule of an attorney. It may even include an occasional vacation or fishing expedition. The important fact will be the general cooperation and availability of the attorney, not the occasional insubstantial excuse for absence.

An attorney who has too many cases or one who consistenly procrastinates cannot be accomodated. It hurts too many other people. Being a nice guy results in more injury to ones compatriots than being strict.

The basic strategies for avoiding the bad continuance is to keep them short and keep track of the reasons. When a case proceeds too long, the Court takes full charge. The assumption is that the attorney can no longer be accomodated for anything but a matter which results in injury to his client.

The system must be monitored. The decision made to be strict will not be self-executing. The monitoring information will make it possible to follow the exceptional judge, the exceptional lawyer and the exceptional cases without waiting a month to find out why they are exceptions.

By bringing in Judge Sulmonetti, you can give credence to the proposition that the program will work. In Portland they are reaching jury trials regularly within the proposed limits.

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