Working Smarter, Not Harder: How Colorado Judges Manage Cases

by Roxanne Bailin, R. Brooke Jackson, and Robert L. McGahey, Jr., with contributions by Zachary Willis

Since 1938, Rule 1 of the Federal Rules of Civil Procedure (FRCP) has mandated that the Rules be construed to "secure a just, speedy, and inexpensive determination of every action and proceeding." Beginning in the early 1980s, the affirmative duty of the court to ensure a just, speedy, and inexpensive determination of every action was recognized in amendments to FRCP 16 and 26, empowering federal judges to monitor and control pretrial processes to minimize cost and delay.

Today, judges and lawyers alike recognize active judicial management as a tool for combating excessive cost and delay in civil litigation. Civil trial judges in state and federal courts across the country manage the pretrial process daily to minimize cost and delay while working to provide just resolutions. 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 effective case management techniques can be constrained.

In 2012, the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver (DU), undertook a study of pretrial civil case management in state and federal courts. The study's purpose was to facilitate information-sharing on civil case management practices that might reduce cost and delays for litigants while saving judicial time and resources. The end result was the report "Working Smarter, Not Harder: How Excellent Judges Manage Cases,"[1] published earlier this year by ACTL and IAALS. This report is based on interviews with approximately thirty state and federal trial court judges from diverse jurisdictions across the country who were identified as outstanding case managers and whose civil case management experience can serve as a model for others.

Several of the judges identified in the report are from Colorado, including Judge Roxanne Bailin (ret.), Judge R. Brooke Jackson, and Judge Robert L. McGahey, Jr. In this article, these three jurists share an expanded view of their successful case management and pretrial practices, as wells as recommendations for fellow judges and attorneys.

About the Judges

Judge Bailin is a recently retired judge, having served as a judge in the Twentieth Judicial District (Boulder County) for more than thirty years, including as Chief Judge from 1998 to 2013. She currently consults for the National Center for State Courts.

Judge Jackson was in private practice in Denver for twenty-six years before being appointed to the state trial court in Jefferson County in 1998. After thirteen years on that bench, he was appointed to the U.S. District Court in 2011. He is a Fellow of the American College of Trial Lawyers.

Judge McGahey has been a Denver District Court Judge since January 2000, and has served in all three divisions of the Denver District Court. Before his appointment, he was a practicing civil trial lawyer for more than twenty-five years, during which time he tried more than 100 jury trials. Judge McGahey is a graduate of Princeton University (*magna cum laude*) and DU College of Law. He has served numerous times as an instructor for the National Institute for Trial Advocacy and has been an adjunct professor at DU since 1985, teaching Basic and Advanced Trial Practice and the Judicial Externship Seminar. In 2013, Judge McGahey received the Ruth Murray Underhill Teaching Award, presented by the DU Faculty Senate to the outstanding adjunct professor in the university system.




About the Authors

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Chief Judge Bailin (Ret.), Boulder District Court

I retired on August 31, 2013, having been appointed by Governor Lamm exactly thirty-one years before, on August 31, 1982. I served as Chief Judge of the Twentieth Judicial District from August 1, 1998 to my retirement. I would sometimes remark to my staff that "I had seen it all," only to have something new and different (sometimes good, sometimes bad) happen. What I always enjoyed was the sense of accomplishment that I defined as providing high-quality, efficient public service to the bar and the public. It was my view that assertive case management and prompt, clear, and well-analyzed opinions were the way to do that. Here are some of my thoughts about case management.

1. One of the most important aspects of case management is taking charge early and getting cases off the ground. Once a lawyer files a case, the court's case tracking system should mark the case for review within sixty days to either set the matter for trial or have the plaintiff file for default before the case is dismissed. This process makes it much more likely that a case will be tried within a year, which is our goal. Although some argue that we should allow "good" lawyers to dictate the speed of their cases, in my experience, delay is generally in the interest of one party, while the other ends up frustrated by the lapse of time. Court management of cases has been the norm for two decades, and it has substantially improved case flow and efficiency.

2. It is important to evaluate each case early to determine its complexity. Complex cases may need regular and repeated case management conferences to stay on track. It is useful to set hearings every sixty days to handle any discovery disputes or motions that have arisen since the last hearing. It may seem difficult to set such hearings, but, in both the short and long run, they save a great deal of time for the judge and the lawyers because they force the lawyers to regularly evaluate the case and take action. Such hearings often produce prompt rulings on issues that otherwise delay the case. These hearings also require the lawyers to meet face-to-face, which assists in their fostering personal and professional communication. In addition, judges should be available as quickly as possible for telephone conferences if matters come up, even during a deposition. Simpler cases do not require as much case management, but should still be put in a tickler system and reviewed monthly or bimonthly to monitor progress.

3. One of the greatest impediments to movement and resolution of cases is judicial delay in ruling on motions to dismiss and motions for summary judgment. Taking six months to rule on a motion to dismiss means that the case will not be set for trial for six months in the event the motion is not granted. During my five-year term as chair of the Colorado Commission on Judicial Discipline, one of the most frequent complaints against judges related to delay. Often, judges have no system to remind themselves about pending motions. Although Colorado has one of the most sophisticated computer systems in the country, some judges are not aware of or skilled in using these computer tools. Additionally, keeping a list of cases with decisions pending that shows when the motion, response, and reply were filed is a simple and excellent way to ensure the judge is aware of what needs to be decided.

4. Some lawyers also contribute to delay and inefficiency by filing motions to dismiss and motions for summary judgment that they know will not be granted. In addition, some lawyers file extraordinary amounts of discovery and take too many depositions. This impedes the efficient progress of the case by creating costly discovery disputes that must be resolved. The misuse of discovery is one of the greatest problems facing civil litigation. Judges need to take strong control of lawyers who are abusing the process. This can include determining the number and length of depositions, limiting the number of questions in interrogatories, and determining the order of witnesses to be deposed—all powers that judges already have. It is also important to impose sanctions, because doing so may be the only way to resolve or ameliorate these problems.

5. There is no substitute for a firm trial date. When lawyers know that the first (or second or third) trial date is not real, their perspective on when they need to act changes. A firm trial date saves enormous amounts of money, reduces stress on clients, and keeps the trial docket real (in that it is not filled with "fake" dates) and less jammed because cases are not set over and over for trial. A firm trial date allows lawyers to count backward from trial and make sure they are ready. It is the duty of any court to provide a system of firm trial dates.

6. Finally, the practice of law can be a stimulating, rewarding, and enjoyable occupation. We are all public servants and should feel obliged to support the highest standards of that practice.

Judge R. Brooke Jackson, U.S. District Court for the District of Colorado

I can't solve the age-old problem of the excessive cost and delay of civil litigation in this short article, but here are a few thoughts to consider.

1. The initial pleadings are a good place to start. Complaints with multiple claims and answers with multiple boilerplate affirmative defenses (starting with the ubiquitous "failure to state a claim" and following with every other defense on your office's list) invite wasteful motion practice. Lawyers are paid "the big bucks" to exercise judgment. Go with your best stuff and amend later if you develop a solid factual and legal basis. Courts need to play ball by liberally allowing amendments. I believe they will.

2. How about calling (not e-mailing) opposing counsel soon after you know who he or she is, and suggesting coffee, breakfast, or lunch? Once you know someone face-to-face, it's easier to work together and so much harder to be a jerk. It ultimately saves money too—for everyone involved.

3. Sometimes there is a central legal issue, the resolution of which will significantly affect the course of the case. When you meet with the judge for the initial scheduling or case management conference, why not suggest teeing it up for a ruling on the law before doing anything else?

4. Don't file a Rule 12(b)(6) motion "just because." *Twombly*[2] and *Iqbal*[3] have fostered bad habits (and have plagued my life). Save it for when you really have it.

5. Don't introduce your interrogatories with an obnoxious set of definitions and instructions. Don't introduce your response with an obnoxious general objection, followed question by question with "X objects to this question, but without waiving its objection, responds as follows." Yuck! Simple, straightforward questions and answers are super.

6. Don't file discovery motions—at least not in my court. First, cooperate (really!) and confer (meaning talk). Don't simply write, "This e-mail satisfies my duty to confer, and if you don't agree by the end of the day, I'll file a motion." Then, if you still don't agree, call my chambers and set up a telephone hearing. We can usually take you within a day or two, even "right now" if you're in the middle of a deposition. I can usually rule on the spot.

7. You don't have to depose every potential witness; sometimes it isn't even a good idea. You learn quite a bit from documents. Why spend your client's good money to give the witness a practice session? I've heard it said, "If I don't depose everyone, I'm looking at malpractice." I don't buy it (of course, I can't get sued for malpractice!).

8. Traditionally, I set dispositive motion deadlines when I meet with counsel for a scheduling conference near the beginning of the case. But in "Working Smarter, Not Harder,"[4] I read that at least one judge believes that the deadline encourages the filing of summary judgment motions even where there are pretty obvious material fact disputes. Some judges are requiring counsel to show that there are no material fact disputes before filing a summary judgment motion, thus avoiding lots of cost where failure is inevitable. I like it.

9. While it might seem to go against the grain, I think you should frequently, if not always, request oral argument on dispositive motions. It fosters more informed (and quicker) rulings, and it gives counsel and the court a better chance to focus on the wheat, not the chaff.

10. A huge money waster is having your trial "bumped" due to a conflict on the judge's calendar. In federal court, I think counsel should seriously consider stipulating to one of our superb magistrate judges in those (rare) situations.

11. Finally, and above all, always be absolutely civil and professional, not sneaky or pejorative. It is, of course, the right thing to

do. It will also save money and make the practice of law a lot more fun.

Judge Robert L. McGahey, Jr., Denver District Court

Before becoming a judge, I spent twenty-five years as a trial lawyer. During that time, I tried more than 100 jury trials. One of the first things I learned as a judge was that "case management" means something completely different when you're standing in front of the bench than it does when you're sitting behind it. Over time, I've developed, borrowed, or modified some practices that work well for me and, I hope, for the lawyers and litigants whose cases are pending in my courtroom.

1. Stay on top of stuff. My staff gently suggests that I'm OCD about my "pending" folder in ICCES (the Colorado courts' e-filing system). I plead guilty. I look at it constantly, all day long. I try to know when new cases are filed and what they're about. I like to know when motions are filed or when cases settle. I've never thought there was such a thing as "TMI" when it comes to my caseload.

2. Practice early case management. This is a no-brainer. I try to hold a case management conference with counsel soon after a case is at issue. This lets me get a feel for the case that doesn't necessarily show up in the pleadings alone. These conferences are almost always in person; I like to look lawyers in the eye and have them talk to me directly, without the shelter of a telephone. An early conference allows all of us involved to learn about potential glitches, wrinkles, or friction points, and then take preemptive steps to smooth those out. It also sends a message to counsel that I'm available.

3. I'm also a believer in status conferences when necessary—and in person when possible. Lawyers frequently complain that they don't get enough "face time" with judges. I try to make my face as available as possible. Status conferences can be held on any issue, and, some whining aside, most lawyers only come see me if they have to. I also use status conferences for specific purposes; I don't allow parties to set trials for more than five days unless they do it in person. This allows me to keep cases on track, and to balance my docket.

4. I schedule pre-trial conferences (PTC) much farther out from trial dates than many judges. My PTCs are set roughly thirty days before trial. There are several reasons for this. One is practical: thirty days before trial is when most expert witnesses want their fees. Another reason for setting PTCs this far out is that it gives me flexibility to fix problems that may arise as trial approaches, without sacrificing the trial date. I also use that early PTC as a time to decide motions *in limine*. The PTC date is a marker for other things, too. My pre-trial order (PTO) requires that *Shreck*[5] motions be filed thirty-five days before the PTC, which gives me ample time to consider such motions and to set hearings if necessary. Also, when I order alternative dispute resolution (which I don't do in every case), I require that it be completed before the PTC.

5. I do not allow written discovery motions. If one thing has made my docket management easier this rotation, it's this—because it most emphatically *works*. We all know that nothing slows down civil litigation like discovery fights, which can sometimes take upward of 120 days to resolve. What happens in the case in the interim? Frequently, the answer is "absolutely nothing." Moreover, not all discovery fights are legitimate; do I have to mention what could politely be called "tactical" discovery disputes? By doing away with written discovery motions, and requiring discovery dispute resolution hearings (which I hold generally over the lunch hour), I have reduced the number of discovery battles substantially.

6. Another part of my PTO is not allowing written motions *in limine*. Lawyers make their motions *in limine* orally at the PTC. I then hear what the other party has to say, and I rule. Very rarely, I will allow the party opposing the motion to file a response, but that's usually unnecessary. Again, this saves time and resources, and the immediate ruling allows counsel to get ready for trial knowing what to expect.

7. I frequently establish expedited schedules for motions and also am known to dispense with replies. Let's face it: many replies are just a regurgitation of what the lawyer said the first time. I try to rule on motions as quickly as possible.

8. Emphasize and expect professional behavior. Not to sound like an old crab, but the level of today's lawyer discourse frequently strikes me as harsh, mean-spirited, or downright snarky. I hate to call lawyers out on this; there's a paragraph in my PTO telling them not to engage in "Rambo lawyering." If they do, I try to stop it as soon as it starts. And yes, I'll bring them in for an in-person status conference to do that, reminding them not to put anything in a pleading that doesn't help me make a decision—and personal missiles lobbed at opposing counsel generally do not. (Remind me to tell you the story of the lawyer who filed a pleading entitled "Motion to Strike Portion of Notice to Set as Impertinent and Scandalous.")

As I've said elsewhere, people come to the courthouse for answers. They may not like the answers they get, but they're entitled to get those answers in a timely and efficient manner. It's up to judges to adopt practices and procedures to make sure that happens, without compromising the integrity of the decisions we make.

Conclusion

Readers can learn more about these and other recommendations from judges around the nation in "Working Smarter, Not Harder." A downloadable PDF is available at iaals.du.edu/workingsmarter.

Notes

1. IAALS and ACTL, "Working Smarter, Not Harder: How Excellent Judges Manage Cases" (Jan. 2014), iaals.du.edu/workingsmarter.
2. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
3. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
4. IAALS and ACTL, *supra* note 1 at 24-25.
5. *People v. Shreck*, 22 P. 3d 68 (Colo. 2001). ■