

21st Century Civil Justice System A Roadmap for Reform



Civil Caseflow Management Guidelines

INSTITUTE *for the*
ADVANCEMENT
of the AMERICAN
LEGAL SYSTEM



21st Century Civil Justice System:
A Roadmap for Reform
Civil Caseflow Management Guidelines

INSTITUTE *for the*
ADVANCEMENT
of the AMERICAN
LEGAL SYSTEM



Institute for the Advancement of the American Legal System

at the

University of Denver

Institute for the Advancement of the American Legal System

The Institute for the Advancement of the American Legal System (IAALS) is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Executive Director and former Colorado Supreme Court Justice Rebecca Love Kourlis leads a staff distinguished not only by their expertise but also by their diversity of ideas, backgrounds and beliefs.

IAALS provides principled leadership, conducts comprehensive and objective research and develops innovative and practical solutions—all focused on serving the individuals and organizations who rely on the system to clarify rights and resolve disputes.

IAALS is a part of the University of Denver, and it benefits from gifts donated to the University for its use. None of the gifts have conditions or requirements, other than accounting and fiduciary responsibility. All IAALS research and products are supported by pooled grants from individuals, businesses and private foundations.

Institute for the Advancement of the American Legal System

University of Denver
2044 E. Evans Avenue, HRTM Bldg., #307
Denver, CO 80208-2101
Phone: 303.871.6600
www.du.edu/legalinstitute

INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

STAFF

Rebecca Love Kourlis, Executive Director

Pamela A. Gagel, Assistant Director

Jordan M. Singer, Director of Research

Michael Buchanan, Research Analyst

Corina Gerety, Research Analyst

Natalie Knowlton, Research Analyst

Dallas Jamison, Director of Marketing & Communications

Erin Harvey, Manager of Marketing & Communications

Abigail McLane, Executive Assistant

Stephen Ehrlich, Consultant

Suzanne Gremaux, Consultant

E. Osborne Ayscue, Jr., Charlotte, North Carolina, a member of the IAALS Board of Advisors and a Fellow of the American College of Trial Lawyers participated as the Institute's liaison to the project.

For reprint permission please contact IAALS.

Copyright© 2009 Institute for the Advancement of the American Legal System.
All rights reserved.



Contents

- Executive Summary 2-5
- Civil Caseload Management Guidelines
 - Guideline One..... 6-7
 - Guideline Two 8-9
 - Guideline Three 10
 - Guideline Four 11
 - Guideline Five..... 12
 - Guideline Six..... 13
 - Guideline Seven..... 12-13
 - Guideline Eight 14-15
 - Guideline Nine..... 18
 - Notes 19



Excessive litigation costs and delay (separate but closely interrelated concerns) are two of the most serious problems in the civil justice system. These problems not only plague litigants whose cases do get into court, but also negatively affect access to justice, not just for the indigent,¹ but perhaps even for the middle class.² These concerns can be addressed meaningfully through caseflow management practices.

Effective caseflow management involves much more than reducing time to disposition; it involves timeliness throughout the life of the case. According to Maureen Solomon and Douglas Somerlot,

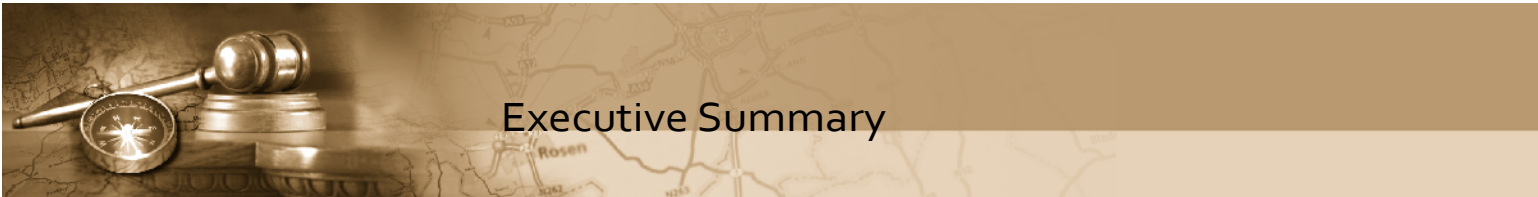
[i]n a sense, the term 'caseflow' may be misleading in connection with the movement of cases through the court. Cases do not flow steadily and smoothly from filing to termination. In terms of court involvement, the life of a case, and reality, may be characterized as a series of events separated

by times during which there is no court activity.

A goal of active case management is to make the sequence and timing of these events more predictable and timely.³

Another goal of caseflow management is to ensure that each event is meaningful, in that "the activity and preparation required for the event to take place on the scheduled date is completed before that date by all involved stakeholders."⁴ A corollary goal is to assure that effort is not duplicated. When the parties, counsel and the court prepare for an event, that event should occur. Otherwise, the preparation will have to be repeated. Additionally, the event itself should advance the resolution of the case in some way.

The Guidelines that follow were drawn from a number of sources, including the *Interim*⁵ and *Final*⁶ *Reports of the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System*



Executive Summary

(IAALS), and a recent and extensive IAALS civil case processing study.⁷

These Guidelines and the discussion of specific suggestions for applying the Guidelines are 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.⁸

The Discussion of the Caseflow Management Guidelines contains the following sections: Guideline, Basis and Background, Operational Protocols and Cross-References. The Guidelines are recommendations that are intended for the majority of cases. They are not intended to be adhered to in every instance and judges who are actively involved in case management are in the best position to determine the applicability of each Guideline, based on the specific needs of the case. Each Guideline is accompanied by a Basis and Background section that explains the rationale behind the Guideline and the benefits that flow from the caseflow manage-

ment practice set forth in the Guideline. Where applicable, the Basis and Background section references support from the specific sources listed above.

The Operational Protocols accompanying the Guidelines are intended to breathe life into the Guidelines. The Protocols are recommended practices and procedures that will assist judges in implementing the Guidelines. As is true with the Guidelines, not all of the Operational Protocols will be applicable to every case and judges exercising active caseflow management will be best positioned to determine which Protocols should be adopted in each case.

These Guidelines were developed from the Principles set forth in the ACTL/IAALS *Final Report*, and are intended to supplement the ACTL/IAALS *Pilot Project Rules* (PPR). In order to facilitate the implementation of these Caseflow Management Guidelines, each Guideline is also accompanied by a Cross-Reference section to the PPR and, where applicable, the *Interim* or *Final Report*.

Guideline One

Caseflow management should be tailored to the specific circumstances of the case and the parties. Judges 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

Judicial involvement in the management of litigation should begin at an early stage of the litigation and should be ongoing. 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

Judges 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.

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.

Guideline Five

Additional pretrial conferences should be held on request by one or more parties or on the court's own initiative.

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.

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.



Civil Caseflow Management Guidelines

Guideline One

Caseflow management should be tailored to the specific circumstances of the case and the parties. Judges 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.

Basis and Background Just as not all cases require the full range of pretrial procedures provided for under the rules, not all cases require the same expenditure of judicial time and resources. Treating all cases in the same way results in under-management of some cases, over-management of others, and in both situations increased costs or delay, or both. Under-management can result in expensive and disputed discovery and may complicate pretrial processes, as issues may not be adequately narrowed. Problems, disputes, and motions may go unaddressed, protracting the dispute and the cost and time associated with resolving it. Over-management can impose unnecessary procedures and requirements on cases that do not require them, burdening parties and increasing cost and delay. Furthermore, over-managing cases takes judicial resources away from those cases that do require more attention.

Comments from the ACTL Survey highlighted the tension between too much judicial involvement and too little, and indicated frustration where judges imposed needless conferences and procedures that only waste time and resources. Although it is sometimes difficult to determine exactly where the middle ground lies, the general theme that emerged from the Survey comments was a desire for meaningful judicial intervention.

Differentiated case management (DCM) is one of the basic methods used by those courts identified as having successful caseflow management programs. This approach permits a preliminary assessment at the outset as to how much judicial attention a case may require and enables courts to prioritize those cases that might require more judicial attention. A DCM system can automate the screening process so that judicial time and resources are spent re-allocating the limited number of cases that require it, rather than individually screening the caseflow management needs of every case at the outset.

The Federal Rules of Civil Procedure—and their state analogs—were designed to be transsubstantive or “one size fits all,” offering the full range of procedures for all cases, regardless of case type, amount in controversy, or complexity of the case. However, in many cases, the full panoply of pretrial rules and procedures is not appropriate and only leads to increased costs and delay. Over the years, courts have realized this and have informally developed special rules and procedures for certain types of cases. This is not to say that individual courts should tailor their own rules. That process is confusing and highly inefficient.

Rather, this Guideline supports a single system of civil procedural rules designed for the majority of cases while recognizing that the “one size fits all” approach is not the most effective approach for all types of cases.

Results from the ACTL Survey suggest that the process is bloated and has no scaled-down version for cases demanding less expenditure. The effect on access to the courts is pronounced; some deserving cases are not brought because the cost of pursuing

them fails a rational cost-benefit test, while other cases in the system that should be fully litigated are settled rather than tried because the trial process costs too much. Effective caseload management can identify unnecessary events and requirements (based on the specific circumstances of each case), ensuring that inefficiencies in the process—which lead to cost and delay—are minimized.

To this end, proportionality should be the most important principle applied to all discovery. Discovery is not the purpose of litigation. It is merely a means to an end. Discovery should promote the just, speedy, and inexpensive determination of actions and should be conducted in the most efficient, nonredundant, cost-effective method available to procure evidence directly relevant to the claims and defenses asserted in the pleadings.

Operational Protocols

- Most cases will not require intensive judicial involvement, and judges should assess each case as soon after filing as possible to determine the needs of the case and the expected degree of involvement required.
- In assessing the degree of involvement required for a case, judges should consider: the number of parties, including the number of separately represented parties; number of motions anticipated; amount of expected discovery; amount in controversy; complexity of the legal issues presented; disproportionate resources available to one party over the other; and any other factors that would suggest a need for more intensive management.⁹
- Judges should develop a differentiated case management system that includes simplified procedure for some cases and more intricate procedure for other kinds of cases. The system should consider categorizing cases by type in a way that would presume a certain level of judicial involvement for certain types of cases. The system might also include specific timelines for each track.¹⁰
- When determining the caseload management needs of each case, judges may need to consider the experience and professionalism of counsel.
- Judges should ensure that the procedural requirements and costs imposed on the parties are consistent with the following proportionality factors: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation.
- Judges should encourage parties to agree on appropriate levels and methods of discovery at the outset of the case, and where agreement fails the court should tailor discovery orders according to the principle of proportionality.
- Judges should be particularly mindful of proportionality with respect to the discovery of electronically stored information (ESI), taking into account the nature and scope of the case, relevance, importance to the court's adjudication, and expense and burden of retrieving and reviewing the ESI, both for the producing party and for the receiving party.

Cross References

- **ACTL/IAALS Pilot Project Rules:**
 - PPR 1.2 (Scope)
 - PPR 8 (Initial Pretrial Conference)
 - PPR 10.2 (Discovery)
- **ACTL/IAALS Principles**



Civil Caseflow Management Guidelines

Guideline Two

Judicial involvement in the management of litigation should begin at an early stage of the litigation and should be ongoing. A single judge should be assigned to each case at the beginning of litigation and should stay with the case through its disposition.

Basis and Background Early involvement familiarizes the judge with more than just the facts and issues in the case; it also helps the judge become familiar with the parties’ unique motivations, goals, and circumstances—characteristics that play a large part in determining the course and tone of the litigation. By becoming familiar with the case at an early stage, a judge can help the parties identify and narrow the issues, thereby narrowing the focus and scope of discovery to save the parties time and money. The judge can also gain an understanding of some of the areas of conflict that may arise in the future.

Early judicial involvement can reduce the parties’ pretrial costs, as identifying and narrowing the issues in dispute focuses discovery and can prevent future discovery disputes. When disputes arise, ongoing judicial involvement can prevent them from becoming protracted—a situation that adds significantly to the total costs of litigation.

Judicial involvement early in the process can achieve earlier nontrial dispositions—for example, through dismissal or default at the case initiation stage, through a facilitated settlement at case screening, or through scheduling orders and case management plans that enable counsel to consider the merits of their case and focus their efforts on the issues in dispute. Because a significant majority of cases are disposed of before trial, reaching a nontrial disposition as early in the life of a case as possible can reduce discovery, litigation time, and overall cost.

Early and ongoing control of case progress has been identified as one of the core features common to those courts that successfully manage the pace of litigation. Active court control, which includes scheduling, setting and adhering to deadlines, and imposing sanctions for failure to comply with deadlines, can ensure that each scheduled event causes the next scheduled event to occur, thereby ensuring that every case has no unreasonable interruption in its procedural progress.

The use of a single judge assigned to a case from beginning to end provides the parties in the litigation with a sense of continuity. With respect to discovery issues and disputes, the same judge who handles the pretrial and trial matters is in a better position to resolve discovery matters because of his or her familiarity with the issues,

the parties, the history of the case, and the relationship between the parties. For cases that go to trial, the judge who handled all pretrial and discovery matters in a case is in a better position to try the case, based on a familiarity with the issues, the parties, and the history of the case.

Understanding the parties and the case in this light enables a judge to truly tailor caseflow management to the specific needs of the parties and the case. This practice can also maximize judicial resources by minimizing duplication of work effort. For example, assigning a discovery dispute to a judge other than the judge handling general pretrial matters forces that judge to take the time to familiarize himself or herself with the same matter—an inefficient use of court resources. A similar redundancy results when the judge hearing the case at trial is different from the judge who handled the pretrial matters.

Operational Protocols

- A judge should assess each case as soon after filing as possible, in order to determine its caseflow management needs.
- Judges should become familiar with the issues in the case at an early stage in order to set realistic timelines and anticipate special needs and problems.
- A judge should make himself or herself available to parties and counsel to encourage informal ways of resolving disputes.
- Judges should routinely monitor the progress of the case in order to determine whether caseflow management needs have changed.
- All aspects of a case should be handled by one judge.
- A court's differentiated case management system should preserve judicial resources for the cases that need attention. Because the time and resources required of judicial officers will be minimal in many cases, the assignment of a single judge to every case should be feasible, even where judicial resources are not optimal.

Cross References

- ACTL/IAALS Pilot Project Rules:
 - PPR 4 (Single Judge)
- ACTL/IAALS Principles



Civil Caseflow Management Guidelines

Guideline Three

Judges 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.

Basis and Background Where rules and procedures are consistently applied and enforced, lawyers know what to expect from the court and know what the court expects of them. Consistent application and enforcement of rules and procedures creates a culture and practice in which meaningful events occur as scheduled, and preparation and compliance are promoted. Policies of no continuances, extensions, or adjournments absent extraordinary circumstances create this culture. That culture moves a case toward timely and cost-effective resolution.

While local rules can be a useful mechanism through which a jurisdiction can experiment with new rules and procedures, in many federal district courts the local rules are accompanied by an additional set of rules specific to each judge. These rules result in confusion, unnecessary expenditure of time, and unpredictability.

Operational Protocols

- Judges should consistently apply and enforce rules and procedures both within a single courtroom and within judicial districts. Courtroom-by-courtroom rules or procedures impede efficiency and create a patchwork legal culture.
- Judges should use consistent application and enforcement of rules and procedures to foster a legal culture that accepts efficient case processing as the norm.
- Judges should consistently apply and enforce deadlines. If the case requires a deviation from normal deadlines (such as staying discovery pending resolution of a motion to dismiss or staying the proceedings when parties agree to alternative dispute resolution), those expectations should be set out as early as possible and enforced.

Cross Reference

- ACTL/IAALS Interim Report

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.

Basis and Background An initial pretrial conference can provide an important opportunity for the judge and the parties to flesh out the facts and issues in dispute, discuss the scope of permissible discovery, address anticipated motion practice, and determine how much judicial attention a case may require. During the initial pretrial conference, the judge can also set forth his or her expectations of the parties and their obligations to the court. This can be instrumental in fostering an expectation among the parties that scheduled events will occur and continuances will not be granted absent extraordinary circumstances. Initial pretrial conferences also provide an opportunity to foster cooperation between the parties at an early stage in the litigation, which can reduce costs and increase the efficiency and speed with which the case is resolved.

Operational Protocols

- In order to make the best use of the initial pretrial conference, the judge should be as familiar as possible with the issues in the case and the parties' potential discovery needs before the conference.
- Each party's lead trial counsel should attend the initial pretrial conference.
- At the initial pretrial conference, the judge should meet with counsel and (where appropriate) the parties, to attempt to narrow the issues in the case, explore discovery needs and (where appropriate) set firm dates for the close of discovery, discuss the filing of dispositive motions, and set a trial date.
- At the initial pretrial conference, or before the initial pretrial conference when requested by the parties, the judge and the parties should discuss the manner in which electronically stored information is stored and preserved. When the parties cannot agree, the court should issue an order governing electronic discovery that specifies which electronically stored information should be preserved and addresses the scope of allowable electronic discovery and allocation of cost among parties.

Cross References

- ACTL/IAALS Pilot Project Rules:
 - PPR 8.1 (Initial Pretrial Conference)
- ACTL/IAALS Principles



Civil Caseflow Management Guidelines

Guideline Five

Additional pretrial conferences should be held on request by one or more parties or on the court’s own initiative.

Basis and Background In some cases, additional pretrial conferences or discovery conferences are a useful means of updating the court and parties on the progress of the case, resolving disputes, and assessing deadlines and timeframes. Conferences also provide the parties with an opportunity for face-to-face discussion and cooperation. However, their benefit must be weighed against the costs associated with attending conferences and available court resources.

Operational Protocols

- The judge should be mindful of the cost and expense to parties of multiple conferences and schedule them only when necessary and appropriate to the individual case.
- The judge should resolve all pending issues at a scheduled status conference.
- The judge should avoid taking issues under advisement whenever possible, because doing so inevitably protracts the litigation.

Cross References

- ACTL/IAALS Pilot Project Rules:
 - PPR 9.1 and 9.2 (Additional Pretrial Conferences/Setting the Trial Date)
- ACTL/IAALS Principles

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.

Basis and Background Where the parties are given a trial date at an early stage and made to understand that the date will be firmly adhered to, they are able to plan and prepare for each stage of the litigation process. The IAALS case processing study found a fairly strong correlation—almost the strongest observed anywhere in the study—between the elapsed time from case filing to the setting of a trial date and the overall length of the case. Cases in which the trial date was set early in the litigation process tended to terminate earlier than cases in which the trial date was set later in the litigation process, regardless of whether the case actually went to trial. The study noted that the key to avoiding unnecessarily lengthy times to disposition appears to be keeping the trial date firm. While it is somewhat unclear exactly what point in the case constitutes “early,” this timing should be considered in the initial evaluation of the case.

Firm and credible trial dates are another core feature of courts with successful caseload management programs. The importance of this practice lies in fostering the expectation that events will occur as scheduled. Where such an expectation has been established, parties will prepare accordingly—either to be ready for trial or settlement. In order to ensure a firm trial date, it is important that courts adopt a firm policy—and apply it consistently—for granting continuances. Where continuances are granted too liberally, the expectation that events will occur as scheduled—and the corresponding effect on attorneys’ expectations—become illusory.

Operational Protocols

- A judge should set a realistic and firm trial date at the initial pretrial conference or shortly thereafter. The judge should maintain this date except in extraordinary circumstances.
- In order to ensure that the date is realistic, before setting the trial date the judge should seek to understand the issues in the case and the appropriate scope and length of the discovery process.

Cross References

- ACTL/IAALS Pilot Project Rules:
 - PPR 9.4 (Additional Pretrial Conferences/Setting the Trial Date)
- ACTL/IAALS Principles



Civil Caseflow Management Guidelines

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.

Basis and Background Discovery can be one of the most costly aspects of the pretrial process, and cases involving extensive discovery often proceed more slowly than those involving little to no discovery. Because the potential for unnecessary cost and delay is so high, judicial supervision is crucial.

The discovery period is often the point in the pretrial process at which most of the disputes arise, and motion practice associated with resolving discovery disputes can take a significant amount of court time and resources. Early and active involvement in the discovery process can reduce the frequency of these disputes, as issues and areas of potential disagreement can be identified and either addressed ahead of time or anticipated and factored into caseflow management needs.

Cooperation between counsel can greatly reduce the cost and time associated with discovery; however, where counsel are generally uncooperative, active court involvement in enforcing discovery rules and agreements, and sanctioning noncompliance, can keep the process from becoming disproportionately costly and drawn out.

Even when parties agree on the scope of discovery, their agreement may not be representative of the most cost-effective and proportionate approach. Active court involvement in managing the discovery process can ensure that when parties reach an agreement on discovery, or when parties stipulate around imposed discovery limits, these agreements are not imposing unreasonable cost and delay on the client.

Most cases do not require much discovery; however, many lawyers are hesitant to limit the scope and tools of discovery on their own accord, based in part on fears of malpractice claims. Court-imposed limits on discovery provide lawyers with the “cover” they need to practice limited discovery.

Operational Protocols

- The judge should actively monitor the discovery process and should review party agreements on discovery matters. Where the parties' agreement is not conducive to a just, speedy and inexpensive resolution of the dispute, or is otherwise inappropriate in scope, volume, or methods to be employed, the judge may refuse to accept it in whole or in part. The judge has an important oversight role in making certain that everyone understands the implications of their agreement.
- The judge should consider requiring periodic reports from the parties on the progress of discovery.
- Where appropriate, the judge should consider financial restrictions on discovery, cost shifting, or co-pay rules, including cost allocation for the production of electronically stored information.
- Judges should enforce the defined default limits for discovery and should not permit additional discovery absent good cause and a showing of proportionality.
- Where any disputed issues require expert testimony, the judge should consider a court-appointed expert or require a joint expert agreed to by the parties.

Cross References

- **ACTL/IAALS Pilot Project Rules:**
 - PPR 1.2 (Scope)
 - PPR 6 (Motion to Dismiss/Stay of Discovery)
 - PPR 8.1 (Initial Pretrial Conference)
 - PPR 11.2 (Expert Discovery)
 - PPR 12 (Costs and Sanctions)
- **ACTL/IAALS Principles**



Civil Caseflow Management Guidelines

Guideline Eight

Judges should rule promptly on all motions.

Basis and Background Delay in ruling on motions can result in significant cost. For example, when a dispositive motion is pending, the parties must continue preparing their case in order to meet pretrial deadlines in the event the motion is denied. When the outcome of the motion is such that the case—in whole or in part—is terminated, the parties will have had significant preparation costs that were needlessly incurred. When discovery motions languish, the discovery process is interrupted, and that also forestalls progress of the case.

A significant amount of motion practice can be generated during the discovery process, and in order to move the case forward, prompt rulings on these motions are important. Courts can minimize the costs imposed on both the parties and the court and maximize efficiency in dealing with these motions by encouraging informal methods of resolving disputes and deciding motions.

Prompt ruling on dispositive motions is also important—even when the motion will ultimately be denied—as parties often make settlement decisions based on a ruling with respect to dispositive motions. The IAALS case processing study found that cases often proceed toward a quick settlement after a dispositive motion is denied. Of the 743 cases where a motion for summary judgment was denied in its entirety, 24.2 percent still terminated within 30 days of the ruling, and nearly 40 percent terminated within 90 days of the ruling. Of the 396 summary judgment motions that were granted only in part, 15.4 percent still terminated within 30 days after the ruling, and 33.6 percent terminated within 90 days of the ruling. The study concludes that in some percentage of cases, parties making summary judgment motions look to the court to provide answers that affect settlement decisions.

Operational Protocols

- Judges should discuss potential dispositive motions at the initial pretrial conference.
- Judges should consider staying discovery where appropriate until resolution of a motion to dismiss.
- Early in the pretrial process, the judge should set a firm date for the filing of dispositive motions and should maintain this date except in extraordinary circumstances.
- Judges should consider requiring opposing counsel to meet and confer in good faith before filing motions.
- Judges should rule expeditiously on motions. If the judge decides to hold a hearing on the motion—either telephonic or in open court—that hearing should occur as soon as possible. Whether the motion is granted or denied, the ruling advances the case.
- Judges should make themselves available for informal resolution of motions, for example by being available to counsel by telephone before the filing of any motions.

Cross References

- **ACTL/IAALS Pilot Project Rules:**
 - Rule 6 (Motion to Dismiss/Stay of Discovery)
 - Rule 8 (Initial Pretrial Conference)
- **ACTL/IAALS Principles**



Civil Caseflow Management Guidelines

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.

Basis and Background The growing preference for alternative dispute resolution (ADR) mechanisms to resolve legal disputes may be the result of a number of factors. The growth may reflect the efficiency and effectiveness of these mechanisms or could be a reflection of the increasing delay and inefficiency encountered in the judicial process. It could also be a means through which parties avoid costly discovery. Whatever the reason, the reality is that an increasing number of parties opt for ADR as opposed to judicial trials, and judges should consider the possibility of ADR when assessing caseflow management needs.

While a judge should raise the possibility of ADR early, so as to avoid the unnecessary expenditure of parties' time and money, the judge should also consider the appropriate timing of ADR in the individual case. Scheduling mediation or another form of ADR before the case is postured for meaningful discussion may be counterproductive and increase costs and delay.

Operational Protocols

- The judge should explore the possibilities for ADR at the initial pretrial conference. However, it is critical that the judge not create the impression that settlement is expected or demanded. Trial does not represent a failure of the system.
- The judge should ensure that ADR mechanisms are available after the parties have provided sufficient disclosures to fully understand the issues in dispute but before the parties have incurred significant costs for discovery and trial preparation.
- When parties agree to ADR, the judge should consider staying the underlying proceeding for a reasonable period of time.
- Where appropriate, judges should consider mediation of issues, as opposed to the entire case.

Cross References

- ACTL/IAALS Pilot Project Rules:
 - Rule 8.1 (Initial Pretrial Conference)
- ACTL/IAALS Principles

Notes

1. A 2005 study conducted by the Legal Services Corporation (LSC) found that for every individual served by LSC, at least one individual seeking assistance was turned away because of a lack of available program resources. The study estimated that in 2005, LSC-funded programs would have been unable to serve approximately one million people seeking legal help.
2. Results of the ACTL Fellows Survey show that the median monetary amount below which respondents believed it was not cost-effective to handle a case—and below which firms routinely turn a case away—is \$100,000. *See, e.g.*, JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS app. B, at B-1 (2008).
3. MAUREEN SOLOMON & DOUGLAS SOMERLOT, CASEFLOW MANAGEMENT IN THE TRIAL COURT: NOW AND FOR THE FUTURE 3 (1987).
4. Giuseppe M. Fazari, *Caseflow Management: A Review of the Literature*, 24 CT. MANAGER 48, 49 (2009).
5. INTERIM REPORT, *supra* note 2.
6. JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT (Mar. 11, 2009).
7. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS (2009).
8. These Caseflow Management Guidelines use the term “judges” broadly; however, we recognize that certain Guidelines and related protocols may involve court personnel other than the judge.
9. A review of complex civil litigation rules in Arizona, California, Connecticut, Florida and Pennsylvania showed that these were among the most commonly recommended factors that judges are to consider when deciding whether a case is complex.
10. *See, e.g.*, E.D. Mo. R. 5.01 (2009).



INSTITUTE *for the*
ADVANCEMENT
of the AMERICAN
LEGAL SYSTEM



Institute for the Advancement of the American Legal System

University of Denver

2044 E. Evans Avenue, HRTM Bldg., #307

Denver, CO 80208-2101

Phone: 303.871.6600 www.du.edu/legalinstitute