New Civil Discovery Rules Seminar and Webinar

August 26, 2019
Hall of Justice, Lansing, Michigan

Working Smarter Not Harder: How Excellent Judges Manage Cases through Communication and Coordination with Parties and Lawyers

Mr. Daniel D. Quick, JD, Dickinson Wright, PLLC
WORKING SMARTER NOT HARDER
Mr. Daniel D. Quick, JD, Dickinson Wright, PLLC

HOW EXCELLENT JUDGES MANAGE CASES THROUGH COMMUNICATION AND COORDINATION WITH PARTIES AND LAWYERS

OR: HOW A LAWYER CAN COMMIT CAREER SUICIDE IN 25 MINUTES
“DISCOVERY IS THE PROBLEM”

“Americans deserve a civil legal process that can fairly and promptly resolve disputes for everyone—rich or poor, individuals or businesses, in matters large or small. Yet our civil justice system often fails to meet this standard. Runaway costs, delays, and complexity are undermining public confidence in our system and denying people the justice they seek.”

-- Conference of Chief Justices, 2016 Report

STATE BAR OF MICHIGAN 21ST CENTURY PRACTICE TASK FORCE

THE PROBLEM

inefficient and overly complex legal processes

The legal profession has been reticent to modify litigation processes, court rules, and business practices in ways that may deliver more efficient and inexpensive solutions to legal problems. The organized bar and regulators have not taken up the challenge of creating, evaluating, testing, or implementing significant changes that utilize existing business process tools and technologies to create a more efficacious system.
THE TRADITIONAL LAMENT:

“The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory cannot know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester’s claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define ‘abusive’ discovery except in theory, because in practice we lack essential information.” Easterbrook, Discovery as Abuse, 69 B.U.L.Rev. 635, 638–639 (1989) (footnote omitted).


VARYING ATTITUDES TOWARD DISCOVERY –

We know it is “not the [c]ourt’s role to micromanage all discovery,” Henderson v. Peterson, 2010 U.S. Dist. LEXIS 70366 (N.D. Cal. 2010); that “the [c]ourt certainly does not enjoy being cast in the role of babysitter at the slightest discovery problem” and should not be “needlessly entangled in time-consuming discovery skirmishes,” Cleveland Indians Baseball Co. v. United States, 1998 U.S. Dist. LEXIS 1459 (N.D. Ohio 1998); and that “the court has neither the obligation nor the inclination to act as a referee in every spat that may arise between the parties during discovery,” LoVora v. Toys “R” Us-Delaware, Inc., 2008 U.S. Dist. LEXIS 121312 (E.D. Wis. 2008).
VARYING ATTITUDES TOWARD DISCOVERY –

Some courts apparently operate under the philosophy that, “If I have to hear a discovery dispute, someone is going to have to pay.” This attitude strikes the court as being a tad shy of judicious. Good, reasonable lawyers will have legitimate discovery disputes, and the court should quickly resolve those disputes so that the litigation can progress with all due speed.


Finally, if a recurrent theme can be divined from all of the studies and the commentary to the myriad rule changes in the last thirty years, it is that the most effective way to control litigation costs is for a judge to take charge of the case from its inception and to manage it aggressively through the pretrial process by helping shape, limit, and enforce a reasonable discovery plan, resolve disputes that the parties cannot settle on their own, and keep the case on a tight schedule to ensure the most expeditious disposition of the case by motion, settlement, or trial.

Mag. Judge Paul Grimm, _The State Of Discovery Practice In Civil Cases: Must The Rules Be Changed To Reduce Costs And Burdens, Or Can Significant Improvements Be Achieved Within The Existing Rules?_, 12 Sedona Conf. J. 47, 5-6 (2011).
Discovery is an essential part of civil and probate case management. Discovery is a significant portion of litigation time and expense; therefore, management of discovery is essential if a case management system is to be effective and efficient. The court should limit the nature and scope of discovery according to the management needs of the case. Each of the following approaches is aimed at minimizing the time and expense devoted to discovery while promoting nontrial dispositions at the earliest point in the process:

- **a) Designing a discovery plan** for each case in consultation with counsel, generally as part of the case management plan under MCR 2.401(B), Early Scheduling Conference and Order.
- **b) Limiting the nature and scope of discovery by category of cases.** For example, under a DCM system complex cases have longer discovery periods, using the full range of discovery techniques, and expedited cases have shorter time periods with limits on interrogatories and depositions.
- **c) Providing informal methods for resolving discovery disputes** such as teleconferencing before the filing of a motion.
- **d) Developing a process where initial discovery** focuses on the information needed for settlement with discovery for trial provided only in cases that are not likely to be tried.
- **e) Monitoring the close of discovery.**

**NEW RULES:**

**Rule 1.105 Construction**

These rules are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties.

MCR 2.301(C): “The court may control the scope, order, and amount of discovery, consistent with these rules.”
2.401 TOOLS:

- Early scheduling conference (2.401(B)): “During the conference the court should consider any matters that will facilitate the fair and expeditious disposition of the action…”
- (f) the amount of time necessary for discovery, staging of discovery, and any modification to the extent of discovery

(C) Discovery Planning

(1) Upon court order or written request by another party, the parties must confer among themselves and prepare a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared are jointly responsible for arranging the conference and for attempting in good faith to agree on a proposed discovery plan.

(2) A proposed discovery plan must address all disclosure and discovery matters, including the matters set forth in subrule (B), and propose deadlines for completion of disclosure and discovery. The parties must show good cause to request a change in deadlines set by a scheduling order.

(3) A discovery plan noting any disagreements between the parties, may be submitted to the court as part of a stipulation or motion. The court may enter an order governing disclosure, discovery, and any other case management matter the court deems appropriate.

(4) If a party or attorney fails to participate in good faith in developing and submitting a proposed discovery plan, the court may enter an appropriate sanction, including payment of attorney fees and costs caused by the failure.
(J) ESI Conference, Plan and Order

(1) ESI Conference. Where a case is reasonably likely to include the discovery of ESI, parties may agree to an ESI Conference, or the judge may order the parties to hold an ESI Conference, or a party may file a motion requesting an ESI Conference. At the ESI Conference, the parties shall consider:

(H) Mediation of Discovery Disputes. The parties may stipulate to or the court may order the mediation of discovery disputes (unless precluded by MCR 3.216(C)(3)). The discovery mediator may by agreement of the parties be the same mediator otherwise selected under subrule (B). All other provisions of this rule shall apply to a discovery mediator except:

TAKEAWAYS:

- Assess a case and its challenges at the outset. Use active and continuing judicial involvement when warranted to keep the parties and the case on track.

- Convene an initial case management conference early in the life of the case. Discuss with the parties anticipated problems and issues, as well as deadlines for major case events.

- Reduce and streamline motions practice to the extent appropriate and possible. Rule quickly on motions.

- Create a culture of collegiality and professionalism by being explicit and up front with attorneys about the court's expectations, and then holding the participants to them.

- Explore settlement with the parties at an early stage and periodically throughout the pretrial process, where such conversations might benefit the parties and move the case toward resolution.
FOUR PARTING THOUGHTS
(borrowed from Laurence Pulgram, The Discovery Rules Have Changed But Will We?, 42 Litigation 3 (ABA, Spring 2016))

First, judges and lawyers need to raise the issue and impact of the proportionality standards explicitly—and early—in their cases. Lawyers need to prepare for the scheduling conference with the six factors in mind, to identify what discovery is really needed and what is not, and to come up with creative approaches to conduct discovery efficiently. Judges should expressly ask about proportionality. Only if the court and parties consciously focus, early and often, on the new proportionality standard will practice start to change.

Second, we need to remember that the goal of these amendments is not to hinder development of needed evidence but to prioritize and access it more efficiently. Reducing discovery costs necessarily means doing less of it and doing it smarter. To reduce the amount of discovery without reducing access to truth and justice, we must deliberately seek out, identify, and prioritize not just what we need but also what areas of discovery can be postponed or avoided.
FOUR PARTING THOUGHTS
(borrowed from Laurence Pulgram, The Discovery Rules Have Changed But Will We?, 42 Litigation 3 (ABA, Spring 2016))

Third, we must recognize that the benefits of a proportionality regime depend largely on sequencing and managing the case. Here’s why: Ask judges if they’ll rule differently on discovery motions under the new rules, and most will say no. They think they already were, before the amendments, properly considering and balancing the factors, using their common sense. Thus, one key opportunity to reduce the volume of discovery is to narrow the issues on which discovery is needed, by focusing on and resolving the key issues first. We should identify the discovery that is important to resolve the case, do only that discovery first, and defer the rest.

Which leads to the fourth idea: Our system needs judges to invest in wisely managing cases proactively from the outset. Management provides practical benefits for judges’ workloads because planning the progress of a case at the front end—what needs to be done, what not, when, and in what sequence—often means faster dispositions and fewer disputes to resolve later. As Judge Lee Rosenthal (U.S. District Judge for the Southern District of Texas) put it, “while parties may thank me for actively managing their case, it’s really a matter of my own enlightened self-interest.”

But more significantly, the rules’ promise will be realized only if judges manage with an intention and focus to reduce the parties’ costs. In the end, judges hold the ultimate authority over case management, and it is with them that the buck stops. While the initial responsibility falls on the parties and counsel to plan the progress of their case, any one lawyer can wreck everyone else’s efforts unless the judge actively officiates. A court’s direction to “work it out among yourselves and come back when your discovery is done” just won’t suffice.
1. **Redefine**

   *ˈrɛdəfɪn/ *Verb*

   To reexamine or reevaluate especially with the view to change, transform
redefining case management

Brittany K.T. Kauffman
Director, Rule One Initiative

&

Natalie Anne Knowlton
Director, Special Projects

April 2018

For reprint permission please contact IAALS.
Copyright © 2018 IAALS, the Institute for the Advancement of the American Legal System.
All rights reserved.
IAALS—Institute for the Advancement of the American Legal System

John Moye Hall, 2060 South Gaylord Way, Denver, CO 80208
Phone: 303-871-6600
http://iaals.du.edu

IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a “think tank” that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative and practical solutions to problems within the American legal system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

Rebecca Love Kourlis  Executive Director
Brittany K.T. Kauffman  Director, Rule One Initiative
Natalie Anne Knowlton  Director, Special Projects
Janet L. Drobinske  Legal Assistant, Rule One Initiative
  Honoring Families Initiative
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Updated Civil Case Management Guidelines</td>
<td>4</td>
</tr>
<tr>
<td>The Continuous Evolution of Case Management</td>
<td>5</td>
</tr>
<tr>
<td>The Origins of Modern Case Management</td>
<td>5</td>
</tr>
<tr>
<td>Current Challenges &amp; Opportunities for Courts</td>
<td>7</td>
</tr>
<tr>
<td>Recent Advancements in Case Management</td>
<td>11</td>
</tr>
<tr>
<td>A Renewed Case Management Vision for 21st Century Justice</td>
<td>13</td>
</tr>
<tr>
<td>Rethinking the Paradigm:</td>
<td>14</td>
</tr>
<tr>
<td>Court Ownership of Case Management</td>
<td>15</td>
</tr>
<tr>
<td>Managing to the Overarching Goal:</td>
<td>15</td>
</tr>
<tr>
<td>User-Centric Processes</td>
<td>15</td>
</tr>
<tr>
<td>Strategies for Anchoring a Holistic Case Management Vision</td>
<td>20</td>
</tr>
<tr>
<td>Case Management is a Team Sport</td>
<td>20</td>
</tr>
<tr>
<td>Systematization is Essential</td>
<td>23</td>
</tr>
<tr>
<td>Judges Remain Primary Drivers Through Strategic Case Management</td>
<td>25</td>
</tr>
<tr>
<td>Data is Essential to Effective Case Management</td>
<td>29</td>
</tr>
<tr>
<td>Conclusion</td>
<td>32</td>
</tr>
</tbody>
</table>
ACKNOWLEDGEMENTS

We would like to express our gratitude to the following individuals, who served as an ad-hoc focus group for this project.

Hon. Jerome B. Abrams, First Judicial District, Minnesota
Alexander Aikman, then Independent Management Consultant
Hon. Jennifer Bailey, Eleventh Judicial Circuit, Florida
Dan Becker, former State Court Administrator, Utah
Hon. Kevin Burke, Fourth Judicial District, Minnesota
Alan Carlson, former Court Executive Officer of the Superior Court of Orange County, California
Sherri R. Carter, Executive Officer of the Los Angeles Superior Court, California
Tom Clarke, National Center for State Courts Vice President of Research & Technology
Hon. Jeremy Fogel, Director of the Federal Judicial Center
Hon. Richard A. Frye, Franklin County Court of Common Pleas, Ohio
Richard Gabriel, President of Decision Analysis Trial Consultants
Steven Gensler, D. and W. DeVier Pierson Professor of Law, University of Oklahoma College of Law
John Greacen, Principal of Greacen Associates, LLC
Paula Hannaford-Agor, National Center for State Courts Director, Center for Jury Studies
Hon. Michael Mattice, Superior Court of Solano County, California
Hon. David Prince, Fourth Judicial District, Colorado
Hon. Lee Rosenthal, Chief Judge of the U.S. District Court for the Southern District of Texas, Houston Division
Hon. Craig Shaffer, U.S. District Court for the District of Colorado
Hon. Jack Zouhary, U.S. District Court for the Northern District of Ohio

These are the people who are redefining case management on the ground to advance our system and better serve system users. We greatly appreciate their time, thoughts, and expertise.
Case management is part of every civil justice reform proposal afoot in the nation. It is mentioned at every conference and in every set of recommendations. Attorneys want a judge in charge of their case, from beginning to end: a judge who is knowledgeable, accessible, and engaged.

But, here is the rub. The literature and experience on the ground all pointed to the importance of case management decades ago, yet it is still not the norm. One of the reasons for this may be resistance on the part of some judges or courts to managing cases. This, however, is becoming more the exception than the rule. In reality, there are many other reasons that these best practices have not taken hold. For example, many judges around the country are faced with docket pressures that often make this demand for early, active judicial management in every case challenging, particularly at the state level. Further, in rapidly growing numbers, litigants in our system are navigating the process without attorneys, leading to new demands on the system—from the judges and the courts—in terms of case management.

How can we change the culture, pierce through the resistance, and put case management into practice everywhere? We at IAALS thought about trying to change the words used: is it just a problem of converting Brad’s Drink into Pepsi-Cola or Tokyo Telecommunications Engineering Corporation into Sony? Or is it an operational problem? Do we need to invent a different pour spout like Heinz did with ketchup? Or put wheels on suitcases?

In the end, we came back to a simple reality. Case management works—both in name and in practice. It works for judges and the court, because time invested on the front end of a case actually saves time throughout the case. It works for the litigants, because someone is actually in charge of driving the case to resolution—someone impartial and trustworthy. In fact, it is a key component in procedural fairness. And it works for the lawyers, because it keeps noncompliant lawyers on track and it forces even the best-intentioned lawyers to keep to a firm schedule and to minimize inefficiencies.

But we also came to the conclusion that case management needs to be broadened, re-envisioned, and ultimately redefined for our rapidly evolving legal system. It needs to be refocused on the end user of our system.

Accordingly, we offer this report as our vision for how to redefine case management.
INTRODUCTION

IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, began working with the American College of Trial Lawyers (“ACTL”) Task Force on Discovery and Civil Justice in 2007. Two years later, the partnership released a set of Proposed Principles that recommended solutions to some of the serious problems in our civil justice system.1 Intent on ensuring that these recommendations facilitated positive system reform, IAALS and the ACTL Task Force published a set of Pilot Project Rules so that jurisdictions around the country could work from some proposals to implement the Principles and measure their impact.2

Recognizing that rules changes are just one aspect of reform, IAALS also published the standalone Caseflow Management Guidelines, “designed to assist judges in effectively managing the flow of civil cases to ensure that all events in the life of a case are timely and meaningful.”3 The Guidelines were drawn from a number of sources, including emerging research on the civil justice system and viable solutions to curtailing excessive litigation costs and delay. Finally, in collaboration with the National Center for State Courts (“NCSC”), IAALS published a third report in the Roadmap series, highlighting the importance of evaluating civil justice reform efforts and suggesting ways to build in evaluation components to any civil justice reform project.4

Numerous reform efforts followed the initial work of the IAALS/ACTL Task Force: pilot projects directly implementing the Principles (New Hampshire); statewide rule changes focused on discovery reform (Utah); procedures designed to streamline the process for more simple cases (Texas); and reforms dealing with the more complex cases (Colorado and Massachusetts). The NCSC and IAALS, along with others, evaluated many of these projects, and the results yielded important lessons about successes and opportunities for improvement.5 While these efforts had objectives beyond case management, one of the themes that emerged from the evaluations and other national reform efforts was the importance of early, active case management as an essential piece of the puzzle in addressing cost and delay.

---

Civil rules reform and case management practices have come a long way since 2009 when IAALS and the ACTL Task Force first released the *Pilot Project Rules* and the IAALS *Civil Caseflow Management Guidelines*. Recognizing this and drawing on lessons learned since the partnership commenced work in 2007, IAALS and the ACTL Task Force issued an updated joint report in 2015, *Reforming Our Civil Justice System: A Report on Progress and Promise*, with a new set of proposed Principles to guide future innovation. To complement this piece and in recognition of the central role case management has come to play in civil justice reform, IAALS is now issuing an update to our *Civil Caseflow Management Guidelines*. Given the unique challenges across our state and federal systems, we recognize that the prior set of nine case management guidelines—focused largely on judicial case management—need updating in response to our complex and evolving legal system.

Here, we take the original nine guidelines that we first published in 2009 and build on and broaden them. We recognize their continued importance, but also recognize that we need to redefine how we think about case management. Whose responsibility is case management? How is it accomplished? And just as importantly, how do we get the buy-in we need from everyone in the system to take case management from a concept heralded by a few judges and court administrators to a concept implemented across our legal system.

Case management is and has for decades been recognized as an essential court function. But, it was practiced by some judges and not by others; and opposed by some attorneys, while others invited it. More recently, the concept has evolved and has achieved the prominent role it deserves in civil justice reform efforts. There has been a recognition that yesterday’s management practices and principles need to evolve in order to meet the needs of tomorrow’s courts and court users. These renewed conversations highlight the degree to which there is considerable room for improvement, in terms of more broadly anchoring case management practices and perspectives in our courts and the practices of judges, court administrators and staff, and lawyers around the country. It is clearly not enough to talk about case management. Everyone in the system has to be committed to doing it.

In creating this update, we thought long and hard about a new term for case management that would encompass this broad vision for our system—something that could reinvigorate the concept and its promise. We could not find one; case management sticks. Thus, in this publication, we retain the term case management but with the recognition that we are thinking broadly about the term and its redefined role and vision.

With this report and the following expanded set of ten guidelines, we encourage civil justice system stakeholders to rethink, if not rename, case management. In this effort to breathe new life into the concepts and practices supporting case management, we partnered with experts in court and case management who shared their first-hand experience and perspectives with us. We also examined client and customer management strategies from industries outside of the legal system, where common challenges and opportunities provide invaluable insight into how justice system stakeholders might rethink case, court, and judicial management. These expert and interdisciplinary perspectives are included throughout the publication to support a fresh approach to 21st Century case management.

---

We start with an updated set of civil case management guidelines. Here we take IAALS’ original set of *Civil Caseflow Management Guidelines* and update them consistent with our renewed case management vision for the 21st Century. We have updated the guidelines to recognize that our courts must take responsibility for managing the cases that are filed, with the ultimate goal of service to the user. Thus, when we use the term “courts” we use that term broadly to include the whole judicial branch: judges, magistrates, judicial clerks, court clerks, court staff, court administrators, and other non-judicial personnel. We further incorporate the concepts of a team approach, systematization, strategic management by judges, and the importance of monitoring and measuring performance and using data for continuous improvement.

Following the updated set of ten civil case management guidelines, we begin in Section II with a discussion of the origins of modern case management and the ways in which current practices are being affected by internal and external pressures facing court systems today. Here, we also briefly detail recent developments at the state and federal level that influence modern conversations on case management. In Section III, we set the framework for a renewed case management vision: court ownership of case management and user-centric case management processes. Building on this guiding vision, Section IV outlines various strategies for anchoring case management principles and practices in courts and courtrooms.
GUIDELINE ONE: Case management should be tailored, or right-sized, to the specific circumstances of the case and the parties. Courts, including judges and court staff as a team, should manage civil cases so as to ensure that the overall volume and type of discovery and pretrial events are proportionate and appropriate to the specific circumstances of the case.

GUIDELINE TWO: Court management should begin at the time of filing and should be ongoing. Ideally, a single judge should be assigned to each case at the beginning of litigation and should stay with the case through its disposition.

GUIDELINE THREE: Courts should be consistent in the application and enforcement of procedural rules and pretrial procedures, particularly within the same types of cases, and within the same courts. These processes should be systematized where possible and appropriate.

GUIDELINE FOUR: Unless requested sooner by any party, the court should set an initial pretrial conference as soon as practicable after appearance of all parties. In cases that present uncomplicated facts and legal issues, initial pretrial conferences may not be necessary. In those cases, the court should establish clear deadlines including a firm trial date, with the flexibility to hold a pretrial conference when needed.

GUIDELINE FIVE: Judges should utilize case management conferences to address critical issues, on request by one or more parties or on the court's own initiative, throughout the life of the case.

GUIDELINE SIX: In the initial pretrial order, or at the earliest practicable time thereafter, the court should set a trial date, and this date should not be changed absent extraordinary circumstances.

GUIDELINE SEVEN: Judges should play an active role in supervising the discovery process and should work to assure that the discovery costs are proportional to the dispute. Streamlined cases, which tend to have less discovery, will benefit from clear deadlines and enumerated discovery limits.

GUIDELINE EIGHT: Judges should rule promptly on all motions.

GUIDELINE NINE: When appropriate, the court should raise the possibility of mediation or other form of alternative dispute resolution early in the case. The court should have the discretion to order mediation or other form of alternative dispute resolution at the appropriate time, unless all parties agree otherwise.

GUIDELINE TEN: Courts should monitor and measure performance and then use this data to continuously improve case management. Courts should publish this data to ensure transparency, accountability, and public trust and confidence.
THE CONTINUOUS EVOLUTION OF CASE MANAGEMENT

Case management is recognized as an essential court function and a means through which courts can control civil litigation abuses, such as cost and delay. It has also come to be widely recognized as an essential piece of the puzzle—beyond rule changes—for achieving real and lasting reform of our civil justice system. While case management is not a new concept, it is also not a static concept. Case management practices—at the judge or court level—are constantly evolving alongside changes in the court landscape and in response to the changing needs of court users. Today's case management discussions look noticeably different than their mid-20th Century counterparts. Understanding where we have been with case management is instrumental in redefining the future of case management.

The Origins of Modern Case Management

Concerns over delay drove early conversations about civil case management. With a primary focus on managing the pace of civil litigation, many of these efforts focused on court structure, judicial resources/workload, and rules of procedure because “assumptions implicit in discourse on court delay were that court resources and formal rules and procedures determined the pace of litigation and that solutions to the problem of delay must be applied in these areas.” Additionally, because the prevailing perspective at the time was that attorneys controlled the process prior to trial, not judges or the court, the time between trial readiness and trial was a common measure of delay, as opposed to the time between filing and trial. Courts tended to center case management efforts on those components of the process that were largely under their control, and trial was the most time-consuming aspect of the process for judges at the time.

Case management solutions in the 1970s, under the rubric of delay reduction, began to focus on how cases progress through the system from filing to disposition. “No Continuances” was one of the mantras of case management gurus. Also, at this time, court administrators were becoming an integral part of the state and local court landscape, with responsibility for monitoring and managing delay. Courts increasingly began to give attention to measuring times between all events in a civil case, not just the time between filing and trial or between trial readiness and trial. In addition to these quantitative measures, caseflow management practices also began to

9 Steelman et al., supra note 7 at xi-xvii; David C. Steelman, What Have We Learned About Court Delay, “Local Legal Culture,” and Caseflow Management Since the Late 1970s?, 19 Just. Sys. J. 145, 145 (“Few problems have been more difficult for court professionals than court congestion and delay. The assertion that ‘justice delayed is justice denied’ is one of the most frequently quoted themes in the discourse of American court management.”); Thomas W. Church, Nat’l Ctr. for State Courts, Justice Delayed: The Pace of Litigation in Urban Trial Courts (1978).
10 Steelman et al., supra note 7, at xiv; see also Steelman, supra note 9, at 152 (noting that “a 1968 review of remedies for court delay discussed the following techniques: a) pretrial conferences, trial readiness rules, and ‘blockbuster’ courts parts; b) referral procedures to remove cases from the trial system, such as auditors and compulsory arbitration; and c) removal of claims from the tort liability system by means such as no-fault basic insurance protection and administrative agency operation of an automobile accident victim compensation program like worker’s compensation.”).
11 Steelman, supra note 9, at 149.
12 Id.
13 Steelman et al., supra note 7, at xiv.
take on a qualitative component, as commentators highlighted the importance of ensuring that key events in the life of a case are not just timely but also meaningful:

> Creation of the expectation that court events are meaningful (that is, that they will contribute substantially to progress toward disposition) and will occur as scheduled is an important way to ensure that lawyers and parties will be prepared to make those events meaningful in terms of progress toward appropriate outcomes.14

Additionally, several now-seminal, empirical research studies of civil and criminal case management provided new insight into various additional factors and circumstances that contribute to delay. Rather than just structural and organizational factors, these studies found that delay is substantially affected by local legal culture—in other words, the informal practices and attitudes of those involved in the civil court process.15 Civil case management from then on had a much broader focus, both in terms of those system stakeholders charged with responsibility for managing civil cases (judges, administrators, attorneys, and whole court systems) and in terms of the scope of court focus on the process (from filing to disposition and all events in between). Additionally, the notion that courts should control the pace of litigation at all stages as opposed to passively waiting for the attorneys to come to the court when they were ready to have the court do something, gained support. Caseflow management became a more active process than it used to be, in terms of both court oversight and intervention.

Over the last several decades, research and court best practices have coalesced around a number of accepted core civil case management principles:16

- Early court intervention in a case
- Continuous interventions throughout the life of a case
- Differentiated case management rules and systems
- Meaningful pretrial court events
- Prompt ruling on motions
- Firm and credible trial dates17

IAALS detailed many of these and other then-best practice guidelines in the 2009 Civil Caseflow Management Guidelines. We elaborated on these themes in IAALS’ 2014 publication Working Smarter Not Harder: How Excellent Judges Manage Cases.18 The themes and recommendations in these publications are no longer new concepts—in fact, many of them were established practices at the time of publication. Nevertheless, judges and courts have not always embraced and implemented these concepts. New challenges facing our civil justice system emphasize the importance of case management and provide an opportunity for revisiting these principles and more current practices.

---

14 Id. at 6.
15 Id. at xv (“[B]oth quantitative and qualitative data generated in this research strongly suggest that both speed and backlog are determined in large part by established expectations, practices, and informal rules of behavior of judges and attorneys. For want of a better term, we have called this cluster of related factors the ‘local legal culture’ …. These expectations and practices, together with court and attorney backlog, must be overcome in any successful attempt to increase the pace of litigation. Thus most structural and caseload variables fail to explain interjurisdictional differences in the pace of litigation.”); Steelman, supra note 9, at 150-51 (citing Church, supra note 9).
16 See Steelman et al., supra note 7.
17 There is a split between commentators, including judges, as to whether the best practice is to set a firm trial date early in the life of a case or later in the pretrial process. See Inst. for the Advancement of the Am. Legal Sys., Working Smarter, Not Harder: How Excellent Judges Manage Cases 16 (2014), available at http://iaals.du.edu/sites/default/files/documents/publications/working_smarter_not_harder.pdf [hereinafter Working Smarter].
18 Id.
Current Challenges & Opportunities for Courts

Our civil justice system has changed significantly over the past 20 years. In just the years that IAALS has been researching and developing civil justice system solutions, new internal and external pressures on the system are creating a need to redefine tomorrow’s case management. We highlight these pressures here, as they are essential considerations for thinking about case management going forward.

**Budget & Funding Challenges**

Budget cuts have shaped much of the judicial experience over the last decade. While the recent recession substantially worsened state courts’ financial situation, courts around the country had weathered significant cuts in funding even prior to 2008. Deeper cuts after the market collapse forced state courts to take a variety of cost-saving measures—some as serious as layoffs or reduced hours of operation—and, not surprisingly, many such measures impacted courts’ ability to manage cases and caseloads. Federal court budgets have arguably fared better than state court counterparts, but they have not been immune to cuts.

The judiciary’s experience during the recession is unique from that of other government sectors, on account of the nature of the court’s duties and responsibilities. As Chief Justice Roberts of the United States Supreme Court has highlighted: “Unlike most Executive Branch agencies, the courts do not have discretionary programs they can eliminate or postpone in response to budget cuts. The courts must resolve all criminal, civil, and bankruptcy cases that fall within their jurisdiction, often under tight time constraints.” Even as federal and state judicial budgets diminished, courts were required to handle the full caseload that came to them. In addition, court budgets are primarily personnel costs, which means cutting actual people rather than programs. Cutting personnel has the direct effect of undermining a court’s ability to process cases in a just, speedy, and inexpensive manner. Alongside greater expectations by consumers in terms of service and technology, courts have been forced to do more with less.

---


20 While the early 2000s recession was not nearly as impactful as the 2008 recession, states reported sizeable budget shortfalls. See Daniel J. Hall, *How State Courts are Weathering the Economic Storm in Nat’l Ctr. For State Courts 1-4* (Carol R. Flango eds., 2009), available at https://ncsc.contentdm.oclc.org/digital/collection/financial/id/141. The American Bar Association Task Force on Preservation of the Justice System found that, “unlike other elements of state government, which fared relatively well in the better economic times before 2007, the nation’s courts and related services were already being curtailed even before the current recession, and that since 2008, the courts of most states have been forced to make do with 10 to 15 percent less funding.” Peter T. Grossi, Jr. et al., *Crisis in the Courts: Reconnaissance and Recommendations, in Nat’l Ctr. For State Courts, Future Trends In State Courts 83-89, 83* (Carol R. Flango eds., 2012), available at http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/-/media/Microsites/Files/Future%20Trends%202012/PDFS/Crisis_Grossi.ashx.


22 Id. at 5.
Rising Civil Litigation Costs & the Impact on Access

Key civil justice system stakeholders have coalesced around the reality that the cost of litigation is having an impact on litigant access to the court. A majority of attorney respondents to surveys of diverse professional associations23 “believe that potential litigation costs can inhibit the filing of cases or force cases to settle that should not settle based on the merits.”24 Over 80 percent of survey respondents in private practice indicated that they turn away cases when handling them would not be cost-effective, and, among those attorneys who defined a threshold amount in controversy, the most commonly identified amount was $100,000.25

The NCSC 2015 Landscape of Civil Litigation in State Courts study found: “For most represented litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case. In some instances, the costs of even initiating the lawsuit or making an appearance as a defendant would exceed the value of the case.”26 For many, resolution of civil issues through our legal system is not even contemplated. While “civil justice situations” are widespread in the United States—involving money, debt, housing, insurance, employment, education, and personal injury—Americans respond in a variety of ways, and “rarely do they turn to lawyers or courts for assistance.” As Rebecca Sandefur has noted regarding this crisis, “One predominant explanation for why more Americans do not turn to lawyers with such situations involves the cost of legal services.”27

Changes to Court Caseloads & Filings

Since 2010, national-level data show that civil caseloads are in decline, across case types and across tiers of courts.28 This may be attributable to the rising cost of litigation, as the pretrial process becomes more and more expensive and fewer members of the public turn to the courts for resolution of their civil justice issues. Others are turning to private arbitration. “[P]rivatization of civil litigation,” warns the NCSC, “undermines the ability of the legislative and executive branches of government to respond effectively to developing societal circumstances that become apparent through claims filed in state courts.”29 For those civil cases that do proceed through the court system for resolution,

---


25 Depending on the study, the $100,000 figure may also represent the median amount. Id. at 41.


29 LANDSCAPE STUDY, supra note 26, at vi.
pre-trial settlement (often facilitated by court-annexed mediation) is the norm.\textsuperscript{30} The “vanishing trial” phenomenon has been well documented, and evidence continues to point to an overwhelming decline in trial rates. \textsuperscript{31}

These trends are redefining the work of courts and civil case management practices. Trial courts today are increasingly administrative and less adjudicative, as fewer and fewer cases engage in the traditional pretrial process we associate with civil litigation. The role of attorneys, too, is evolving as civil trials become a rarity. The number of true trial attorneys is decreasing:

Add in a generation of litigators who have no trial experience and are ill equipped to sort through relevant information in discovery. Young attorneys without trial experience may insist on excessive discovery out of fear of missing something, because they cannot know what will be useful at trial, and in accordance with their economic incentives to check behind every button when the prudence of their actions will never be tested by a trial.\textsuperscript{32}

As attorneys increasingly view discovery as a means to a pretrial end and judges increasingly resolve paper cases, a self-perpetuating cycle emerges: “With fewer trials there are fewer lawyers with trial experience and, consequently, fewer judges taking the bench with trial experience.”\textsuperscript{33} Moreover, there is a significant number of cases, particularly in state court, where there is minimal—if any—discovery.\textsuperscript{34} This marks a dramatic shift from what we traditionally consider the book of business for our courts and the legal profession.\textsuperscript{35}

**Significant Numbers of Self-Represented Litigants**

It follows from these challenges of cost, delay, and access that more and more litigants are navigating the legal system without representation. The *Landscape* study revealed “striking findings” with respect to the portion of cases involving self-represented parties.\textsuperscript{36} At least one party was self-represented in 76 percent of cases in the study’s dataset,\textsuperscript{37} and the NCSC concluded that “[i]n the vast majority of cases, deciding to litigate a typical civil case in state courts is economically unsound unless the litigant is prepared to do so on a self-represented basis, which appears to be the case for most defendants.”\textsuperscript{38} Data collected as part of the National Center for Access to Justice 2016

\begin{footnotes}
\item 30 Settlement rates vary by case type. A review of approximately 3,300 federal court tort, contract, employment discrimination, and constitutional torts found a single rate of approximately 67 percent, but the author cautioned that this aggregate rate may be misleading. Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUDIES 111, 132 (2009). The 2015 NCSC *Landscape of Civil Litigation* study found that settlement was the single most common outcome (62%) for the civil cases involved in the study. *Landscape Study*, supra note 26, at 7.
\item 31 Examining federal caseload data between 1962 and 2002, Professor Galanter commented in 2004 that “[t]he drop in civil trials has not been constant over the 40-year period; it has been recent and steep.” Since the mid-1980s, the absolute number of trials in federal courts declined 60 percent; the portion of cases terminated by trial is also declining. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 3 J. EMPIRICAL LEGAL STUDIES 459, 461 (2004), available at http://epstein.wustl.edu/research/courses.judpol.Galanter.pdf. Additionally, in state courts from 1976 to 2002, the number of jury trials decreased by 32 percent and the number of bench trials decreased by seven percent. Marc Galanter & Angela M. Frozena, *A Grin without a Cat: The Continuing Decline & Displacement of Trials in American Courts*, 143 DAEDALUS 115, 116 (2014).
\item 33 Id. at 755.
\item 34 *Landscape Study*, supra note 26, at 20-21.
\item 36 Id. at iv.
\item 37 Id.
\item 38 Id. at 35.
\end{footnotes}
Justice Index found that “as many as two-thirds of the litigants appear without lawyers in matters as important as evictions, mortgage foreclosures, child custody and child support proceedings, and debt collection cases.”

As increasing numbers of self-represented litigants proceed through the system, established civil case management practices—many of which are still premised on the presence of attorneys on both sides—are being put to the test. Furthermore, justice system stakeholders are growing into new roles and undertaking new responsibilities in response to the changing face of court users. Finally, entire court systems are assuming a more active role in providing users with self-help resources and information, stepping into the vacuum created by litigants’ inability—or in some cases unwillingness—to obtain representation.

**Advances in Technology**

Courts are increasingly leveraging technology to provide information and resources to assist litigants. Virtual self-help centers and robust websites enable courts to serve wide populations without substantially increasing court staff numbers. In some jurisdictions, online portals for court users are helping individuals appreciate the nature of their civil legal issue, as well as identifying options, potential outcomes, and available legal and non-legal resources. These and other technology solutions are enabling courts to perform their key functions and serve users more efficiently and effectively.

In the area of pretrial discovery, the explosive rise in the use and amount of electronically stored information (“ESI”) is a primary driver of increasing litigation costs. In response, new technology is available to deal with the ESI explosion and control these costs, as information retrieval technologies and methodologies focused on electronic discovery become the norm rather than the exception. Technology also has the potential for impacting the litigation process in a much more profound way than merely lowering discovery costs. Courts have seen the impact of technology and are exploring ways in which the courts can utilize technology to provide greater access and more timely and cost-effective outcomes. Online dispute resolution is one example. This type of dispute resolution has gained acceptance in the private sector with companies such as eBay and PayPal, and our courts are jumping into the fray.

While there is a unique opportunity to improve the administration of justice through technology, technology is nevertheless one of the major challenges facing our court system today. Staying abreast of technology requires financial investment and agility—qualities that are rarely associated with our court system. As a result, there is an ever widening gap between “what people experience with technology in the courts and what they experience with technology in the private sector.”

---

39 The Justice Index, justiceindex.org (last visited January 22, 2018).
43 Microsoft has partnered with the Legal Services Corporation and Pro Bono Net to develop a prototype access to justice portal. Microsoft, Microsoft partners with Legal Services Corporation and Pro Bono Net to create access to justice portal (Apr. 19, 2016), https://blogs.microsoft.com/on-the-issues/2016/04/19/microsoft-partners-legal-services-corporation-pro-bono-net-create-access-justice-portal.
45 Id. at 15.
Recent Advancements in Case Management

In the face of these changes to the civil justice landscape, case management can no longer be something that only a few judges and forward-thinking courts embrace. System stakeholders are responding to these challenges and opportunities, and case management is often at the forefront of these efforts.

Driven by the pilot project activity, the changing landscape of civil litigation, and the potential benefits arising from nationwide coordination among state reform efforts, the Conference of Chief Justices (“CCJ”) adopted a resolution in 2013 creating a Civil Justice Improvements Committee (“CJI”) Committee. The Committee was charged with:

1. developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and from other applicable research, and informed by implemented rule changes and stakeholder input; and
2. making recommendations as necessary in the area of case flow management for the purpose of improving the civil justice system in the state courts.

Committee membership included state chief justices, trial court judges, court administrators, attorneys, general counsel, and academics, and both IAALS and the NCSC supported its work.

The Committee issued a final report, A Call to Action: Achieving Civil Justice for All, that empowered state courts with 13 recommendations for transforming state court systems to meet the needs of 21st Century litigants. In July 2016, the CCJ and the Conference of State Court Administrators endorsed these recommendations.

The Committee’s recommendations were significantly informed by a companion study from the NCSC. The Landscape study documented case characteristics and outcomes for civil cases in 10 state court counties around the country and broadly concluded:

The picture of civil caseloads that emerges from the Landscape study is very different than one might imagine from listening to current criticism about the American civil justice system. High-value tort and commercial contract disputes are the predominant focus of contemporary debates, but collectively they comprised only a small portion of the Landscape caseload.

Additionally, as briefly discussed in the previous section, the Landscape assessment also revealed that self-representation rates have changed dramatically. Compared to a 1992 NCSC study, plaintiffs’ representation rates declined only slightly (from 99% to 96%), but attorney representation for defendants decreased by more than half (97% to 46%). The NCSC notes that “[t]he Landscape data are insufficiently detailed to draw firm conclusions about the impact of attorney representation in any given case, but it is clear that it does affect case dispositions.”

---

46 Conference of Chief Justices, Resolution 5 To Establish a Committee Charged with Developing Guidelines and Best Practices for Civil Litigation (2013).
47 Id.
48 Nat’l Ctr. for State Courts, Call to Action: Achieving Civil Justice for All, Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee (2016) [hereinafter Call to Action].
49 Id. at iii.
50 Call to Action, supra note 48, at 9; see also supra Sec. II.B.
51 Landscape Study, supra note 26, at 31-32.
52 Id. at 33.
In light of these various changes to the landscape of civil litigation, the overarching theme of the CCJ recommendations was that courts—meaning judges, court managers, indeed the whole judicial branch—must take responsibility for managing civil cases from the time of filing to disposition.\textsuperscript{53} The report recognizes the “party-take-the-lead culture can encourage delay strategies by attorneys, whose own interests and the interests of their clients may favor delay rather than efficiency.”\textsuperscript{54} According to the Committee’s recommendations:

\begin{quote}
It is time to shift this paradigm. The Landscape of Civil Litigation makes clear that relying on parties to self-manage litigation is often inadequate. At the core of the Committee’s Recommendations is the premise that the courts ultimately must be responsible for ensuring access to civil justice.\textsuperscript{55}
\end{quote}

Similarly, case management as a means of ensuring a proportionate process was essential to the December 2015 federal rule amendments, which sought to address the growing cost and delay in the federal system. In addition to cooperation and proportionality, these amendments focused on ensuring earlier, active, hands-on judicial case management,\textsuperscript{56} which is central to achieving a more proportional process in discovery. As IAALS and the ACTL Task Force highlight in \textit{A Report on Progress and Promise}, “[t]his is an idea whose time has come. Effective judicial case management, tailored to the needs of the case, will save the parties time and money and will, in most cases, lead to a more informed and, we think, reasonable resolution.”\textsuperscript{57}

While case management is a common theme in state and federal reform activities, the various efforts highlight the differences in perspectives. The federal rule amendments focus on “judicial case management,” and the role judges play in managing individual cases to meet the goals of Rule 1 and the promise of a “just, speedy, and inexpensive resolution.” Likewise, the 2009 IAALS \textit{Civil Caseflow Management Guidelines} was written primarily for judges,\textsuperscript{58} and the same is true of a later IAALS publication, \textit{Working Smarter, Not Harder}, which presented themes from interviews with federal and state judges on civil case management techniques.\textsuperscript{59}

The work of the CJI Committee, on the other hand, treated case management from a broader perspective, including judicial management of cases but also highlighting a role for other court personnel in executing effective case management. Additionally, court experts like David Steelman urge us to think about caseflow management even more broadly, recognizing the interconnection with successful court management: “[c]aseflow management involves the entire set of actions that a court takes to monitor and control the progress of cases, from initiation through trial or other initial disposition to the completion of all post disposition court work, to make sure that justice is done promptly.”\textsuperscript{60}

It is important that our courts and judges embrace the importance of judicial case management, caseflow management, \textit{and} court management. What our system needs is all of the above—and more.

\textsuperscript{53} Call to Action, supra note 48, at 16.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{57} Progress and Promise, supra note 6, at 5.
\textsuperscript{58} Guidelines, supra note 3.
\textsuperscript{59} Working Smarter, supra note 17.
\textsuperscript{60} Steelman et al., supra note 7, at xi.
A RENEWED CASE MANAGEMENT VISION FOR 21ST CENTURY JUSTICE

The changes in our civil justice landscape and the pressures on our system are forcing all system stakeholders to revisit ingrained and dated approaches to case management: in some instances, refining established methods and concepts, in other instances, supplementing the field with innovative perspectives.

There is an ever-increasing need to rethink case management. Here, we ask civil justice system stakeholders to broaden their perspective of case management. Who should be involved in managing cases? What roles should these actors play? How can they best work together? We are also encouraging system stakeholders to think more deeply about case management. What are the end goals? Who ultimately stands to benefit from effective case management? How can management techniques be delivered more efficiently and directly to the end users? Our guiding vision begins to answer these questions: our court system as a whole is responsible for case management, and the ultimate goal of case management is to deliver civil justice in a fair, efficient, and accountable way to the users of our system and the general public.

This section and the following benefits from the first-hand perspectives of respected stakeholders and experts in court and case management who helped IAALS with this update. Informal conversations with these experts illuminate the relevance and application of evolving notions of civil case management and the strategies for cementing case management in court practice. Further, in identifying, distilling, and researching the strategies that emerged from these experts, we also considered case management from fields outside the legal industry. In order to respond to the challenges and pressures on our system, it is essential we look outward to understand and learn from the development of management practices more broadly.

61 The list of expert participants can be found in the acknowledgements section.
62 Over the course of several months in Fall 2016, IAALS conducted informal telephonic interviews with participating stakeholders.
Rethinking the Paradigm: Court Ownership of Case Management

The CJI Committee’s paramount recommendation for civil justice reform was that “[c]ourts must take responsibility for managing civil cases from time of filing to disposition,” and the Committee defined “courts” broadly to include the whole judicial branch: judges, magistrates, judicial clerks, court clerks, court staff, court administrators, and other non-judicial personnel. Ensuring that every case has a plan and proceeds according to that plan is first and foremost the court’s responsibility; following through on this obligation, according to the CJI Committee recommendations, is key to facilitating access to justice, thereby enhancing the rule of law. Technology solutions can support this goal, presenting new opportunities for managing the docket in ways that are responsive to the needs of the users.

Certainly, there are strong advocates for this holistic approach to managing cases, but there remain many around the country—judges and attorneys alike—who believe that attorneys are in the best position to control the pace and flow of their own cases. Those who hold this view believe that attorneys know their case best and that judges should defer to the attorneys, particularly when there is agreement. Knowing the case well, particularly from an advocacy perspective, does not necessarily equate to being in the best position to manage it toward a “just, speedy, and inexpensive” resolution. Attorneys are definitionally advocates for their clients’ points of view. They have a duty as officers of the court, but their perspective is colored by what is best for their client—not for the system as a whole. Only the judge and court staff have an undivided responsibility to the system and to procedural fairness for all. The increasing recognition of the numbers of self-represented litigants have illuminated tensions between this traditional approach and the need for the courts to take a more active and engaged role in case management, especially in state courts where there is attorney representation on both sides in just 24 percent of cases. Even where both sides are represented, “the party-take-the-lead culture can encourage delay strategies by attorneys, whose own interests and the interests of their clients may favor delay rather than efficiency.” Think: a tennis match where the referee only shows up when summoned—the players will certainly handle themselves differently, as will the referee, who will not have a sense of the whole match and the behavior of the players overall. The court plays a critical role in balancing power as well, particularly in asymmetric litigation.

63 Call to Action, supra note 48, at 16. In addition to appreciating the impacts of rising numbers of self-represented litigants, the CJI Committee recognized that adversarial strategizing by attorneys contributes to unnecessary delay and expense for litigants.

64 Landscape Study, supra note 26, at iv.

65 Call to Action, supra note 48, at 16.
This is not to say that the attorneys and parties do not play a central role in case management—they are essential partners in ensuring a "just, speedy, and inexpensive resolution." Rather, the goal is to delineate a clear responsibility in our court system for managing the cases that are filed, and then to enlist the support of all stakeholders in support of this effort.

Managing to the Overarching Goal: User-Centric Processes

Traditional notions of case management often focus on individual cases, but not necessarily the individuals behind the cases. Increasingly, justice system stakeholders are accepting the reality that courts are rooted in the service industry. Recent work on improving court user experience is being influenced by concepts from the technology and service delivery sectors, recognizing that process and system design is an important component of better serving users.66 There is also a growing awareness that the justice system is not effectively serving its customers.

Case management is an essential component of a civil justice system that is, first and foremost, responsive to the needs of those it serves. A number of essential court goals are advanced by centering case management innovations around the needs of users.

Consistency Within & Across Cases

Litigants and attorneys need a reasonable understanding of what they can expect over the life of a case (and what the court expects from them), and this set of expectations should be predictable and consistent throughout the case. Information on the process and court expectations is important for self-represented litigants, who are rarely familiar with the intricacies of civil court processes and procedures. Even the smallest bit of information up front on what the court is doing, when the court is doing it, and why the court is doing it can maximize efficiencies and effectiveness.

66 See, e.g., Margaret Hagan & Miso Kim, Design for Dignity and Procedural Justice, Advances in Intelligent Systems and Computing, Proceedings of the Applied Human Factors and Ergonomics International Conference (2017), available at https://ssrn.com/abstract=2994354; Video: Person Centered Case Management – Changing the Way our Systems See Cases, CTC Salt Lake City 2017 (Sept. 12, 2017), http://www.ctc2017.org/Schedule/Streaming-Schedule.aspx (recounting Utah’s efforts to reengineer a case-centric, client-server content management system into a person-centric, web-based content management system. “This changed our thinking a little bit about how we look at cases. Instead of cases and case management, it became more about people and the overall experience with the courts, which led us to a person-centered case management system. . . . When we started thinking about things this way, we were able to identify additional opportunities for innovation and we realized if we could program our case management system to identify relationships between cases, it changed at the core our system so that we can improve our processes.”).
throughout the process. It is equally important for represented clients to hear from the judge what is expected of them. Case management is the key to: establishing these expectations, creating a structure through which the court can convey them to users, and holding the court accountable for consistently enforcing them.

It is also important to have consistency at a systemic level across cases. Attorney stakeholders with experience in both state and federal courts routinely highlight the consistency that is a hallmark of federal practice. If a deadline is set in federal court, one can generally assume it is real and meaningful; the same is not true in all state court systems. This is a particular challenge for courts that have a master calendar docket rather than assigning cases to individual judges. In the absence of an underlying, institutionalized system to assure efficient progress of a case toward resolution, this progress can be undermined as judges rotate in and out of assignments or as new judges join the bench and others step down. That we are having the same conversations about case management that we had decades ago seems to confirm that relying on individual judges to implement active and continuing case management has not translated into broad and system-wide reform—and likely will not.

It also bears mentioning: as system stakeholders look to technology solutions to “increase efficiency, effectiveness, and clarity,” consistency and predictability are essential. “The only way to take advantage of technology is to create a systematic approach that is consistent across a court,” according to Judge Jennifer Bailey. “You can’t have every judge doing everything differently and expect technology to be helpful.”

Proportionality

The days of trans-substantive processes are quickly waning in courts around the country as there is growing recognition that the one-size-fits-all approach has contributed to the current cost and delay in our system. In response, proportionality has developed as a consistent theme across civil justice reform efforts. At the state level, the Conference of Chief Justices recognized that “uniform rules that apply to all civil cases are not optimally designed for most civil cases,” often providing “too much process for the vast majority of cases.”

At the federal level, recent amendments to the Federal Rules of Civil Procedure require that discovery be proportional to the needs of the case. Applying proportionality to the pretrial process more broadly, the joint IAALS/ACTL Task Force concluded that the concept of a just resolution includes “procedures proportionate to the nature, scope, and magnitude of the case that will produce a reasonably prompt, reasonably efficient, and reasonably affordable resolution.”

While the growing paradigm of court-owned civil case management requires that every case have a plan for resolution that is comprehensive enough to get it from beginning to end within a reasonable time, not all cases...
require all available processes and procedures. A right-sized approach involves assessing the case, the parties, and the issues at the time of filing and matching the court's resources to what is needed to most efficiently and effectively resolve the issues presented.74

**Procedural Fairness**

Courts increasingly have become focused on how best to serve litigants directly, as opposed to just serving attorneys. The now well-understood tenets of procedural fairness point to the importance of ensuring that people experience a fair process, which suggests that the system needs to: give people a voice, convey neutrality, ensure people are treated with dignity and respect, and foster an environment where people trust that court personnel care and are sincere.75 Attorneys play an important role here in case management and must make sure that they, likewise, serve their clients by treating them with respect, listening to them, and being responsive to their feelings and needs.

Relatedly, while litigants are the primary court users, it is important to remember that attorneys are important users of the system as well, and procedural fairness concerns apply equally to them.76 Communicating clearly and up front to attorneys what deadlines are being imposed on them, and why, can ensure much more effective case management. If attorneys feel as if they are respected and heard in the process, there will be downstream impacts on cooperation, communication, and efficiency.

**Public Trust & Confidence**

Public opinion of the civil justice system is currently at a less-than-ideal level. A recent NCSC survey suggests that “persistent concerns about customer service, inefficiency, and bias are undermining the public's confidence in the courts and leading them to look for alternative means of resolving disputes or addressing problems that would have previously led them into the court system.”77

According to the CCJ CJI Committee, “[r]estoring public confidence means rethinking how our courts work in fundamental ways. Citizens must be heard, respected, and capable of getting a just result, not just in theory but also in everyday practice.”78 Similarly, IAALS’ *Change the Culture, Change the System* publication suggests:

> Courts must recognize that cases are ‘public property’ in the sense that they consume public resources and showcase the public dispute resolution system. It is in the system's best interest to move the case along, monitor expenditures, and work toward procedural fairness. . . . Society expects more from the court system than ever before, and it is clear litigants are willing to take their business elsewhere if the court cannot meet expectations.79

User-centric processes—built around the principles of consistency, predictability, and fairness—are important means through which courts can increase public trust and confidence in the system.

---

74 It is important to recognize that proportionality does not always translate into a quicker, more streamlined process. Efficiency in civil case management is not an end in and of itself. It is inextricably tied to efficacy and, as such, there are cases in which faster, more expeditious processing is not responsive to the needs of the case or parties. Sometimes, a proportionate approach means allowing the case the opportunity to have more processes.


76 David Prince, *A New Model for Civil Case Management: Efficacy Through Intrinsic Engagement, 50 Court Review 174 (2014).*

77 Memorandum from GBA Strategies to the Nat'l Ctr. for State Courts 1 (Nov. 17, 2015) http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Survey%20Analysis.ashx.

78 *Call to Action, supra* note 48, at 3.

79 *Change the Culture, supra* note 67, at 16.
Many outside the court context and legal industry recognize the value (and often necessity) of efficient case management. Health care workers, social workers, mental health providers, and related professionals embrace case management as a means through which to balance workload, manage workflow, and facilitate customer/client care. Here and throughout this publication, we look to case management practices and principles in these non-legal contexts to highlight commonalities across industries as well as emerging themes that track the broad vision of case management—and the strategies for anchoring case management—that we present here.

Client-Centric Focus

In the health care and human services contexts, care coordination includes engagement and collaboration with the client directly, touching on another key principle that appears across descriptions of case management in these fields: case management is an inherently client-centric practice. Case Management Society of America (“CMSA”) President Mary McLaughlin-Davis notes: “We can find sufficient evidence in the literature that delivering patient-centered care is central to all our work with our patients, our clients, our beneficiaries, and (or) our members.” According to Patrice Sminkey, former-CEO of the multidisciplinary Commission for Case Manager Certification (“CCMC”): “We do not work with cases. Actually, we have never worked with cases. We work with people.”

Certainly, any number of factors influence case management decisions in providing health care, but the client is central. The CMSA Standards explain: “Professional case management today fosters the careful shepherding of health care dollars while maintaining a primary and consistent focus on quality of care, safe transitions, timely access to and availability of services, and most importantly client self-determination and provision of client-centered and

---

80 Within the health care and human services context, some industries or professional organizations use different nomenclature to denote the practice of case management. For example, care management, care coordination, service coordination, transitional care, or patient navigation may be used interchangeably to describe high-level case management or may be used distinctly to denote discrete practices. See Nat’l Ass’n Soc. Workers, NASW Standards for Social Work Case Management 10 (2013), available at https://www.socialworkers.org/LinkClick.aspx?fileticket=acrzqmEfhlo%3D&portalid=0 [hereinafter NASW Standards].


84 Comm’n for Case Manager Certification, Theory into practice: Transitional Care Model’s success demonstrates that evidence alone isn’t enough, ISSUE BRIEF 5 (Jan. 2015) (emphasis in original).
culturally-relevant care." CMSA notes\(^{85}\) that if a conflict arises between the client, the health care team, and (or) the payer, "the needs of the client must be the number one priority."\(^{86}\)

The primacy of a client-centric approach in the health care industry also has evolved over time. For example, the CMSA first released its Standards of Practice for Case Management in 1995, and an amendment to the operating definition of case management in 2002 highlighted the importance of a case manager’s role in client advocacy: “The case manager should advocate the client’s individualized needs and goals by incorporating such considerations throughout the case management process.”\(^{87}\) A more recent update to the Standards reaffirms the emphasis on the provision of "client-centered and culturally and linguistically-appropriate case management services" and includes suggestions to heighten positive client experiences, for example by using language and terminology that is empowering to the client as opposed to potentially stigmatizing.\(^{88}\)

In the social work field under the NASW Standards, “person-centered services” is a distinguishing characteristic of case management and involves engaging the client and appropriate family members in all aspects of the case management, with services tailored to their needs, preferences and goals.\(^{89}\) As in the CMSA Standards, the NASW Standards detail a substantial advocacy role for social work case managers, delineating micro-, mezzo-, and macro-level advocacy activities, each of which is designed to help clients “identify and define their strengths, needs, and goals and communicate those needs and goals to service providers and decision makers.”\(^{90}\)

\(^{86}\) Id. at 17.
\(^{88}\) CMSA 2016 Standards, supra note 85, at 10 (emphasis removed).
\(^{89}\) NASW Standards, supra note 80, at 17.
\(^{90}\) Id. at 38.
STRATEGIES FOR ANCHORING A HOLISTIC CASE MANAGEMENT VISION

There is strong consensus around certain fundamental principles of effective judicial and court-wide case management. What is needed are tools for anchoring these principles and practices into courts and courtrooms. The discussion that follows recommends strategies that can help stakeholders ensure that effective case management becomes part of the everyday operations of state and federal courts.

**Case Management Is a Team Sport**

One of the CJI Committee’s 13 recommendations concerns the development of civil case management teams which consist of a “responsible judge supported by appropriately trained staff.”

This recommendation “proposes a radically different staffing model for civil case processing that delegates substantial responsibility for routine case management to specially trained professional staff supported by effective case technology.”

Examining caseflow and business practices can help courts delegate routine case management decisions and certain aspects of case processing to appropriate non-judicial or quasi-judicial personnel, or automated processes.

In addition to facilitating the progression of a case from filing to disposition, establishing and deploying effective case management teams frees up valuable judge time for tasks that require their unique authority, expertise, and discretion. “The most valuable thing in the court—the scarcest resource—is judge time,” says Alan Carlson, former Court Executive Officer of the Superior Court of Orange County, California, “so whatever you can do to relieve the judge and make best use of the judge’s time is what the support staff ought to be focused on.”

Equally important, this frees up resources for additional support from team

---

91 Call to Action, supra note 48, at 27.
93 Telephone Conversation with Alan Carlson, CEO, Orange County Superior Court of California (Jan. 10, 2017).
members who can focus on case management tasks that are critical but not uniquely judicial. Case management teams can ensure that cases of all types get prompt attention right-sized to the needs of the case.

In defining the roles of those on the case management team, “[w]e should not be cabined by the traditional positions or responsibilities of court staff. We need to rethink how best to allocate the work of the court in this modern age.”94 Thought should be given to the education and skill set of court personnel so that everyone involved is “utilized to act at the ‘top of their skill set.’”95 Because court staff roles are quickly evolving,96 training is becoming increasingly important. The CJI Committee recognized: “Accumulated learning from the private sector suggests that the skill set required for staff will change rapidly and radically over the next several years. Staff training must keep up with the impact of technology improvements and consumer expectations.”97

Evidence from state efforts implementing this management approach shows considerable success in reducing civil case disposition times.98 In Salt Lake City’s team model, each team is assigned to two judges and consists of three judicial assistants and one case manager. The case manager plays an active role, meeting with attorneys, conducting scheduling conferences, and attempting to resolve cases through the court’s mediation program. Utah’s implementation of team management brought about a 54 percent reduction in the average age of pending civil cases and a 54 percent reduction for all case types over the same period—despite higher caseloads.99

At the federal level, Judge Jack Zouhary of the U.S. District Court for the Northern District of Ohio, Western Division, views case management as a “chamber function—everyone has a role.”100 He routinely involves non-judicial staff in managing individual cases, and an important part of facilitating this team approach is empowering his staff to exercise discretion to move certain cases through the system. Communicating with lawyers when an issue in the case arises is also among the tasks that Judge Zouhary entrusts to his staff. Federal judges generally have more support staff than their state counterparts, so they have a unique opportunity to think of case management in terms of a team approach within chambers.

While ultimate responsibility for civil case management rests with the court, there remains a significant role for parties and their attorneys. In some cases, tailored case management will mean heavy reliance on parties to manage the flow and pace of litigation. Sophisticated parties who have an ongoing relationship with one another, for example, have a vested interest in cooperation. An appropriate path to resolution in such cases may rely substantially on these parties to manage the process. That means that attorneys must embrace case management as a key aspect of the legal services they provide in order to be an equal partner in reducing cost and delay for their clients. On the other hand, self-represented parties with little understanding of complex court procedures will require management from the court that empowers them with the information they need to navigate the process. In either scenario, communication between the parties and the court is important so that the court can provide effective oversight and appropriate and timely action.

94 Change the Culture, supra note 67, at 17.
95 Call to Action, supra note 48, at 27.
96 Id. at 29; Cases Without Counsel Recommendations, supra note 41, at 5-7.
97 Call to Action, supra note 48, at 29.
98 Id. at 27-28.
99 Id. at 27.
Collaborative & Coordinated Process

A collaborative, coordinated team approach is central to how health care industry professionals approach case management and patient care. The CCMC defines case management as “a collaborative process that assesses, plans, implements, coordinates, monitors, and evaluates the options and services required to meet the client’s health and human service needs.”101 Similarly, the CMSA102 2016 Standards of Practice for Case Management defines case management as “a collaborative process of assessment, planning, facilitation, care coordination, evaluation and advocacy for options and services to meet an individual’s and family’s comprehensive health needs through communication and available resources to promote patient safety, quality of care, and cost effective outcomes.”103

This team-based approach to patient care and case management, however, was not always standard practice in the health care industry. The move away from isolated, single-care providers and fragmented interventions over the last 20 years represents an evolution in the health care field, and “[t]he high-performing team is now widely recognized as an essential tool for constructing a more patient-centered, coordinated, and effective health care delivery system.”104 Additionally, research in this field has indicated that “team-based care can result in improvements in both health care quality and health outcomes,” with some evidence suggesting that “costs may be better controlled.”105

A collaborative component is also built into how the social work profession views and defines case management—not surprising considering the roles and responsibilities of social workers. According to the National Association of Social Workers (“NASW”) Standards for Social Work Case Management, “[c]ollaboration with other social workers, other disciplines, and other organizations is integral to the case management process.”106 Coordination of efforts “limits problems arising from fragmentation of services, staff turnover, and inadequate coordination among providers.”107

102 The Case Management Society of America is an international, non-profit organizations founded in 1990 dedicated to the support and development of the profession of case management. About CMSA: Our History, Case Mgmt. Soc’y of Am., http://www.cmsa.org/about-cmsa (last visited January 22, 2018).
103 CMSA 2016 Standards, supra note 85, at 11.
104 Pamela Mitchell et al., Core Principles & Values of Effective Team-Based Health Care, Discussion Paper, Inst. of Med. 3 (2012), available at https://www.nationalalhec.org/pdfs/VSRRT-Team-Based-Care-Principles-Values.pdf; see also Health2 Resources, Comm’n for Case Manager Certification, CareCoordination: Case managers “connect the dots” in new delivery models, 1 Issue Brief 2 (2010) (“The case manager has a key role to play in coordinating a spectrum of care through patient transitions and care settings …. The case manager offers a link and oversight on the complexity across settings and providers, the technology, and the increased need for accurate communication.”).
105 Mitchell et al., supra note 100, at 3.
106 NASW Standards, supra note 76, at 18.
107 Id. at 13.
Systematization Is Essential

One of the key takeaways from the changing landscape of litigation is that there is a wide variety of cases in our courts, and a one-size-fits-all approach is not an efficient or effective way of approaching case management. That said, many judges have struggled to tailor the process to the needs of each case, particularly in jurisdictions where the size of the docket makes individual case management conferences in every single case unmanageable. This is where systematization can play an important role to move traditional case management into the 21st Century.

One of the key recommendations from the CCJ Committee is that courts need to match the resources of the court with the needs of the case.108 The Committee took this recommendation one step further by recommending a pathway approach for right-sizing the process to the needs of the case, with three different pathways ranging from a more streamlined approach (appropriate for the vast majority of state court cases) to complex (1-3% of the caseload). This is similar to traditional differentiated case management (DCM), but with a few important differences:

The right-sized case management approach recommended here embodies a more modern approach than DCM by (1) using case characteristics beyond case type and amount-in-controversy, (2) requiring case triaging at time of filing, (3) recognizing that the great majority of civil filings present uncomplicated facts and legal issues, and (4) requiring utilization of court resources at all levels, including non-judicial staff and technology, to manage cases from the time of filing until disposition.109

Through systematization of this process, we can eliminate the time that judges and court staff take at the beginning of the case to develop a case plan. Rather, we can create systems that identify for the court and the judges an initial recommendation for the amount of process and type of attention each case needs. Systematizing the triage process allows cases that do not need a high judicial touch to be placed into a largely self-managing process with built-in mechanisms for monitoring and ensuring the case moves forward, with court staff supporting this process. This frees up scarce judicial time and resources for those cases that require a high level of judicial involvement. “You have to figure out

108 Id. at 18.
109 Id. at 19.
how to get these simple cases to run themselves,” says Minnesota state court judge Jerome Abrams. \(^{110}\) “And you have to make sure . . . that when they are running themselves, the rules are robust enough and supervision is in place well enough to make sure things go well.” \(^{111}\)

With judicial and non-judicial personnel communicating and working as a team to manage civil cases, courts can create a bottom-up and top-down system that facilitates the right mix of automated and human case management. The CJI Committee recommendations “envision a civil justice system in which civil case automation plays a large role in supporting teams of court personnel as they triage cases to experienced court staff and/or judicial officers as needed to address the needs of each case.” \(^{112}\) Some routine case functions (for example, scheduling and monitoring compliance with deadlines) can be automated with oversight by specially trained court staff.

This vision of systematization is directly responsive to the pressures facing our courts today. For many courts and judges, early, active, bespoke\(^ {113}\) judicial case management of every case on the docket is not feasible. Many judges have not embraced case management because such an approach is simply not possible given their caseload and limited staff and technology support. To the extent business practices can be put in place, and then carried out where appropriate by staff and technology, time can be freed for tailored case management where needed.

Systematization is also responsive to the needs and demands of our court users. To the extent processes are systematized, the user will have a much more consistent experience in our court system. In addition, if processes are put in place with the concept of procedural fairness from the start, these concepts automatically will be built in to the user experience.

This is a place where we can utilize technology and build on knowledge about case types to drive the triage approach. At a minimum, the CJI Committee suggests that key business processes should be managed by information technologies. \(^{114}\) At a broader level, systematization may hold the key to imbedding case management firmly and deeply into a court system and court culture. If court leadership and individual judges are not committed to court management, however, technology alone will not fill this gap. According to Minnesota state court judge Kevin Burke, “[t]echnology will only aid the people who are really committed to this.” \(^{115}\) Thus, systematization is essential, but just one aspect of redefining case management going forward.

\(^{110}\) Telephone Conversation with Jerome Abrams, Judge, Minnesota Judicial Branch (Jan. 5, 2017).

\(^{111}\) Id.

\(^{112}\) Call to Action, supra note 48, at 12.

\(^{113}\) On the role of bespoke, or made to order, legal services, see Richard Suskind, Tomorrow’s Lawyers: An Introduction to Your Future (2013).

\(^{114}\) Id. at 30.

\(^{115}\) Telephone Conversation with Kevin Burke, Judge, Minnesota Judicial Branch (Jan. 11, 2017).
Decades of expert commentary and research have illuminated some common themes that guide effective judicial management of a civil case from filing to resolution. Many of these principles were included in the 2009 Civil Caseflow Management Guidelines and the 2014 Working Smarter, Not Harder themes for pretrial management of civil cases.

**Engagement:** Direct, in-person engagement with attorneys/parties is far better than a passive, mechanical approach. According to Federal Judicial Center Director Jeremy Fogel, "[t]he case is a living, breathing thing, and judges should be an active presence." An engaged judge is also more effective at appropriately tailoring processes to the needs of the case and parties.

**Encourage communication and cooperation:** The key to effective case management is getting parties to communicate with one another, and an active judicial manager can facilitate communication and cooperation between the parties. Included in this role is the ability to assess parties' personalities and relationship with one another—case dynamics that are often instructive in determining an appropriate path to resolution.

**Simplify the issues:** Whether by critically reviewing the pleadings and other case files or through active case management conferences with the parties, a judge has a unique opportunity to facilitate the early identification and simplification of issues. Early engagement and communication with the parties is particularly important in achieving this goal, since parties are far more familiar with the issues at the outset of the case than the judge.

**Streamline the process:** There is an important place for motions in civil case management, although there are circumstances in which these tools are abused and/or overused. Paying attention to the staging and timing of motions—particularly dispositive motions—can help judges appropriately and cost-effectively resolve cases.

---

117 Change the Culture, supra note 67, at 15.
118 The impetus for collaboration and cooperation is high when lawyers are repeat adversaries, either because they practice in a smaller communities or because the parties have an ongoing relationship with one another.
119 Change the Culture, supra note 67, at 10-11.
WORKING SMARTER NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES

In 2012, the American College of Trial Lawyers (“ACTL”) Task Force on Discovery and Civil Justice, the ACTL Judiciary Committee, ACTL Jury Committee, ACTL Special Problems in the Administration of Justice Committee, and IAALS undertook a study on practices and methods for pretrial management of civil cases that might reduce cost and delay for litigants while saving judicial resources. The following themes emerged from interviews with approximately 30 state and federal trial court judges from diverse jurisdictions around the country. The themes below are supplemented in light of the changing landscape and evolution of case management discussed herein.

- **Assess a case and its challenges at the outset. Use active and continuing judicial involvement when warranted to keep the parties and the case on track.** Utilize court staff and technology to right-size management of the cases. Cases with clear issues and fewer parties need a streamlined process with clear deadlines and communication to the parties. More complex cases will need more active judicial management from the judge through a case management conference and continued monitoring.

- **Convene an initial case management conference early in the life of the case. Discuss with the parties anticipated problems and issues, as well as deadlines for major case events.** Case management conferences are essential in complex cases at the state and federal level. Additional status conferences throughout the life of these types of cases will keep them on track and ensure problems are addressed early so as to reduce cost and delay.

- **Reduce and streamline motions practice to the extent appropriate and possible. Rule quickly on motions.**

- **Create a culture of collegiality and professionalism by being explicit and up front with lawyers about the court's expectations, and then holding the participants to them.** Where parties are self-represented, communication of court expectations are even more important, as are clear schedules and meaningful and intentional court interactions.

- **Explore settlement with the parties at an early stage and periodically throughout the pretrial process, where such conversations might benefit the parties and move the case toward resolution.**
**Enforce rules and expectations:** Expectations, rules, and deadlines lose meaning if they are not routinely and consistently enforced. If parties and attorneys question whether events will occur as scheduled or suspect that certain behaviors will be overlooked, at best, inefficiencies will result and, at worst, trust in the system will deteriorate.

While there is widespread consensus around the efficacy of these principles and techniques, there are still countless courtrooms in which these are not common practice. Some of the resistance to case management has come from judges who find this a less-than-desirable aspect of their position—a more ministerial and less judicial function. Case management, however, “is not a rote, mechanistic process. It is complex and sophisticated, calling upon experience, understanding of the issues and of the interrelationship of the parties in order to craft the best possible path to resolution for that case.”

Indeed, there is a part of civil case management that remains a core judicial function and that cannot be delegated or systematized. You might view this in terms of “strategic management”—a concept originating from seminal business management literature and industry leaders like Peter Drucker. According to Drucker, “management is not just passive, adaptive behavior; it means taking action to make the desired results come to pass.” Judges may have balked at this concept thinking that they had no desired results in the case—other than the application of the law. But, to the contrary, the desired result is a just, speedy, and efficient process that satisfies procedural fairness. To achieve that result, the judge has to be engaged. Applied to the justice system context, this is the process of identifying specific goals for a case, designing strategies to achieve these goals, and then implementing the strategies based on considerations of resources and the legal framework of the case. This is as core to the judicial function as ruling on the law. Judges routinely make high-level strategic decisions that drive all other aspects of case management and resolution: thinking through the process in light of the issues in a case, determining what discovery is proportional, deciding whether discovery should be phased, talking with the parties about what dispositive motions to file, etc. Judges (and because of their unique and special skill, judges alone) must be engaged in this aspect of the case strategy. Judges can think ahead several steps in the process—and plan accordingly. This type of high level strategy is at the heart of the value that high-level lawyers bring to their clients, and this strategy should be equally valued in our judges. This is particularly true for complex cases. Furthermore, the team approach to management, discussed above, “will free the judge to focus on tasks that require the unique expertise of a judicial officer, such as issuing decisions on dispositive motions and conducting evidentiary hearings, including bench and jury trials.”

---

120 Kauffman, supra note 68, at 13.


123 Call to Action, supra note 48, at 12.
Judicial education and leadership training can play an important role in empowering judges to engage in case management and implement proven practices in their courtroom. Particularly, early-stage training of new-to-the-bench judges can be valuable. “Start training on day one and never let up,” says Alexander B. Aikman, former Oregon Deputy State Court Administrator for Program Operations.\(^{124}\) Many commentators suggest that it is easier to train new judicial officers to do things in fundamentally different ways, because judges who are new to the bench do not enter the system with entrenched notions of judicial independence or habituated case management practices. Ongoing support and encouragement, however, is essential for cementing effective case management practices among new judges. According to former Utah State Court Administrator Dan Becker:

> What typically happens is judges go through training, get fired up, implement it in their courtroom, attorneys start complaining that this judge is treating them differently, and it fails to translate to other courtrooms. Judges get tired, they get relatively little in the way of reinforcement or support regarding what they are trying to do differently and they give up.\(^ {125}\)

Presiding judges can play an important role in fostering a widespread court culture across individual courtrooms, by leading by example or by having difficult conversations with less-active colleagues. Among Aikman’s recommendations for improving the management of cases is supporting and incentivizing presiding judges, through rules and otherwise, so they can help ensure case management is implemented in their courts.\(^ {126}\)

---

\(^{124}\) Telephone Conversation with Alexander Aikman, then-Independent Management Consultant (Jan. 27, 2017).

\(^{125}\) Telephone Conversation with Dan Becker, former State Court Administrator, Utah (Jan. 4, 2017).

Expansive Case Manager Skill Set

Much of the knowledge and skills that case managers in the health care and social work industries must possess are technical, specialized, and industry specific—for example, understanding of funding sources, healthcare delivery and financing systems, contractual health insurance or risk arrangements, clinical standards, human behavior dynamics, etc. As the health care industry’s understanding of patient care evolves, however, soft skills are becoming increasingly important in the case management field. The CMSA 2002 Standards lists primary case management functions that include many interpersonal, demeanor-based skills and concepts: positive relationship-building, effective written and verbal communication, attention to cultural competency, and ability to plan and organize effectively. These soft skills are equally critical for judges in their role as strategic case managers.

Data Is Essential to Effective Case Management

Understanding & Managing to a Court’s Landscape

The National Center for State Courts’ multijurisdictional Landscape study was instrumental in the CJI Committee’s work, providing an empirical and meaningful basis for understanding the problems about which the Committee could then shape its recommendations. Data collection is similarly important for individual courts, because only when the court fully understands the landscape of its civil docket and cases can it successfully manage to that landscape. A well-functioning, institutionalized case management system must be built from a comprehensive understanding of the jurisdiction’s caseload makeup. “Experience and research,” according to the CJI Committee, “tell us that one cannot manage what is unknown. Smart data collection is central to the effective administration of justice and can significantly improve decision making.”

127 Providers, too, have recognized the importance of these interpersonal skills and emotional intelligence indicators. Denise M. Kennedy et al., Improving the patient experience through communication skills building, 1 Patient Experience J. 56, 59 (2014). (“Many patients carry the burdens of illness, such as pain, disability, loss of control, and fear. They often take time away from work and family and incur significant expense to receive care. They have expectations of their doctors and prefer those who are forthright and thorough yet, at the same time, empathetic and humane. By cultivating their interpersonal and communication skills, as well as their technical skills, providers can help alleviate their patients’ burdens and help create the best possible patient experience.”).

128 CMSA 2016 Standards, supra note 85, at 8.

129 IAALS and NCSC included an Assessment step in the Roadmap to empower each state to first understand the volume and characteristics of civil case dockets across their state and identify areas of concern before tailoring and implementing the CJI Committee recommendations. Call to Action, supra note 48, at 4.

130 See CJI Committee’s Recommendation 10, which highlights the importance of collecting and publishing descriptive data and performance measures. Id. at 32.

131 Id. at 31.
This type of monitoring and measuring of actual performance is an essential aspect of case management.

Successful caseflow management requires that a court continually measure its actual performance against the expectations reflected in its standards and goals. Therefore, the court should regularly measure times to disposition and the size and age of its pending caseload as well as determine whether it is disposing of as many cases as are being filed, and assess the rates at which trials and other court events are being continued and rescheduled.\(^{132}\)

Understanding significant changes in case filings and types of dispositions are equally important given the changing landscape. This is not a static assessment. Circumstances within and outside the court system change rapidly; frequent assessments should drive management processes and performance goals in order to best meet the needs of litigants within a jurisdiction. Judge Kevin Burke, recounting advice given by preeminent court management consultant Dale Lefever, Ph.D., describes how good case management is like gardening: “Strategies that might have been very effective two or three years ago may no longer work. . . . You have to periodically take out the weeds.”\(^{133}\) Such continuous improvement processes, where there is an ongoing effort to evaluate and improve processes, must be informed by data.

Furthermore, with the rapid changes in the internal and external factors affecting court systems, we must change the way we think about data and evaluation. Thomas Clarke, Vice President of Research & Technology at NCSC, reminds us: “The rate of change is so fast that we can’t spend years evaluating a problem that will be three years old when we have a solution.”\(^{134}\) Rather than focusing on retrospective data collection, stakeholders must turn their sights to leveraging existing data to build prospective solutions. The focus should be on building a system for the next 20 years, not responding to improvements that were necessary over the last 20 years. We also need to increase the cycle at which we look at the landscape of our court system. At both the court level and system wide, we need to examine the landscape of our system frequently so as to monitor trends, anticipate issues, and keep apace of the rapid changes to the profile of cases in our courts and the profile of court users.

### Using Data to Support Transparency & Accountability

Not only is docket and case data important for driving internal court policies, it also plays an important role in influencing outward-facing policy decisions. Publishing performance data empowers courts to be proactive in facilitating transparency and accountability—both with other branches of government and with the public. Sometimes, the mere availability of court performance data has a positive impact on public trust and confidence.

Data can also have a reinforcing effect on systematizing case management. Under the Civil Justice Reform Act of 1990 ("CJRA"), the United States Administrative Office prepares a semiannual report, often referred to as the six month list, that includes—by U.S. district judge and magistrate—all motions pending for more than six months, all bench trials submitted more than six months, and all civil cases pending more than three years.\(^{135}\) The reporting requirements are intended to reduce cost and delay by highlighting those cases that reach these threshold levels, providing judges a “strong incentive to find ways to take control of and manage the cases that appear on their individual dockets.”\(^{136}\)

\(^{132}\) Steelman et al., supra note 7 at 83.

\(^{133}\) Telephone Conversation with Kevin Burke, Judge, Minnesota Judicial Branch (Jan. 11, 2017).

\(^{134}\) Telephone Conversation with Tom Clarke, Vice President of Research & Technology, National Center for State Courts (Jan. 27, 2017).


\(^{136}\) Steven S. Gensler, Judicial Case Management: Caught in the Crossfire, 60 DUKE L.J. 669, 675–76 (2010).
Collecting and sharing data can foster continuous improvement among individual judges and across entire court systems. Because the impact of transparency and the use of data to drive case management has been underdeveloped, this is an area where there is room for a lot of growth and impact, including transforming how we view data and how it can benefit the justice system. Attorneys are already beginning to embrace the role that data analysis can play on the practice side.\textsuperscript{137} Innovative courts have embraced the use of data as well. Some judicial performance evaluation programs utilize case management data as part of a broader-based assessment of judges’ on-the-job performance. Specifically, these programs focus on those elements of case management over which the judge has authority—for example, compliance with case-under-advisement time standards and time to rule on pending motions.\textsuperscript{138} According to Judge Abrams, “[t]he greater the shift from existing practice, there is an almost inverse relationship to its likelihood of being adopted. . . . In that crossover area in between, scalability will be based on empirical data or ease of implementation.”\textsuperscript{139}

\section*{Case Management In Non-Legal Contexts}

Informed by Evidence & Research

Data collection and evaluation appear to play a substantial role in case management in the health care and social work industries. The earliest definition of case management in the 1995 CMSA Standards “recognized the importance of the case managers basing their individual practice on valid research findings,”\textsuperscript{140} and this emphasis has persisted throughout the various iterations that followed.\textsuperscript{141} These provisions and others encourage case managers to “become active participants in advancing the art and science of case management.”\textsuperscript{142}

Furthermore, NASW Standard 9 states: “The social work case manager shall participate in ongoing, formal evaluation of her or his practice to maximize client well-being, assess appropriateness and effectiveness of services, ensure competence, and improve practice.”\textsuperscript{143} In this context, the Standards describe evaluation as obtaining feedback on the case management process and outcomes—especially, of course, from clients.

\begin{itemize}
\item \textsuperscript{137} Lex Machina Inc., a data analytics company, is one example. Lex Machina mines and analyzes publicly available data, such as data from the federal PACER (Public Access to Court Electronic Records) system, to enable lawyers to develop data-driven litigation strategies. See generally https://lexmachina.com.
\item \textsuperscript{139} Telephone Conversation with Jerome Abrams, Judge, Minnesota Judicial Branch (Jan. 5, 2017).
\item \textsuperscript{140} Id.
\item \textsuperscript{141} The CMSA Standards of Practice for Case Management suggest this principle can be demonstrated in practice in a variety of ways. CMSA 2016 Standards, supra note 85, at 30. (“Incorporation of current and relevant research findings into one’s practice, including policies, procedures, care protocols or guidelines, and workflow processes, and as applicable to the care setting. Efficient retrieval and appraisal of research evidence that is pertinent to one’s practice and client population served …. Participation in research activities which support quantification and definition of valid and reliable outcomes, especially those that demonstrate the value of case management services and their impact on the individual client and population health. Identification and evaluation of best practices and innovative case management interventions. Leveraging opportunities in the employment setting to conduct innovative performance improvement projects and formally report on their results.”).
\item \textsuperscript{142} Comm’n for Case Manager Certification, Measuring Care Coordination: Validated tools for an evolving environment, 5 Issue Brief 5 (2014).
\item \textsuperscript{143} NASW Standards, supra note 76, at 42.
\end{itemize}
CONCLUSION

A central, and unfortunate, theme that emerges from our high-level conversations with diverse justice system experts is that case management has not yet become sufficiently embedded in court processes or in the system more broadly. Commentators recount decades of recurring conversations and recycled efforts that centered on the same recommendations that courts and stakeholders are discussing today. If case management is to gain widespread adoption and impact in our court system, we need to transform how we think about this concept. Then we need to make changes on the ground. We present a vision of a system where the court, writ large, recognizes its role and embraces it fully, taking overarching responsibility for the delivery of justice. Case management must also be expanded from a court-centric business management tool to a system in which the end user is the ultimate recipient and beneficiary. The paradigm shift will happen when management of civil cases is woven into the fabric of our legal system, from judicial chambers to the user experience. Current pressures and opportunities in our system are creating an opportunity for this shift to occur. In short, the time is now.

New strategies are helping courts integrate and anchor case management. A team approach, systematization in tandem with high-level strategic management, and the use of data could be transformative. It bears mentioning that anchoring case management within and across courtrooms does not mean implementing rigid processes and systems. The world is evolving at a fast pace, and the needs of litigants and the court will necessarily evolve in tandem. Courts must be prepared, and this means that court systems must be flexible and designed for continuous improvement. Courts must consider staffing, technology, and the use of data in this design. Attorneys and other legal service providers must rethink their own role in case management if they are to be true partners in achieving a “just, speedy, and inexpensive” system for those who turn to and rely on the courts for dispute resolution. Strategies that may have been effective a few years ago—or even those that are effective today—may not work in coming years. As Dan Becker points out, courts can no longer “force the realities of today’s work into yesterday’s practices and procedures.”

144 Telephone Conversation with Dan Becker, former State Court Administrator, Utah (Jan. 4, 2017).
WORKING SMARTER NOT HARDER
HOW EXCELLENT JUDGES MANAGE CASES

streamline

collaborate

convene

https://iaals.du.edu/publications/working-smarter-not-harder-how-excellent-judges-manage-cases
Since Chief Justice Warren Burger convened the Williamsburg conference in 1971 to address serious problems of backlog and inefficiency in U.S. courts, study after study has confirmed that judicial case management is the answer. Cases resolve in less time, at lower cost, and often with better results when judges manage them actively.

This short publication provides insightful, hands-on advice from trial judges who are excellent case managers. Reading it will improve the performance of any trial judge.

- Judge David G. Campbell (D. Ariz.)
January 2014

For reprint permission please contact IAALS.

Copyright © 2014 IAALS, the Institute for the Advancement of the American Legal System.

All rights reserved.
Rule One is an initiative of IAALS dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system. Through comprehensive analysis of existing practices and the collaborative development of recommended models, the Rule One Initiative empowers, encourages, and enables continuous improvement in the civil justice process.
The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years’ experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.
ACKNOWLEDGEMENTS

IAALS and the American College of Trial Lawyers gratefully acknowledge the assistance of the Foundation of the American College of Trial Lawyers, which provided financial assistance for the publication and distribution of this report. The Foundation is dedicated to the improvement in the quality of trial and appellate advocacy, the ethics of our profession, and the administration of justice.

IAALS and the ACTL would also like to thank the judges who participated in this study for taking the time to share insights, and to the many Fellows of the American College who were instrumental in facilitating this study. Appendix C contains a complete listing of participating judges and the ACTL Fellows who interviewed them.
# Table of Contents

Executive Summary .................................................... 1
Introduction .............................................................. 3
Background .............................................................. 5
Themes & Recommendations ........................................... 6

**Theme One** —
Assess a case and its challenges at the outset. Use active and continuing judicial involvement when warranted to keep the parties and the case on track .......... 7

**Theme Two** —
Convene an initial case management conference early in the life of the case. Discuss with the parties anticipated problems and issues, as well as deadlines for major case events .................................................... 10

A. Be prepared to facilitate meaningful discussion among the parties at an early stage in the case .................................................... 10
B. Encourage and assist parties in prioritizing and streamlining discovery .................................................... 12
   1. Alternative Approaches to Discovery .................................................... 13
   2. Presumptive Limits .................................................... 14
   3. Disputes .................................................... 15
C. Set the trial date or trial month early in the life of a case. Do not deviate from this date except in extraordinary circumstances .................................................... 16
   1. Trial Continuances .................................................... 17
   2. Impact of Firm, Fixed Dates .................................................... 18
D. In collaboration with the parties, work backwards from the trial date to set meaningful and firm deadlines for pretrial events in the case, in order to make the pretrial process more efficient .................................................... 19
   1. Working with the Parties .................................................... 19

**Theme Three** —
Reduce and streamline motions practice to the extent appropriate and possible. Rule quickly on motions .................................................... 21

A. Oral Argument .................................................... 21
B. Ruling Quickly .................................................... 22
C. Streamlining Motion Practice Significantly .................................................... 23

**Theme Four** —
Create a culture of collegiality and professionalism by being explicit and up front with lawyers about the court's expectations, and then holding the participants to them .......... 27

A. Sanctions .................................................... 29

**Theme Five** —
Explore settlement with the parties at an early stage and periodically throughout the pretrial process, where such conversations might benefit the parties and move the case toward resolution .................................................... 30

**Conclusion** .................................................... 31

***Appendices*** .................................................... 32

A. Methodology .................................................... 33
B. Interview Guide .................................................... 34
C. Interview List .................................................... 37
D. Discussion Topics for Initial Status/Case Management Conference .................................................... 38
EXECUTIVE SUMMARY

In 2012, the American College of Trial Lawyers ("ACTL") Task Force on Discovery and Civil Justice, the ACTL Judiciary Committee, ACTL Jury Committee, ACTL Special Problems in the Administration of Justice Committee, and IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, undertook a study on practices and methods for pretrial management of civil cases that might reduce cost and delays for litigants while saving judicial time and resources. This report is based on personal interviews with approximately 30 state and federal trial court judges, from diverse jurisdictions across the country, who were identified as being outstanding case managers and whose civil case management experience can serve as a model for others.

Five general themes emerged from the interviews, with numerous specific practices and techniques discussed further in the report.

Assess a case and its challenges at the outset. Use active and continuing judicial involvement when warranted to keep the parties and the case on track. There was strong consensus among the judges interviewed that becoming involved at the earliest stage of a case is critical. Some judges review cases as soon as they are assigned. Others hold off until the time of the initial case management or Rule 16 conference. Virtually all interviewed judges, however, agreed that a small expenditure of time at the very beginning of a case saves significantly more time as the case progresses.

Convene an initial case management conference early in the life of the case. Discuss with the parties anticipated problems and issues, as well as deadlines for major case events. Initial conferences provide a valuable opportunity for judges to get a feel for the relative complexity of the case and the relationships among the parties and their counsel. By spending time in advance familiarizing themselves with the pleadings, judges can establish priorities for discovery. By obtaining input from counsel about the realistic timing for trial and for various pretrial events—such as amendment of pleadings, joinder of additional parties, discovery cutoffs, and expert disclosures—judges can establish a firm trial date and work backwards to set necessary pretrial deadlines that will assist in moving the case forward expeditiously. By limiting continuances to serious and unanticipated circumstances, judges can work toward meaningful and timely resolution in processing the case.

Reduce and streamline motions practice to the extent appropriate and possible. Rule quickly on motions. The judges emphasized that motions practice drives cost and delay in the civil pretrial process. Many judges aim to resolve motions, especially discovery disputes, informally. This obviates the need for written submissions and focuses on oral presentations. The judges
interviewed also overwhelmingly believe that prompt rulings on motions, including those announced from the bench, can dramatically expedite progress in cases, reduce litigants’ expenses, save judicial time and resources, and enhance ultimate resolution.

Create a culture of collegiality and professionalism by being explicit and up front with lawyers about the court’s expectations, and then holding the participants to them. Interviewed judges universally recognized the importance of collegiality and professionalism among counsel. Most judges interviewed make their expectations of civility explicit during the initial discussions with counsel in the pretrial process.

Explore settlement with the parties at an early stage and periodically throughout the pretrial process, where such conversations might benefit the parties and move the case toward resolution. Keeping the subject of settlement on the table expedites resolution, and periodically opening the topic for discussion may give lawyers the cover needed, with clients and opposing counsel, to avoid the appearance of negotiating from a position of weakness.

The collective experience of these judges suggests several techniques that—used individually or together—can expedite resolution of cases with lower cost to litigants and courts. The ACTL and IAALS offer this report to share successful practices, and hope the report will spark further use of these and other practices to better serve litigants, lawyers, and the court.

This report is primarily designed to provide civil trial court judges with proven techniques used by outstanding judges for more efficient pretrial case management. Nonetheless, trial lawyers may also choose to encourage adoption of these recommendations for use in cases they are handling, in order to decrease the delays and costs of today’s litigation.

early + active = efficiency
INTRODUCTION

Since 1938, the Federal Rules of Civil Procedure's Rule 1 has set forth an overriding mandate that the rules be construed to “secure a just, speedy, and inexpensive determination of every action and proceeding.”¹ Beginning in the early 1980s, the affirmative duty of the court to ensure a just, speedy, and inexpensive determination of every action began to be reflected in amendments to Rules 16 and 26, empowering federal judges to monitor and control pretrial processes to minimize cost and delay. The Advisory Committee's notes to the 1983 amendments to Rule 16 acknowledged:

Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.²

The 1983 amendments to Rule 26 also contemplate “greater judicial involvement in the discovery process and thus acknowledge[,] the reality that it cannot always operate on a self-regulating basis.”³ A set of 1993 amendments positioned the court with “broader discretion to impose additional restrictions on the scope and extent of discovery”⁴ and further clarified Rule 1’s mandate by recognizing an affirmative duty of the court to “exercise the authority conferred by [the] rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay.”⁵ After this amendment, Rule 1 not only required that the rules be construed to secure a just, speedy, and inexpensive determination, but also that they should be administered in such a manner.

Today, judges and lawyers alike recognize active judicial management as a tool for combatting problems of excessive cost and delay in civil litigation.⁶ Further, the benefits of active case management are not limited to federal judges and courts. They also extend to state judges and courts. Currently, in courts of various types across the country,

⁶ See, e.g., Steven S. Gensler & Lee H. Rosenthal, The Reappearing Judge, 61 U. Kan. L. Rev. 849-75 (2013); Corina Gerety, Inst. for the Advancement of the Am. Legal Sys., Excess and Access: Consensus on the American Civil Justice Landscape 14-15 (2011) (showing agreement with the following judicial management propositions: 1) intervention by judges or magistrate judges early in the case helps to narrow the issues; 2) intervention by judges or magistrate judges early in the case helps to limit discovery; and 3) when a judicial officer gets involved early in a case and stays involved until completion, the results are more satisfactory to the litigants).
rules amendments and pilot projects addressing the issue of cost and delay typically incorporate, as an essential component, provisions requiring early and active judicial involvement.\footnote{See generally Inst. for the Advancement of the Am. Legal Sys., Rule One Initiative – Implementation, http://iaals.du.edu/initiatives/rule-one-initiative/implementation (last visited Dec. 20, 2013).}

Civil trial judges in state and federal courts across the country daily engage in the pretrial process to keep cost and delay in check while providing a just resolution for the parties. Too often, however, successful civil pretrial case management practices may remain within the four walls of the judge’s chambers. Because state and federal court judges can be isolated, information sharing on case management techniques can be constrained. Judge Curtis E.A. Karnow (Cal. Sup. Ct.) describes the problem:

> One of the problems of being a judge—and it is very serious—is that for the first time, you stop watching what other judges are doing because you don’t have time and aren’t wandering into each other’s courtrooms. There are not enough opportunities for judges to learn from each other or learn what is going on in other jurisdictions.\footnote{Unless otherwise noted, all quotations were taken from interview notes, on file with authors.}

BACKGROUND

IAALS and the ACTL first began working together in 2007 to explore aspects of the civil justice system that might have an impact on pretrial cost and delay, including case management. This partnership led to a number of recommendations for reform of the civil justice system, prompting experimental pilot projects and rules changes in jurisdictions across the country. In 2012, IAALS and the ACTL undertook a new qualitative study of pretrial civil case management in state and federal courts to facilitate the sharing of information on civil case management practices and to supplement the empirical data that is emerging from various pilot project jurisdictions. Using the recommendations and resources of experienced trial lawyers who are ACTL Fellows, the ACTL and IAALS identified approximately 30 trial court judges across the country—recognized as being outstanding case managers by lawyers who appear before them—whose civil case management experience could serve as a model for others. These state and federal judges are individuals who understand the court environment and corresponding pressures under which judicial officers operate. The study’s methodology is described in detail in Appendix A. The interview guide and list of judges interviewed are set forth in Appendices B and C, respectively.

12 IAALS and the ACTL are more fully identified in the organizational descriptions immediately prior to the table of contents of this report.

THEMES & RECOMMENDATIONS

In the interviews, a number of overlaps emerged with respect to the civil pretrial case management practices of a diverse group of judges: judges from state and federal court, judges with low- and high-volume dockets, judges in single assignment and master calendar districts, and judges with a variety of professional experiences. This section details the broad themes that emerged from the conversations, along with recommended practices and procedures that the interviewed judges commonly cited:

• Assess a case and its challenges at the outset. Use active and continuing judicial involvement when warranted to keep the parties and the case on track.

• Convene an initial case management conference early in the life of the case. Discuss with the parties anticipated problems and issues, as well as deadlines for major case events.

• Reduce and streamline motions practice to the extent appropriate and possible. Rule quickly on motions.

• Create a culture of collegiality and professionalism by being explicit and up front with attorneys about the court’s expectations, and then holding the participants to them.

• Explore settlement with the parties at an early stage and periodically throughout the pretrial process, where such conversations might benefit the parties and move the case toward resolution.

In addition to exploring these themes, in the sections that follow we also identify subthemes and, where relevant, areas of divergence among the interviewees. Given the qualitative nature of this study, we did not explore the themes and recommendations from a quantitative standpoint and make no claims as to their scope in that respect. Further, because of the limited number of interview subjects, we do not represent these recommendations as proven best practices for all courts. They do represent the best practices of the judges with whom we spoke. Nevertheless, their common use by various judges who have been recognized and applauded as effective case managers lends credence to the recommendations.
There was strong consensus among the interviewed state and federal trial judges that becoming involved at a very early stage in the life of a case is a critical case management practice that can save substantial amounts of time later. Judge Mark I. Bernstein’s (Pa. Ct. Com. Pl.) overarching recommendation for saving judicial time in the pretrial processing of civil cases is to expend judicial time by being available to ensure that every step in the case management process is meaningful. Judge David S. Prince (Colo. Dist. Ct.) related that “high-touch, early-on management in the first few months makes all the difference.” Since he first began applying this approach to his civil docket, he reports reducing his caseload by 20 to 30 percent. He further estimates that taking a little time at the beginning in all cases reduces the time he has to spend on dispositive motions and discovery by approximately 90 and 70 percent, respectively.

For a number of the judges interviewed, this early management begins almost immediately. Recognizing that complex cases are often harder to get moving than less complex cases, Judge Thomas K. Kane (Colo. Dist. Ct.) reviews complaints as soon as they are filed. If anything stands out as complex at this initial stage, he quickly focuses on the particular needs of the case. Similarly, Chief Judge Michael P. McCuskey (C.D. Ill.) assesses the complexity of the case, and he then assigns the case to a particular schedule/track even before consulting with the lawyers—sometimes before the answer is filed—in order to get a schedule in place as soon as the parties are reasonably ready to answer. Judge Jack Zouhary (N.D. Ohio) looks at the complaint as soon as it appears on the docket (also sometimes before an answer is filed) in order to make an initial assessment as to the anticipated demands of the case and what should be done next. He admits it takes time but has found that “time spent up front greatly reduces time later in the life of the case.” It has also been his experience that “when you know how to handle that case, you can handle it more efficiently down the road.” Chief Judge Roxanne Bailin (Colo. Dist. Ct.), who believes in exerting control early on and maintaining a high level of supervision for cases throughout the pretrial process, also begins monitoring cases the day they are filed to ensure that no more than 60 days pass before one or more parties is required to take action.

Two common, interrelated concepts emerged in this area. First, these judges “triage” a case at the outset to make an initial determination of how much judicial involvement may be required. According to Judge Kathy M. Flanagan (Ill. Cir. Ct.), who is Supervising Judge of the court’s Motion Section, “what we are doing mostly on case management days is a triage function.” Judge Karnow relates the triage function to determining the “signal-to-noise ratio,” a measure used in science and engineering that compares the levels of a desired signal to the level of background noise. Judge Karnow triages cases as well, noting that “80 percent of what a judge does is to clear the decks to focus on the
20 percent of cases that really need attention.” To Judge Phyllis J. Hamilton (N.D. Cal.), pretrial case management in civil litigation is about finding a balance between the interests she is trying to serve: the parties’ interest in a quick and inexpensive resolution and the court’s interest in conserving judicial time and resources.

The second concept is that pretrial case management in civil litigation is not a one-size-fits-all proposition; rather, the tools used during pretrial case management should be tailored to the specific circumstances of a case. In this respect, an early triage process becomes particularly important in order to determine the likely progression of a case. According to Judge Zouhary:

Each case requires different attention from the judge or the judge’s staff. So it’s important that the judge and his chambers, when the case first hits the docket, make an initial assessment and prioritize according to what they believe the demands of the case will be.

According to Chief Judge Steven J. McAuliffe, in the U.S. District Court for the District of New Hampshire, the judges in his district keep the human element in mind when thinking about case management: “Our view is that litigation ought to be treated as real disputes between real people that deserve real attention.” Judge McAuliffe does not believe in “assembly line types of processes that reduce cases to statements and involuntarily move them along and everything is arbitrary.” Also steering away from a one-size-fits-all process, Judge John P. O’Donnell (Ohio Ct. Com. Pl.) describes his approach as follows:

Know the case, rely on the lawyers and parties not to dictate the pace at which a case will move—certainly the court reserves that prerogative—but to reasonably and accurately inform the court with respect to what is needed in that case, and proceed based on that information, not on some standard pretrial order that doesn’t vary from case to case.

Requiring cases to be processed within the confines of a one-size-fits-all order, says Judge O’Donnell, runs the risk of “forcing parties to expend time and effort getting ready for a trial that they never needed and maybe in their hearts never wanted.”

From the perspective of many judges, tailored judicial management is not synonymous with intensive judicial management. In fact, most cases do not end up requiring much, if any, judicial involvement during the course of the pretrial process. For Judge Zouhary, “[a]ctive judicial management means ‘hands off’ in those cases where experienced lawyers are able to work together professionally, and ‘hands on’ when they or their clients are misbehaving.”

---

The most precious asset today is time and attention. If you don’t explain to attorneys that you are available, they never know to call. — Judge David S. Prince (Colo. Dist. Ct.)

Kenneth R. McHugh (N.H. Super. Ct.) relates that “if two lawyers get along and discovery proceeds without real difficulty, many times I only see them twice—when they fill out the case scheduling form and a year later at the trial management conference.”

A few of the judges suggested that a key part of balancing limited judicial resources and active judicial management during the pretrial process is as simple as being available and accessible to lawyers when certain aspects of the case begin falling off the tracks. One of Judge Robert L. McGahey, Jr.’s (Colo. Dist. Ct.) goals is to show lawyers he is available and interested in seeing them. Judge Joseph R. Slichts, III (Del. Super. Ct.) has found that “an important part of the court’s case management process is being accessible—once attorneys launch, they are gone and we assume everything is fine unless we hear otherwise.” His perspective is that “just being attentive to the particular circumstances of the case promotes efficiencies.” According to Judge Prince, “the most precious asset today is time and attention. If you don’t explain to attorneys that you are available, they never know to call.”

The interviews highlighted a role for technology and case tracking systems (where available) in assisting judges to streamline active pretrial case management in both federal and state courts. Judge Zouhary supplements the district-provided monthly caseload report with a decisional list his staff generates that contains all the pending motions on his docket. This list allows him and his staff to assess and prioritize the resolution of pending motions. Similarly, Judge R. Brooke Jackson (D. Colo.) finds use in the automatically generated six-month-motion list, which allows him to identify and prioritize older motions. Judge Margaret M. Morrow’s (C.D. Cal.) staff has recently developed an electronic case alert tickler system, calculating and listing all pending dates and deadlines in her civil cases. She finds this to be a valuable way in which to track individual deadlines. Although electronic case tracking systems seem to be robust in the federal courts, a few state court judges similarly find their system useful as a case management tool. Judge Bailin described a sophisticated tracking system in Boulder County District Court, which flags items for judicial review and can automatically generate certain orders—for example, if service does not occur or an answer is not served within a particular period of time, the system will automatically generate a delay reduction order directing the plaintiff to take action within 30 days. She reports that much of the case management goes on automatically because of this system. Few other state court judges, however, reported having such a system.
THEME TWO

Convene an initial case management conference early in the life of the case. Discuss with the parties anticipated problems and issues, as well as deadlines for major case events.

A. BE PREPARED TO FACILITATE MEANINGFUL DISCUSSION AMONG THE PARTIES AT AN EARLY STAGE IN THE CASE.

Consistent with the broad theme of early and active case management, many judges move quickly after the case appears on the docket to schedule an initial case management (or analogous) conference. Judge Brett M. Spencer (Ohio Ct. Com. Pl.) schedules his pretrial conference after the complaint is filed and service is effected in order to “keep the case on the front of the attorneys’ desk.” According to Judge McGahey, who has case management conferences early in every case: “I believe that I need to be proactive, not reactive, on case management.” Writing from the perspective of federal practice in The Reappearing Judge, U.S. District Court Judge Lee Rosenthal (S.D. Tex.) and co-author Professor Steven Gensler posit that the initial Rule 16 conference is not just the first opportunity for a judge to interact with lawyers, it is the most important.15

Perhaps not surprisingly, many of the interviewed judges cited preparation as a significant component of the initial pretrial conference. Judge Barbara A. Zúñiga (Cal. Super. Ct.) emphasizes preparation above all else: “I think attorneys appreciate judges who are prepared and know the facts in their case.” She reviews the case file before the case management conference and can usually get a feel for whether mediation would be beneficial and/or whether to anticipate subsequent motions practice. Prior to the case management conference, she will routinely run a case number through the court’s case management system to see whether there are pending motions about which counsel have not told her. Where there are, she will reschedule the conference accordingly.

For Judge Slights, “sequencing things is more meaningful if you have some basic understanding of what the case is about.” To increase his understanding of the case and to facilitate substantive discussion, Judge Zouhary requires the parties to have made their Rule 26(a) disclosures before the initial case management conference. In Ten Commandments for Effective Case Management, he explains: “These disclosures cannot be superficial. Each side’s cards are laid out on the table. This allows for more realistic input into scheduling dates and it also minimizes litigation expense by avoiding ritualistic or form discovery requests.”16 Judge McHugh receives written summary statements from each side before the case management conference. These statements are more detailed than the general allegations in the

15 Gensler & Rosenthal, supra note 6, at 857.
16 Zouhary, supra note 14, at 38.
pleadings and reviewing these statements often triggers issues that he can then discuss thoughtfully with parties during the conference.

In addition to being prepared, Chief Judge Robert S. Hyatt (Colo. Dist. Ct.) expressed the importance of having an agenda and structure: “Case management conferences require that you have a format—you don’t show up and all start talking at once.” All of the issues that Judge Karnow addresses with parties at the initial case management conference stem from a fundamental question: “What is stopping me from setting the trial date today?” In Appendix D, the authors offer readers a list of possible topics to be discussed at an initial status/case management conference.17

With respect to whether the initial case management conference should be held in person or over the telephone, the judges interviewed were split, generally speaking, between state and federal court judges. Those judges who frequently hold telephonic case management conferences, often federal court judges who routinely deal with out-of-state or otherwise remote lawyers, generally cited cost-efficiencies as the reason for this practice. “I think a judge needs to know when something can be done in person and when you can save time and money and do it by phone,” says Judge Patricia A. Gaughan (N.D. Ohio). An individual judge’s practice with respect to conference format, therefore, is reasonably dictated by the bench on which the judge sits and the geography of the judge’s jurisdiction.

Interviewed judges who preferred that case management conferences be in person—at least the initial conference—primarily do so in order to get impressions about the parties, issues, and potential hang-ups in the case. Judges expressed this aim in a variety of ways:

I have a strong sense that in every case, big or small, the first case management conference should be done in person. I want to look everyone in the eye and get a sense of how I’m going to deal with this case. I think you lose that by phone.
– Judge Hyatt

The vast majority [of case management conferences] are in person and that is my personal preference. I like to look lawyers in the face and for them to look at me when they talk to me. It’s a lot more difficult to avoid candor to the court when you have to look at the court when you’re doing it.
– Judge McGahey

17 While this document has not been prepared or used by the judges interviewed, it includes topics mentioned by various interviewed judges.
Ninety percent of these [case management] conferences are in person. The threat of coming in and looking face-to-face means to me that someone is going to take the time beforehand to read the file, know the claims, and be better prepared to discuss discovery issues, or ultimately settlement.

– Judge McHugh

I like to be able to reach out and touch the attorneys. It’s too easy for attorneys to slough things off if they aren’t talking to you in person. I also like to watch body language.

– Judge Zúñiga

Judge Hamilton, who described herself as initially open-minded about telephone conferences in lieu of personal appearances, has changed her view of that practice since being on the bench. She now requires a personal appearance for every initial case management conference in order to set the tone, figure out the nature of counsel’s relationship, and convey her expectations to them. Whether in person or on the phone, Judge Morrow emphasizes the importance of talking to lawyers who are knowledgeable about the case and have the ability and authority to make decisions about the case.

Judge Jackson, who was a state district court judge before moving to the federal bench, goes beyond discussing procedural matters during his scheduling conference. He will often go off the record at the conclusion of the conference and ask counsel to tell him more about who they are from a professional and personal standpoint. According to Judge Jackson, doing so “is a way of getting to know them on a more personal basis and, at the same time, giving them an opportunity to get to know one another a little better.”

B. ENCOURAGE AND ASSIST PARTIES IN PRIORITIZING AND STREAMLINING DISCOVERY.

From her perspective of having been on the bench for 24 years, Judge Flanagan notes that:

The downside of civil litigation is that nearly every case now is over-discovered. Discovery has become the process in and of itself, and we have become so subsumed with investing money to discover things. I like to approach case management by trying to make lawyers think through “Is this necessary?” and “Can we prioritize based on what you really need instead of what you might want?”

Others agreed. According to Judge Karnow, “discovery management is extremely important because, as we all know, we are spending most of our money as lawyers on discovery.” He describes the general challenge as limiting
discovery and getting people to focus on what they need to do to get to the next stage.

Many judges use case management conferences as an opportunity to discuss the discovery process and potential hurdles or, as Judge Kane frames it, to “advance problem-solve” discovery issues. The case management conference is one of at least two occasions on which Judge Morrow discusses discovery with the lawyers, particularly emphasizing this discussion where the discovery plan set forth in the parties’ Rule 26(f) report seems disproportionate to the stakes. The second occasion is during a telephone conference that she schedules approximately 30 days before the cut-off of fact discovery. Many of those interviewed acknowledged that the ability to discuss discovery meaningfully can be constrained at the early stages of a case, but nevertheless emphasized the importance of an early case management conference. As Professor Gensler and Judge Rosenthal point out, “judges can, with the parties’ help, identify the areas where discovery should begin, focusing discovery on the core issues and targeting the best sources. In many cases, the parties will find that is all they need.”

Judge O’Donnell’s approach is to be generally aware of what the status of discovery is at any given moment and what the next steps in discovery will be. As he explains, “often there is a minimum, so to speak, of discovery that has to be done before one or the other side is willing to get realistic about settlement.” Staying apprised of the process helps him identify that point.

1. Alternative Approaches to Discovery

A number of judges raised the issue of targeted discovery. Judge Matthew F. Kennelly (N.D. Ill.) suggests that parties should identify focused areas of discovery needed to make an intelligent settlement proposal and defer other discovery. Where it appears that one claim is really driving the case, the disposition of which would likely resolve the entire dispute, Judge Sights has encouraged parties to conduct limited discovery related to that claim for purposes of a dispositive motion hearing. The understanding is that if this targeted discovery does not resolve the case, he will enter an order with new deadlines through trial. Judge Mary A. McLaughlin (E.D. Pa.) will ask parties to think hard about conducting limited discovery in certain area(s) where she feels doing so would move the case along or resolve it completely. “I’m completely open to structuring discovery in a way that makes sense,” she says.

Judge Prince describes the importance of defining a “critical path” forward. If lawyers are able to define this path, everything else falls into place. This path, however, may not necessarily look like the standard pretrial process. For example, in a personal injury case, he may ask the lawyers whether the key

18 Gensler & Rosenthal, supra note 6, at 860 (citations omitted).
issue is likely to be liability or damages and will then ask parties to focus their initial discovery on that issue. Judge Karnow will encourage parties to bifurcate the legal issues, which he can then decide at an early stage. He then instructs the parties to conduct discovery needed to allow resolution of the legal issues arising from the factual disputes before full discovery of the factual issues on the merits.

In some situations, Judge Flanagan will ask parties to formulate a schedule for the three most important witnesses, telling them to start with those depositions and afterward reassess what they will need. Sometimes parties will obtain what they want after this first tier and there is little reason to continue on to additional discovery. Similarly, Judge Zouhary has been using phased and targeted discovery more frequently of late. He has found that, afterward, parties are more intelligent about the case and have gone about it in a way that is reasonable and takes into account the cost of litigation.

Some judges raised a related concept: phased discovery. For example, in Judge Flanagan’s courtroom, discovery management is phased according to a case’s timeline and each phase closes before another begins. She explains that “progressing a case in phases and having them close before you go to the next phase forces people to analyze where they are so far, and they can then make a decision as to where they want to go and in what direction.” In Judge O’Donnell’s experience, some cases seem to identify themselves within the first two to five months of filing as cases where discovery should be phased. In such cases, he confers with the lawyers to determine a reasonable time for completing each phase.

2. Presumptive Limits

The judges were split on the issue of placing presumptive limits on parties’ discovery, beyond those contained in the rule. Judge Kane frequently limits the length of lay and expert depositions, and he largely views interrogatories as “an opportunity for lawyers to put opponents to expense for no good reason.” As a general matter, Judge Jackson suggests that there is no place for instructions and definitions in a set of interrogatories. Similarly, he says, there is no place in responses for a lengthy set of general objections.

The majority of those interviewed, however, tended to disfavor presumptive limits. In discussing potential discovery limitations, Judge Bailin asks parties to think things through and justify their discovery needs. In many instances, she says, parties won’t do this until they begin trial preparation, when they must focus on which issues actually need to be tried. Her hope is to get lawyers to ask themselves at an earlier stage: “If I were in trial six months from now, what would I need to have and know in order to properly proceed?” The Default Standards for Discovery, Including Discovery of Electronically Stored Information
in place in Judge Leonard P. Stark’s (D. Del.) court provide the following instructions to lawyers about weighing their
discovery needs:

   Parties are expected to use reasonable, good faith and proportional efforts to preserve, identify and
   produce relevant information. This includes identifying appropriate limits to discovery, including
   limits on custodians, identification of relevant subject matter, time periods for discovery and other
   parameters to limit and guide preservation and discovery issues.19

3. DISPUTES

An important aspect of streamlining the discovery process is assisting parties with discovery disputes.20 Generally
speaking, interviewed judges advocated for a hands-on approach during the dispute process. Judge McLaughlin
is personally involved in almost every aspect of the pretrial process, including discovery disputes. “I really think
that discovery disputes are important,” she says, and “you learn a lot about the lawyers and the case.” According to
Chancellor Leo E. Strine, Jr. (Del. Ch. Ct.), the key in his court “is the total connection between the judge who will
handle the case and the discovery.”

Chancellor Strine also suggested that involving senior counsel in discovery matters had the effect of resolving most
disputes. “In my experience,” he says, “if I require senior lawyers to meet and confer before they bring the dispute
to the court, it gets worked out.”21 Similarly, Vice Chancellor J. Travis Laster (Del. Ch. Ct.) recognizes the positive
impact on the degree of cooperation in a case when senior lawyers are involved, and he suggests senior members of
the bar play a key role in fostering collegiality. The Guidelines on Best Practices for Litigating Cases before the Court
of Chancery suggest that good-faith discussion among all lawyers is fundamental during the collection and review
of documents in discovery:

   The goose and gander rule is typically a good starting point for constructive discovery solutions.
   Through good faith discussion, the parties will better understand the basis for each other’s production
   of privileged documents, reduce disputes based on misunderstandings, and foster a more efficient
   production process.22

One technique Judge Kennelly has used, in the small number of cases where he encounters chronic problems in the
discovery process, is to require discovery motions be signed and argued in court by lead counsel.

---

20 See infra Section C for a discussion of the perspectives on and procedures for reducing and streamlining motion practice relating to
discovery.
21 The requirement that parties meet and confer in a good-faith attempt to resolve discovery disputes is a part of the court rules in many of
the judges’ jurisdictions.
22 Del. Court of Chancery, Guidelines to Help Lawyers Practicing in the Court of Chancery § II.7(b)(viii) (Jan. 13, 2012),
C. SET THE TRIAL DATE OR TRIAL MONTH EARLY IN THE LIFE OF A CASE. DO NOT DEViate FROM THIS DATE EXCEPT IN EXTRAORDINARY CIRCUMSTANCES.

According to Judge Zouhary, the best case management technique is “a firm trial date and a ready judge.” Many of the judges shared this perspective; in fact, one of the most common practices that interviewed judges cited is an early setting of the trial date. A firm trial setting more often than not accompanies this practice. Judge Karnow, who sets the trial date as early as he possibly can, says “being aggressive and firm on dates is the way to do it.” He explains, “I will never change it, unless a new party comes in and needs some time, but if that has been foreseeable, I still might not change the date.” Judge Thomas L. Hogan (Ill. Cir. Ct.) tries to get parties to commit to a trial date during the first case management conference, which is generally held within 14 days of assignment. He admits he is not always successful but, when he is, he has found that the setting of a trial date forces everyone to be a lot more disciplined in their approach. Judge McGahey’s standard pretrial order requires that cases must be set for trial no later than 28 days after the case is at issue. Many judges who set the trial date early recognize a need to set multiple trials on any given date, in recognition of the reality that over 90 percent of cases settle before trial.

In most cases Judge Hamilton imposes a firm trial date at the initial case management conference, but there is a subset of cases in which she has found it prudent to hold off. For example, in Employee Retirement Income Security Act cases, she might only set dates for discovery and dispositive motions, given that many of these cases are decided on cross-motions for summary judgment. In class actions, she initially sets the class certification date because without certification a trial would look much different. In recognition that it is not always realistic to select a definitive date at the first conference, Judge Zouhary gives parties a trial month that is agreed upon by all. Similarly, the pretrial protocol used by Judge John E. Jones, III (M.D. Pa.) requires counsel to select a trial month, with a later decision regarding a specific date.

Instead of selecting a date or month at the outset, a few of the judges work with parties to set a trial date later in the pretrial process, accounting for the fact that most cases settle before trial. For example, Judge Kennelly will not set a trial date in every case at the beginning, reserving such action for cases he predicts will actually go to trial. Typically, he begins setting dates with parties around the time dispositive motions are filed or after he has denied them, at which point he can gauge whether there is a realistic chance the case will be tried. “I want to know it’s a firm date; I want to be able to plan; and from the lawyers’ standpoint, it’s disruptive to people in practice to set trial dates that aren’t firm trial dates.” Similarly, Judge McLaughlin schedules a telephone call at the end of the discovery period and after the date for the end of dispositive motions, so that she can talk to the parties before motions are fully briefed and scheduled for oral argument. Where there are no dispositive motions, she schedules a trial date. She began scheduling in this manner after years of scheduling early dates and finding they were vacated or continued. It is Judge Gaughan’s practice to give the trial date after the close of discovery but before the dispositive motion deadline, specifically after a settlement conference has proven unsuccessful. At this point, she explains, “it’s etched in stone—I don’t believe in dates that won’t be met and I don’t want to have to continue.”
1. Trial Continuances

Once set, a number of the judges were very firm in their practice of not moving the trial date. In the Delaware Superior Court, “the burden to move a trial date is substantial,” says Judge Slights. Judge Spencer generally tells parties: “I will be as flexible as I can on other matters, but the trial date will not move.” This practice has become part of the culture in many of the courts on which the judges sit. In Judge McCuskey’s courtroom, a firm trial dates is a key theme: “That’s our mindset and I think a lot of lawyers know it.” In Judge Bailin’s court, she and her colleagues have institutionalized a system that guarantees a commitment to firm, fixed trial dates. Her court operates according to a three-week trial schedule followed by a one-week motions schedule. The judges rotate as scheduler for the other judges during each month-long period. The responsibility of the scheduler is to ensure that all unsettled cases are assigned to a judge for trial. After undertaking substantial efforts to reduce court backlog—which included early setting of deadlines for key events—Judge Bernstein and his colleagues were able to change the psychology of the bar: “I knew we were making success when the bar was asking for continuances in other counties because they knew our cases would go to trial.” For Judge Spencer, holding parties to a firm trial date is a two-way street: “We have told you we expect you to be ready for trial, so you should expect us to be ready on that date as well.” He could not recall the last time his court had to continue a trial, and he believes that the parties appreciate this expectation, knowing the trial will occur on the scheduled date.

Many interviewed judges distinguished between stipulated and opposed requests for continuances. As a general rule, Judge McCuskey almost always denies those that are opposed. Nonetheless, if parties have a legitimate reason for a continuance that is unopposed, he may be inclined to grant the request. Judge McGahey assesses the parties’ reasoning for a continuance at a pretrial conference 30 days before trial. “I know that things fall apart at the last minute,” he says. Judge Hamilton shares this perspective, with the caveat that she requires a very good reason even where parties want to stipulate to a continuance. Similarly, Vice Chancellor Laster is sympathetic to family or health-related emergencies. In these circumstances, he expects the opposing party to be understanding and, therefore, to make the request jointly.

Judge Karnow, who grants a continuance only where there is a serious and unforeseen problem, cautions that “the fact that lawyers have agreed on something doesn’t mean it’s going to go down that way.” Similarly, Judge McGahey’s standard pretrial order warns parties: “Continuances will not be granted as a matter of course, even if stipulated.” Judge Richard A. Frye (Ohio Ct. Com. Pl.) and many of his colleagues are hesitant to continue a case without good reason. If you do, he warns, “you open the flood gates and everyone expects your cases will never end and your deadlines don’t mean anything.” His Civil Practice Guidelines warn that “Stipulations or ‘Agreed’ Entries are not sufficient to postpone case deadlines or trial dates in Courtroom 5F.”

---

Some judges are generally more lenient about granting continuances. Says Judge McAuliffe, “my personal view is that it’s not my case, it’s the parties’ and the lawyers’ case. They know more than I’ll ever know so if they want a continuance and it’s not crazy, I will defer.” A few state court judges cited a heavy caseload as a consideration in determining whether to grant a continuance. Judge Hogan raised a deeper issue in considering whether to grant a request to continue, noting that, while he is not fond of them when requested because lawyers cannot meet their commitments, denying a request has the very real potential to affect the client negatively.

Several judges recognized that continuances can have an effect beyond the case in which it is requested. In Judge Slights’s court, ten trials are often stacked on a single date. When a continuance is granted in a case, that case goes back into the scheduling mix. It becomes difficult to get that case into the schedule in a reasonable period of time thereafter. He explains that a trial can be continued for up to a year after a continuance is granted, because there is no room on the calendar and it is unfair to bump other cases in which lawyers are doing what they are supposed to do to keep their trial date.

2. IMPACT OF FIRM, FIXED DATES

A number of judges equated a firm trial date with cost savings. According to Judge Bailin, “I think knowing that you are a hundred percent likely to go to trial on a given day saves a lot of money because you don’t have to prepare for trial again.” Within reason, a shorter period of time between filing and trial causes people to economize and focus on what they need to know and how they have to prepare. From the perspective of Judge McCuskey, “firm trial deadlines make everyone have to work within certain parameters, which I think can save everybody money.” Furthermore, as Judge Karnow points out, there is a substantial degree of overlap in effort between working toward settlement and preparing for trial. He helps parties think about what trial preparation looks like, so that they can appreciate “what it will cost in terms of time and energy, and understanding all the things they will have to get done in advance of trial.” He admits this process is sometimes designedly done to make sure the lawyers understand the cost and risk of trial.

Across the interviews, judges recognized that a firm, fixed trial date leads to settlement. “You’d be surprised,” says Judge McCuskey, “how many people settle the case when up against the firm trial date.” Judge Prince’s philosophy is to move a case to resolution. While that doesn’t necessarily mean trial, he positions the case for trial all the time and his trial dates are firm because for parties “knowing they will go to trial will result in resolution, whether or not it is trial.” When setting a trial date, Judge Kennelly explains, “part of what I’m doing is getting the case to trial; part of what I’m doing is making people think about settlement.” “I am constantly mindful of the fact that getting cases to trial promotes settlement,” says Judge Slights, “and so I am never losing my focus on the trial date and making sure the parties are moving forward in a way that will have them prepared to go to trial if that is necessary.”
D. IN COLLABORATION WITH THE PARTIES, WORK BACKWARDS FROM THE TRIAL DATE TO SET MEANINGFUL AND FIRM DEADLINES FOR PRETRIAL EVENTS IN THE CASE, IN ORDER TO MAKE THE PRETRIAL PROCESS MORE EFFICIENT.

Most interviewed judges acknowledged that an early setting of the trial date is important, not only for purposes of focusing parties on resolution, but also for serving as a marker from which to work backwards in setting deadlines for other pretrial events. In Judge Slight's courtroom, as soon as the parties have filed the case and it is clear that everyone involved has been properly included in the process, he issues a scheduling order that starts first with a trial date and moves backwards from there. Dates are fixed for the pretrial conference, motions in limine, and discovery cutoffs. After each designated milestone, status reports are due to keep the court up-to-date on the case's progress. In setting these deadlines, Judge Slight encourages parties to be realistic and not overly ambitious in the schedule they propose, so that extensions are not needed later in the process. The form he sends out to parties before the initial case management conference asks them to assess the likelihood of dispositive motion practice, so as to ensure sufficient time for briefing and ruling. His overarching goal is to "give the parties targets they know they are shooting for, not leaving them wondering when they will be expected to accomplish certain tasks in the litigation."

Judge Jones's protocol compels lawyers to establish a definite date, sequentially, for amendment and joinder, discovery cutoff, exchange of expert reports, dispositive motion filing, and pretrial conference. His goal in doing so is to give counsel and parties achievable dates. Relating back to his days as a practicing lawyer, he posits that "lawyers do better if you give them achievable benchmarks."

Many of the judges indicated a willingness to encourage follow-up case management or status conferences, where doing so would be helpful, in order to keep the case moving and manageable. Judge Karnow, among others, recognizes that multiple case management conferences may be required and he will suggest to parties that they have as many conferences as it takes. In complex cases, Judge Zúñiga will often convene status conferences with lawyers every 90 to 120 days. From Judge O'Donnell's perspective, "as a general rule it doesn't hurt to meet early and often."

1. WORKING WITH THE PARTIES

In working backward to set deadlines for the significant events in the pretrial process, interviewed judges emphasized this is best done with lawyers' input. Judge Kennelly explains:

Part of where I come from is that the lawyers know more about the case than the judge does. I do manage, and I manage actively, but it's also important not to micromanage because I don't know enough to do that for each case. So, largely what I do is set parameters—I get input from the lawyers and set deadlines.
In over 90 percent of Judge Spencer’s cases, lawyers prefer to arrive at dates that everyone can accept. Judge Gaughan—who served on the state bench before becoming a federal district court judge—has found federal cases to be, generally speaking, more discovery-intensive than state court cases. Thus, she is reluctant to substitute her judgment for the lawyers’ with respect to how long discovery is going to take. In the first instance, Vice Chancellor Laster also tries to defer to the lawyers in terms of what the pretrial process should look like. This is largely, he says, because “they know the case far better than I ever will.” He admits this approach breaks down in a few situations and, when it does, he will generally order parties to submit a single letter indicating where the case is, where it is going, and what needs to be done.

A major benefit to having lawyers involved in setting deadlines is in holding them to the deadlines later in the pretrial process. In Judge McCuskey’s courtroom, lawyers will have a tough time explaining to the court why they want to change deadlines on which they previously agreed. Judge McAuliffe recognizes that in spite of a pre-established schedule, parties may stipulate to alternative deadlines outside of the court’s purview. He reminds lawyers, however, that the court does not accept private agreements to extend deadlines. Similarly, Judge Bernstein acknowledges that lawyers can agree to take discovery after the pre-established deadline, but not when it interferes with the court’s control. Judge Kennelly suggested that firm deadlines also help parties work through disputes in an expeditious manner: “when people understand they have to get something done by a particular date, they manage to work their way through disputes.”

For scheduling purposes and, more broadly, throughout the pretrial process, Judge Prince recommends treating lawyers as teammates. In 2006, he, his fellow judges, and a group of experienced civil litigators developed a set of experimental civil case management reforms and this “teammate” approach to judge-lawyer relations was one of the innovations ultimately carried out. He was initially skeptical:

My years of experience in hardball litigation had taught me that opposing litigation lawyers are not teammates. I deferred to the committee but predicted mayhem and awaited my chance to say “I told you so.” That opportunity never came. After more than five years of applying this philosophy to hundreds of cases, I can count on one hand the number of lawyers that failed to respond productively.

He explains that the effectiveness of this strategy is rooted in the principles of procedural justice and serving participant needs and goals. A judge can achieve considerable results “by recognizing the value of serving the lawyers' needs for voice and helpfulness.”
Judge Hamilton paints the following picture of her court, which could well describe many courts across the country:

    We are not a trial court, really. We are a law and motion court. Most cases are resolved short of trial and the delay and expense is incurred by motion practice. Avoiding unnecessary motions and permitting only necessary motions to go forward is the best way to avoid cost and delay.

An overwhelming number of those interviewed agreed with this proposition, as reducing and streamlining motion practice was a key theme emerging from the interviews.

Efforts to reduce motion practice often come at an early stage in the life of a case and the judges interviewed made efforts in a variety of ways. Judge Hamilton expects lawyers to anticipate problems at the case management conference, so as to avoid motions practice later in the pretrial process. Where possible, she talks people out of filing motions and encourages lawyers to stipulate. Judge McGahey always talks about discovery and motion practice at the initial case management conference. Where appropriate, he may establish expedited briefing schedules for motions. Judge Jackson considers it important to discuss claims and defenses at the original scheduling conference because the inclusion of claims that may not apply or boiler-plate affirmative defenses can precipitate expensive and time-consuming motion practice down the road.

A. Oral Argument

The judges were split in their general practices on oral argument. Many recognized the tendency for oral arguments to be simply a recitation of the parties’ briefs, and therefore, an inefficient use of time. Most interviewed judges, however, including those not accustomed to holding oral arguments, indicated that they would generally do so in one of two circumstances: 1) where parties request one, and 2) where holding an oral argument would assist the judge in making a decision.

While Judge Morrow does not hold oral argument on every motion, when she does, she finds it valuable to prepare a tentative ruling to give parties a sense of how she views the record and legal issues. Counsel are required to come sufficiently in advance of the hearing to read through the tentative ruling; they can then tailor their arguments to the content and issues raised in the ruling. Judge Karnow, likewise, finds it extremely helpful to get a written tentative ruling out in advance of oral argument, so lawyers have something to react to during the hearing. If he cannot issue a written tentative ruling in advance, he will begin oral argument by outlining his tentative ruling. Judge Zouhary
sends out questions in advance that he would like to discuss at the hearing, and during the hearing he uses a free-
flowing format that he describes as “cross-fire argument,” whereby parties discuss questions and answers back and
forth with the court.

Chancellor Strine finds oral arguments to be useful to judges for another reason:

Setting the argument date sets a process of preparation that is important. What happens is when
there are no dates, no deadlines, and you’re acting as if the last reply brief is a real deadline, it sits on
a shelf. Oral argument is a culmination date. From a case management perspective, preparing for
oral argument lets one get a decision quicker.

In Judge Jackson’s experience, holding oral argument and ruling from the bench promotes efficiency; nonetheless,
lawyers rarely ask for the opportunity. In every speech he gives to the bar, he tells lawyers: “all you have to do is ask
for oral argument and you’ll get it.”

B. RULING QUICKLY

The interviewer asked each judge the following question for both discovery and summary judgment motions: “Some
judges place a priority on ruling quickly…; some find that holding off on a ruling can encourage settlement. What are
your thoughts and practices on this?” Almost unanimously, those interviewed favored ruling as quickly as possible.
There was consensus that ruling quickly is important so that parties know the lay of the land and can act accordingly.
From Judge McGahey’s perspective, “litigants come to the courthouse because they want answers, and while they
may not like the answers they get, they are entitled to get them in a reasonable amount of time.”

The argument that holding off on ruling might encourage settlement was uniformly unpersuasive. In Judge Slights’s
experience, when parties are in the midst of discovery disputes they are less inclined to want to settle because one
party invariably believes it is entitled to information that the other side is withholding. The party is going to be less
inclined to want to pay more or accept less while it is waiting to get that information. Judge Kennelly expressed a
similar view with respect to summary judgment motions: “the encouragement of settlement at the time of summary
judgment is best done before the motion is filed—once filed, the party wants a decision.” He also notes that, from a
judicial perspective, distinguishing between motions that might benefit from a delayed ruling—and those that would
not—can be challenging.

Litigants come to the courthouse because they want answers, and while they may not like the
answers they get, they are entitled to get them in a reasonable amount of time.

— Judge Robert L. McGahey, Jr. (Colo. Dist. Ct.)
In issuing his ruling, Judge McCuskey holds himself to the same time standards to which litigants are held:

I think all motions that are filed need a response and they need a decision with the same time limits in which you make someone respond. Why should the court be any different than the litigants? The rules say litigants should respond in an appropriate time and we try to do the same.

Many judges observed that ruling quickly can be challenging in light of demanding dockets. Judge Karnow decides motions as quickly as possible for his own benefit, recognizing that putting things off creates additional work. In one judge's experience, a delay of a few months in ruling on one significant motion generated seven additional motions which would not have been filed had he ruled promptly on the first one. If a judge anticipates that he/she may be unable to issue a speedy written ruling, a number of judges cited ruling from the bench as the appropriate alternative.

C. STREAMLINING MOTION PRACTICE

Significantly other practices emerged with respect to specific types of motions, the most common being the informal resolution of discovery disputes. As a general practice, Judge Kennelly and many of his colleagues and fellow interviewees do not allow briefing on discovery motions. What led them to adopt such a rule is the reality that when there are discovery disputes in civil cases, the whole case often comes to a grinding halt until the dispute is resolved. The prohibition against briefing also works as a deterrent factor, since lawyers know disputes will get decided immediately as opposed to putting the case on hold. They therefore tend to resolve the issues on their own.

Judge McGahey also does not permit written discovery motions.25 His standard pretrial order instructs parties as follows:

No written motions regarding discovery disputes will be permitted. I will hear matters each Wednesday at 12:00 noon. To simplify setting, if the parties agree, either counsel shall call the Clerk of Courtroom to be placed on the next Wednesday’s docket. If there is no agreement, there shall be a joint conference call to the clerk to schedule the next available mutually agreeable docket day. Please call no later than noon on the preceding Friday in order to obtain a setting for that next Wednesday at noon.26

25 See also Richard P. Holme, “No Written Discovery Motions” Technique Reduces Delays, Costs, and Judges’ Workloads, 42 Colo. Law. 65-68 (Mar. 2013) (highlighting this technique and the Colorado state and federal court judges who use it, including study participants Judge R. Brooke Jackson, Judge David Prince, and Judge Robert McGahey).
26 McGahey, supra note 23, § II(2)(a).
“Lawyers tell me what they are fighting about,” he says, “and most of the time I can solve the problem within 20 to 30 minutes.” The lawyer on whose side the decision falls then drafts a written order for him to sign.

In his Practice Standards, Judge Jackson instructs parties: “If possible, instead of preparing and filing motions and briefs, set up a telephone hearing with me where the problem can be resolved quickly and relatively inexpensively.” Judge Karnow uses a similar procedure whereby, before parties file a discovery motion, he encourages them to call and get a read on a likely resolution. He estimates that parties do so in 80 percent of his cases. Judge Jones requires parties to submit a short letter in the first instance, after which he will get on the telephone with counsel to attempt resolution. “I stress that brevity is a virtue,” he explains, “because if the letters are excessively long, it defeats the purpose of the exercise.” Only where nothing else has proven effective in resolving the dispute will he permit counsel to file a formal motion. Judge Stark, who handles a significant number of patent cases, requires parties with a discovery dispute to submit letters of up to three pages setting forth the dispute, but only after they have met and conferred. Submission is followed by a 45-minute telephone conference. Alternatively, in his standard pretrial order he reserves the right to resolve the dispute before the teleconference and he will then cancel the call.

He estimates full briefing is necessary in only one out of ten cases. In addition to benefiting the parties, this procedure reduces the court’s burdens. He notes that among the 600 motions in front him on any given day, none are discovery motions.

Judge Hyatt does not foreclose written discovery motions. He does, however, frequently accelerate the response or reply time in order to bring parties in for a discussion on the issues. Similarly, Judge McLaughlin will get parties on the phone before there is a written response to the motion. She estimates that most of the time this discussion is enough to move the case forward.

Similar principles are used by judges for summary judgment motions. Several judges recognize the substantial amount of time consumed by such motions and some have developed specific practices to increase efficiency at this stage of the case. In over 90 percent of his cases, Judge Zouhary will not set summary judgment deadlines at the initial case management conference. He explains that many lawyers, if given a date, think they must file a summary judgment motion and he aims to discourage this practice. “They should file a motion if they believe in good faith that it is appropriate,” but he warns, “don't tell

me it is appropriate unless you’ve done some discovery.” In his article *Ten Commandments for Effective Case Management*, he explains to parties:

> We address the need for a dispositive motion date at a later telephone status conference where I inquire if the movant, after discovery, has a good faith belief in the success of such a motion. I may encourage the parties to go straight to trial—bringing the case to conclusion quicker and at less cost than briefing motions. Sometimes a motion date is set as early as the initial conference—if there is a narrow legal issue that makes sense to decide while discovery is stayed. Again, Rule 16 allows for flexible approaches.29

In cases where he gives the go-ahead to file summary judgment motions, Judge Zouhary requires parties to get together and submit a joint statement of undisputed material facts. The party responding must then identify the disputed material facts in a separate section. Judge Zouhary adopted the requirement of obtaining leave of court in order to file summary judgment motions from a similar practice by judges in the Eastern District of Texas.

A similar procedure is in place in the U.S. District Court for the District of New Hampshire, where Judge McAuliffe thinks it helps “because parties can head off at the pass a lot of wasted effort briefing something if they come to realize there are genuinely disputed material facts.” Judge Frye also pointed to potential cost savings in having parties stipulate to background facts before filing summary judgment motions.

Judge Hamilton permits only one summary judgment motion per case per party, and where there are multiple parties, she expects them to join in moving or opposing if their interests are aligned. Where interests are not sufficiently aligned, she will permit parties to move or oppose separately, but multiple motions can be filed only with leave of court. In Judge Stark’s courtroom, parties are prohibited from filing case-dispositive motions without leave of court more than 10 days before the agreed-on deadline. This practice emerged from the court expending significant time writing summary judgment opinions, only to be presented with a new round of summary judgment motions in the same case. Requiring leave of court to file early dispositive motions helps Judge Stark better control his docket. In certain cases, Judge Flanagan will issue what she calls a provisional ruling, through which she will make a decision in light of what the movant has given her. If it appears that the opposing party might be negatively affected by the ruling, she gives the opponent an opportunity to brief the motion.

Some judges also identified detailed case management practices with respect to pretrial motions. Judge Frye discourages motions in limine, and Judge McGahey simply prohibits written motions in limine, directing parties instead to confer with one another and discuss how the issue might be raised during the pretrial conference. A handful of the judges rule on Daubert motions and motions in limine during, at, or before the final pretrial conference. Judge Hyatt is of the view that, “if there is anything of an evidentiary nature that can be resolved before trial, resolve it.” Judge Jones wants motions in limine filed weeks in advance of the pretrial conference so that he can talk with the parties about every motion filed. In her courtroom, Judge Hamilton rules on motions in limine at the pretrial conference, leaving parties with a four-week period during which they know what the ruling is and can appreciate how their case is going to unfold. “You wouldn’t believe how many cases settle during that time,” she says.

Finally, a few situation-specific, innovative practices for handling motions in complex cases bear mention. In one particularly large and unwieldy case with extensive motion practice, Judge McAuliffe issued an order prohibiting all parties from filing motions without leave of court. Instead, he set up a recurring hearing every two weeks during which lawyers orally summarized what motions they wished to file and why, and he resolved as many as possible without a formal motion. From his perspective, the lawyers thought this approach worked well because they were able to save time not having to file and brief motions. In a complicated case involving a deluge of motions in limine, Judge Karnow used a particular sanctions provision30 to streamline the motion practice. He analyzed all the motions, set out an order listing those that appeared to be frivolous and why, and invited parties either to withdraw any and all motions they wished or file an answer within 10 days. Before this safe-harbor period ended, the lawyers had withdrawn all the motions in limine he had listed in his order.

In response to the question "if you could suggest one rule, practice, or case management technique that, in your experience, is helpful in reducing cost and delay in the pretrial processing of civil cases, what would it be and why?" Vice Chancellor Laster answered candidly, "the professionalism of the bar." The Delaware Chancery Court on which he sits benefits from a highly talented cadre of lawyers both from Delaware and out-of-state and, in his experience, "cases get done faster when there are good relations among the attorneys—that's far more important than anything the court can do." In fact, many judges indicated that lawyers' collegiality and professionalism in the pretrial process have important implications for the time and effort judges spend managing a case. Judge Hogan's experience has been that "the surest way to spend too much money on one or a series of cases is to have the lawyers handling matters not have a good relationship."

Many judges highlighted the importance of setting forth expectations about civility and professionalism at the outset. In his courtroom, Judge Hyatt insists on a level of cooperation from lawyers and will impress on the parties: "I know the parties' interests are not consistent and clients sometimes despise each other," he says, "but I want them to understand what my expectations are in terms of level of cooperation." Judge McGahey has incorporated his expectations concerning behavior into his standard pretrial order, which reminds lawyers:

This is a CIVIL division. “Rambo lawyering” will not be tolerated. Counsel will treat jurors, parties, witnesses, me, my staff, and each other with professionalism, courtesy and respect at all times. This applies not only to the actual trial, but to all aspects of the case, including discovery and motions practice, and includes what is written as well as what is said.31

Judge Frye's Civil Practice Guidelines note that “[c]ontention that merely increases cost or delay for litigants, or wastes the court's limited resources is unwelcome," and he references the Introductory Statement on Civility in the Local Rules for the U.S. District Court for the Southern District of Ohio.32 Judge Zouhary encourages counsel to

---

31 McGahey, supra note 23, § IV(5).
32 Frye, supra note 24, § I.
abide by the American College of Trial Lawyers Code of Pretrial and Trial Conduct and makes this mandatory reading for lawyers who wish admission pro hac vice.33

While acknowledging the importance of active judicial management in preventing disputes from festering, says Judge Bailin, “ultimately, if you set up a structure that is clear and people understand it and they are expected to follow it, then you are much less likely to spend a lot of time getting people to do what they need to do.” Similarly, Judge Spencer opines that because of the tone he sets from the outset, most lawyers do not tread on sanctionable areas or conduct. “I’m a firm believer,” he says, that “if everyone knows the rules are firm and fair up front, I don’t really have to deal with those matters.”

Judge Jones, among others, promotes civility by being civil in the first instance and, in doing so, he finds that lawyers respond in kind. His expectations for professionalism also extend beyond lawyers, as he instructs his staff to be collaborative and cooperative with counsel regarding the progress of the case and preparation. “I think it makes for a happier way to do business,” he says. Judge Karnow stressed the importance of lawyers seeing their relationship to the court as akin to that of colleagues trying to work through problems and attend to the merits. Many of the judges were trial lawyers before taking the bench; even those who were not understand and appreciate the stresses under which civil lawyers work.

Most, if not all, of the judges, however, recognized that even clearly stated expectations may not prevent the case or lawyers from unraveling at key points in the pretrial process. Where civility and cooperation appear to be absent, Vice Chancellor Laster has written short letters to lawyers encouraging them to remember the tradition of civility and the virtue of empathy. He also suggested that insisting a senior member of the bar be involved in the case has a tremendous impact on the degree of cooperation. In his opinion, there is a role for both the court and lawyers in fostering professionalism and collegiality: “It’s a cultural thing that has to flow in the first instance from the court and in both the first and second instances from the senior attorneys.” Judge Bernstein stresses the importance of addressing instances of absent civility and professionalism, noting that if a judge does not do so, the behavior will continue. He recommends taking the time to dig into the real issue in order to respond appropriately.

Although the judges were overwhelmingly complimentary of the lawyers appearing before them, many recognize a growing trend toward cantankerous email correspondence among lawyers—what Judge Jones describes as “flaming arrow” emails and Judge Prince describes as “distant courage”—that frequently find themselves attached to letters and motions. Gone are the days, he says, where lawyers dictated letters that were then transcribed after a period of

33 Zouhary, supra note 14, at 38-39. The American College of Trial Lawyers Code of Pretrial and Trial Conduct “sets out aspirational principles to guide litigators in all aspects of their work. The code looks beyond the minimum ethical requirements that every lawyer must follow and instead identifies those practices that elevate the profession and contribute to fairness in the administration of justice.” Am. Coll. Trial Lawyers, Code of Pretrial and Trial Conduct (2009), available at http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=4380.
time (and during which one's better instincts prevailed). Now, explains Judge McGahey, “you can yell at the screen, push ‘Send,’ and, all of a sudden, you’ve created a document.”

**A. Sanctions**

Most of the judges are reluctant to issue sanctions in response to lawyers’ behavioral and civility issues. One judge is sympathetic to the philosophy that “if you have to go around sanctioning attorneys that means you’ve lost control of your courtroom.” With respect to sanctions more broadly, interviewed judges were somewhat split in their approaches but none have found themselves needing to impose sanctions frequently, perhaps as a testament to the quality of the civil bar appearing before them. While there were some who impose sanctions more often than others, all judges questioned on the subject admitted it was unpleasant. A few described the process that usually precedes the formal issuance of sanctions, including:

1) an off-the-record discussion with counsel;
2) an on-the-record discussion with counsel; and
3) sanctions, where all else has failed.

In describing this hierarchy, one judge explained that “ultimately there comes a time when the hammer has to fall, and you try to push off that time by doing a variety of things. But at some point, it has to fall.” Judge Gaughan shared one particularly egregious instance in which she issued an opinion admonishing the lawyers’ behavior. She required the lawyers to share her opinion with their clients, and the clients to submit a letter to the court representing that they had read the opinion.

Judge Bailin described a difficult balance in using sanctions: “lawyers who generally work hard and do a good job are mortified by sanctions. Lawyers that don’t have a clue and are doing a poor job, or really just not understanding what it means to be a professional, are often not affected by them.” In the latter situation, she opined that repeated sanctions may send a signal about competence and what a lawyer should be doing differently. More often than not, the judges interviewed prefer to view sanctions as a tool that does not ultimately have to be used in order to be effective. Judge Hyatt’s preference is “to have a fair resolution of the issue, and if I can threaten sanctions and get something accomplished, that is usually the better outcome.”

A handful of judges even raised philosophical issues concerning imposing sanctions, some from conflicting perspectives. According to Judge McGahey, “unless the client is collusive with this behavior and the lawyer is engaged in assisting with interference with just process, the person that suffers is the client and the client should be allowed to present his or her case and get it resolved on the merits.” Chancellor Strine has a somewhat different perspective and finds it appropriate for both the client and lawyer to bear the costs, especially where clients are overly aggressive.

The one “sanction” that a fair number of judges did report using was Rule 37 sanctions, which the judges view in a different light than Rule 11 sanctions or those based on bad-faith behavior. “I don’t think of them as sanctions,” says Judge Karnow, “rather as a fee-shifting mechanism.” He will tell parties “if you want to have a discovery motion, you are free to do it,” but he reserves the right to impose fees on the losing party. Vice Chancellor Laster will shift fees under Rule 37 when he concludes there is obstructionist behavior or gamesmanship. He finds that doing so reduces the number of disputes in the case “because all of a sudden there are real consequences.” According to Chancellor Strine, fee shifting is an important part of the discovery realm, especially where one party has caused another to incur unnecessary expense to get discovery and/or has diverted trial preparation.”
Many interviewed judges approach parties early about settlement. While Judge Frye is not adverse to having people try cases, from his perspective, “most will settle and the economics of civil practice generally dictate people at least explore settlement, if not do it, as early as possible.” Given this reality, the first question Judge Karnow has, at least implicitly, is: “What do the parties need to settle the case?” Judge Kennelly actively encourages settlement discussions at all stages, but he begins early by requiring parties to make written settlement demands before the initial case management conference. Under this procedure, which is set forth in his case management order, the plaintiff must submit his or her written settlement demands, after which the defendant must respond. “The idea,” he says, “is that I take the pressure of going first off the lawyers.” He estimates that in one out of every five cases, these settlement demands have moved the parties forward enough that they could be diverted into a settlement track at or before the case management conference. It is also standard practice in his court to hold status conferences on a regular basis. He makes a point of bringing up settlement at each one, where he tries to get parties to focus on why they can’t settle at that moment and what they need to be able to move in that direction. Similarly, Judge Flanagan discusses settlement at certain key points in the litigation and before going on to the next phase.

Although Judge Gaughan holds almost all of her case management conferences by telephone, she begins by asking parties: “If I required you to be here today in person, could you talk settlement?” Where the answer is “yes,” she asks them to come in. She also schedules settlement conferences after all discovery is complete but before dispositive motions are filed; these conferences are in addition to the settlement conferences she may conduct during the discovery period.
Conclusion

These interviews provided a glimpse into the civil pretrial case management practices and techniques successful judges use in diverse jurisdictions across the country: early and active case management; meaningful and firm dates for pretrial events; reduced or streamlined motions practice; civility and professionalism among parties; and strategic exploration of settlement throughout the pretrial process. The ACTL and IAALS hope this report will serve as a resource for other judges and will encourage consideration of ways to bring the civil pretrial process back in line with the goals of a just, speedy, and inexpensive resolution.

☐ use active and continuing judicial involvement
☐ anticipate problems, issues, and deadlines
☐ streamline motions practice
☐ foster collegiality and professionalism
☐ explore settlement
APPENDIX A:

METHODOLOGY

For purposes of this study, the ACTL Board of Regents assigned a subset of the ACTL Task Force to the ACTL Judiciary Committee and directed that Committee to work in conjunction with the ACTL’s Jury Committee and the Special Problems in the Administration of Justice (U.S.) Committee. These Committees, in turn, established a Steering Committee to work with IAALS and oversee administration of the project. Richard Holme chaired the Committee, and its members include ACTL Task Force Chair Paul Saunders, C. Matthew Andersen, David Balser, William Hangley, and Edward Mullinix. Natalie Knowlton served as the IAALS liaison to the Committee.

The Steering Committee identified the following states, chosen for population and geographic diversity, from which to choose potential interview subjects: northern California, Colorado, Delaware, Illinois, New Hampshire, Ohio, and Pennsylvania. Within these states, the Steering Committee worked with the ACTL State Committee Chairs and their Committees. Individual committee members identified state and federal court judges who, from their perspective, met the study’s stated criteria—trial judges who are recognized as being outstanding case managers and whose civil case management experience can serve as a model for others. The Committee Chairs vetted and finalized the lists. Each State Committee identified three to six judges; together, the Committees identified approximately 30 judges.

IAALS, in conjunction with the Steering Committee, developed an interview guide consisting of 30 questions that cover the following substantive areas: case management broadly, case management conferences, discovery, dispositive motions, oral arguments, sanctions, and trial settings. The interview guide, attached as Appendix B, also included a number of ad hoc follow-up questions that interviewers could choose to ask, or not, depending on answers given by an interviewee to an initial question.

Given the geographic challenges involved with conducting interviews across seven states, and in recognition of the fact that judges might be most comfortable being interviewed by someone with whom they had a pre-existing relationship, for each potential interview subject the project Steering Committee and the State Committees identified an ACTL Fellow in the region who knew the judge. These Fellows then made the initial outreach to their assigned judge, explaining the project, assessing interest in participation, and then scheduling an in-person interview.

IAALS and the Steering Committee developed an internal interview guide for the interviewers, which covered the pre-interview process, the interview process and correct protocol for asking initial and follow-up questions, and the post-interview closing. Steering Committee Chair Richard Holme participated via teleconference for the purpose of continuity among interviews, and IAALS project manager Natalie Knowlton participated via teleconference for the purpose of making detailed notes of the discussions.

The interviews began in August 2012 with the Colorado judges in order to test the interview guide and make revisions where questions were unclear or not entirely relevant. Interviews began in earnest around the country in December 2012 and concluded in February 2013. By the end of the interview schedule, 28 interviews had been completed. A full list of judges interviewed, with state, court, and interviewing Fellow is attached as Appendix C. Each interview lasted one to two hours, and many of those interviewed followed up by sending standard orders and forms they use in their courtroom, to provide additional context.

All interviewed judges graciously allowed their comments to be quoted and attributed, and all were asked to review a draft of this report and their quoted comments for accuracy and context. Subsequent drafts were reviewed by IAALS, members of the ACTL Steering Committee, the ACTL Task Force, and members of the ACTL Judiciary, Jury, and Special Problems in the Administration of Justice Committees. A final draft was reviewed and approved by the ACTL Executive Committee and Board of Regents.
APPENDIX B:

INTERVIEW GUIDE

CASE MANAGEMENT—BROADLY

1. What is your overall approach to the pretrial case management in civil litigation?
   [Describe how you manage typical cases during pretrial.]
   [Thinking of your overall approach, how do you use this approach to encourage time or cost efficiencies, if at all?]

2. When does your case management take place—before, during, or after normal court hours?

3. What proportion of your case management is conducted by in-person conference, telephone conference, or submission in writing?
   [What determines which approach is used?]
   [What do you see as the primary advantages and disadvantages of each?]

4. What are the specific techniques you use to manage your cases?

5. What are the benefits of these techniques? Are there any drawbacks?

6. How do you think attorneys and parties perceive your case management approach?
   [If negative, how do you handle objections to your approach?]

7. Do you have judge-specific case management reports available to you? If so, how often do you run them and how do you utilize them in your pretrial case management?

8. On a scale of one to five, with one being facilitating pre-trial case settlement and five being getting cases to trial, how do you view your primary role as a judge?

9. Where cooperation among opposing attorneys and parties during the pretrial process appears to be absent, do you facilitate or insist on it? If so, what specific techniques have you found that work?

CASE MANAGEMENT CONFERENCES

10. What is your approach to case management conferences? How active of a role do you play?

11. When, in relation to filing, do you generally schedule the initial case management conference?

12. What types of issues, if any, do you find it useful for attorneys and parties to address at the initial case management conference? How much of the conversation is purely procedural and how much delves into the substance of the dispute?
   [Do you discuss the allegations and/or try to eliminate some of the claims?]
   [Do you discuss discovery limitations?]
   [What, if anything, do you do to encourage efficiency and hold down costs at this stage?]
13. Do you ever convene additional or follow-up case management conferences or status conferences? If yes, in what circumstances might you do so? 
   [How effective have you found these conferences to be?]

**DISCOVERY**

14. What is your overall approach to the discovery process? 
   [Do you consider and/or discuss with parties the concept of proportionality – i.e., bigger and more complex cases get more discovery; smaller and simpler cases get less?] 

15. Do you, or does your court, have specific rules or procedures relating to discovery? 
   [How effective are these procedures at limiting costs and increasing speed?] 

16. Are there ever instances in which you encourage and/or require parties to limit discovery? If yes, when and how? 
   [Limits on depositions; interrogatories; requests for production of documents; requests for admission?] 

17. How do you handle discovery disputes? 
   [What techniques can limit the time you spend in having to consider and rule on discovery issues? – e.g., page limits; oral requests at outset only; short descriptions of the issues at outset only?] 

18. Do you have any specific techniques for dealing with issues concerning the discovery of electronically stored information? If so, what are they? 

19. Some judges place a priority on ruling quickly on discovery motions to move the case toward trial; some find that holding off on a ruling can encourage settlement. What are your thoughts and practices on this? 

**Dispositive Motions**

20. Do you, or does your court, have any specific rules or practices for handling motions to dismiss? 
   [Any techniques for limiting them or expediting their handling?] 

21. Do you, or does your court, have any specific rules or practices for handling summary judgment? 
   [Any techniques for limiting them or expediting their handling?] 
   [To what extent, if at all, do you encounter summary judgment motions that appear to be designed for the primary purpose of “educating the judge”? If you have and do encounter such motions, do you take steps to limit them and, if so, how?] 

22. Some judges place a priority on ruling quickly on summary judgment motions; some find that holding off on a ruling can encourage settlement. What are your thoughts and practices on this?
ORAL ARGUMENTS
23. If you allow oral arguments on pretrial matters, tell me about the practices you employ?
   [How frequently do you allow them?]
   [What preparation, if any, do you do in advance?]
   [Do you place time limits on arguments and enforce them?]
   [When you allow oral arguments, what is your practice as to how soon you rule?]

SANCTIONS
24. What effects do sanctions have? Have you found any other ways to ensure compliance?
   [What have you found to be the most effective sanctions?]

TRIAL SETTINGS
25. When and how far out, in relation to filing, do you set the trial date and why?
26. How do you handle requests for continuances?
   [As a general rule what oversight, if any, do you exercise on lawyers’ requests for continuances?]

27. In your experience, how does the granting of such requests affect the course of the pretrial process, if at all? How does the denial of such requests affect the litigation process?

CLOSING QUESTIONS
28. If you could suggest one rule, practice, or case management technique that, in your experience, is helpful in reducing cost and delay in the pretrial processing of civil cases, what would it be, and why?
   [If we hadn't limited you to just one, are there others you feel strongly about?]

29. If you could suggest one rule, practice, or case management technique that, in your experience, is helpful in reducing the overall time you must commit to the pretrial processing of civil cases, what would it be, and why?
   [If we hadn't limited you to just one, are there others you feel strongly about?]

30. Do you have any standing or form orders that touch on the issues we have been discussing that you would be willing to give to us?
### Appendix C:

## Interview List

<table>
<thead>
<tr>
<th>Judge</th>
<th>State</th>
<th>Court</th>
<th>ACTL Interviewer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roxanne Bailin</td>
<td>CO</td>
<td>District Court</td>
<td>William R. Gray</td>
</tr>
<tr>
<td>Mark I. Bernstein</td>
<td>PA</td>
<td>Common Pleas</td>
<td>William T. Hangley</td>
</tr>
<tr>
<td>Kathy M. Flanagan</td>
<td>IL</td>
<td>Circuit Court</td>
<td>Dan L. Boho</td>
</tr>
<tr>
<td>Richard A. Frye</td>
<td>OH</td>
<td>Common Pleas</td>
<td>Kathleen M. Trafford</td>
</tr>
<tr>
<td>Patricia A. Gaughan</td>
<td>OH</td>
<td>U.S. District Court</td>
<td>Harry D. Cornett, Jr.</td>
</tr>
<tr>
<td>Phyllis J. Hamilton</td>
<td>CA</td>
<td>U.S. District Court</td>
<td>Otis McGee, Jr.</td>
</tr>
<tr>
<td>Thomas L. Hogan</td>
<td>IL</td>
<td>Circuit Court</td>
<td>William V. Johnson</td>
</tr>
<tr>
<td>Robert S. Hyatt</td>
<td>CO</td>
<td>District Court</td>
<td>Gordon W. Netzorg</td>
</tr>
<tr>
<td>R. Brooke Jackson</td>
<td>CO</td>
<td>U.S. District Court</td>
<td>Richard P. Holme</td>
</tr>
<tr>
<td>John E. Jones, III</td>
<td>PA</td>
<td>U.S. District Court</td>
<td>David E. Lehman</td>
</tr>
<tr>
<td>Thomas K. Kane</td>
<td>CO</td>
<td>District Court</td>
<td>Richard P. Holme</td>
</tr>
<tr>
<td>Curtis E.A. Karnow</td>
<td>CA</td>
<td>Superior Court</td>
<td>Reginald D. Steer</td>
</tr>
<tr>
<td>Matthew F. Kennelly</td>
<td>IL</td>
<td>U.S. District Court</td>
<td>Ann C. Tighe</td>
</tr>
<tr>
<td>J. Travis Laster</td>
<td>DE</td>
<td>Chancery Court</td>
<td>Kenneth J. Nachbar</td>
</tr>
<tr>
<td>Steven J. McAuliffe</td>
<td>NH</td>
<td>U.S. District Court</td>
<td>Philip R. Waystack</td>
</tr>
<tr>
<td>Michael P. McCuskey</td>
<td>IL</td>
<td>U.S. District Court</td>
<td>William J. Brinkmann</td>
</tr>
<tr>
<td>Robert L. McGahey, Jr.</td>
<td>CO</td>
<td>District Court</td>
<td>Richard P. Holme</td>
</tr>
<tr>
<td>Kenneth R. McHugh</td>
<td>NH</td>
<td>Superior Court</td>
<td>James Q. Shirley</td>
</tr>
<tr>
<td>Mary A. McLaughlin</td>
<td>PA</td>
<td>U.S. District Court</td>
<td>William T. Hangley</td>
</tr>
<tr>
<td>Margaret M. Morrow</td>
<td>CA</td>
<td>U.S. District Court</td>
<td>Paul Alexander</td>
</tr>
<tr>
<td>John P. O’Donnell</td>
<td>OH</td>
<td>Common Pleas</td>
<td>James A. Lowe</td>
</tr>
<tr>
<td>David S. Prince</td>
<td>CO</td>
<td>District Court</td>
<td>Richard P. Holme</td>
</tr>
<tr>
<td>Joseph R. Slichts, III</td>
<td>DE</td>
<td>Superior Court</td>
<td>Bartholomew J. Dalton</td>
</tr>
<tr>
<td>Brett M. Spencer</td>
<td>OH</td>
<td>Common Pleas</td>
<td>Daniel P. Ruggiero</td>
</tr>
<tr>
<td>Leonard P. Stark</td>
<td>DE</td>
<td>U.S. District Court</td>
<td>William M. Lafferty</td>
</tr>
<tr>
<td>Leo E. Strine, Jr.</td>
<td>DE</td>
<td>Chancery Court</td>
<td>Collins J. Seitz, Jr.</td>
</tr>
<tr>
<td>Jack Zouhary</td>
<td>OH</td>
<td>U.S. District Court</td>
<td>James E. Brazeau</td>
</tr>
<tr>
<td>Barbara A. Zúñiga</td>
<td>CA</td>
<td>Superior Court</td>
<td>Clement L. Glynn</td>
</tr>
</tbody>
</table>
APPENDIX D:

DISCUSSION TOPICS FOR INITIAL STATUS/CASE MANAGEMENT CONFERENCE

Preferably held within six weeks of the complaint being served. If possible, the court should familiarize itself with the pleadings and motions prior to this hearing.

What are the core factual or legal issues that are likely to be most determinative for this dispute? [E.g., the 2-4 most important]

What information would be most helpful in evaluating likelihood of settlement? Any reason it cannot be obtained right away?

[If unable to review pleadings in advance], a brief description [e.g., up to 5 minutes] by each side of the crucial facts, primary claims and primary defenses.

Are all claims for relief necessary or are they overlapping? Can any be eliminated to reduce discovery and expense?

Are all pled defenses truly applicable to this case? Can any be eliminated?

Who are the most important witnesses each side needs to depose? [E.g., not more than 3.] Any reason they cannot be deposed first and soon?

What can be done at the outset to narrow and target the discovery in the case?

Have the parties agreed on limitations on discovery of ESI— or on discovery generally?

When can each side be ready for trial?

Select a trial date with approval, if possible, of lead counsel. This date will be firm, absent extreme hardship or significant illness.

Work back from trial date to set:

- dispositive motion deadlines,
- expert report and deposition deadlines,
- discovery deadlines,
- amendments to pleadings and addition of parties, and
- other dates as needed.

Orally outline special pretrial procedures or techniques court will use. [Provide any written procedures after discussing them in person. Oral discussions are more effective than written.] [E.g., requirement for oral discovery}
motions before filing written motions; unless good cause exists for not doing so, lead trial counsel should try to resolve issues personally before contacting the court."

Discuss discovery expectations and limitations.

Explain court's views of appropriate conduct for counsel. [E.g., Civility; communication in person when possible; use care to avoid sending accusatory emails; etc.]

When should settlement discussions be scheduled?

Is there need to schedule follow-up status conferences?

Please contact my clerk whenever you need to speak to me.
A must-read for judges who are looking for strategies and tactics to gain control over their civil dockets. What better way to learn what works and what doesn’t than to ask the folks who are in the trenches.

— Prof. Steven S. Gensler (University of Oklahoma College of Law)

As mentioned in the publication, one rarely, if ever, has time to observe how one’s colleagues handle matters. 'Working Smarter, Not Harder' provides that important insight into the area of pretrial civil case management. The publication's dissemination will hopefully spark a conversation among members of the bench that will lead to the further enhancement of our judicial system.

— Judge Marcus Z. Shar (Md. Cir. Ct.)