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- Hon. Jack Zouhary, *Ten Commandments for Effective Case Management*, Fed. Lawyer (2013)
- Natalie Anne Knowlton and Richard P. Holme, Inst. for the Advancement of the Am. Legal Sys. & Am. Coll. of Trial Lawyers, Working Smarter, Not Harder: How Excellent Judges Manage Cases (2014)
- Donna Stienstra, Fed. Judicial Ctr., A Study of Civil Case Disposition Time in U.S. District Courts (2016)

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Recent Criminal Cases of the U.S. Supreme Court

A New Model for Civil Case Management

Advising Criminal Defendants of Possible Immigration Effects: The Trial Judge's Duty

A New Model for Civil Case Management:

Efficacy Through Intrinsic Engagement

David Prince

Most trends in reforming our civil litigation system in recent decades have been based on a "high tech" paradigm—reformers assume the system will be more efficient if we create enough self-executing procedures that issues are resolved automatically and people are kept away from the courthouse. The paradigm is akin to an automated system for answering the telephone at a busy company; just push the right button and you will automatically be transferred to your destination. This article suggests an alternative "high touch" approach[1] that applies the principles of procedural justice to achieve more efficient "distributive justice" (a fair and just result). The testing experience of a seven-year pilot program and the behavioral science research underlying procedural justice are consistent with the following thesis: A civil case management system should achieve greater efficiency, participant cooperation, and participant satisfaction by eschewing the modern trend of dispute suppression and prefab case management in favor of a philosophy that, informed by the behavioral sciences, is based on disputant engagement that tailors case management to the individual needs of the case. Put more succinctly, effective civil case management is tailored to the individual needs of the participants. While a controlled evaluative study is needed, the pilot testing and the existing behavioral science research tell us that the goal of civil case management should be giving each civil case the degree of management it needs (whether greater or lesser) through early, hands-on, and individualized engagement of the judge with the disputants. To continue the telephone analogy, rather than an automated telephone-answering system, a live, knowledgeable, and engaged receptionist will be more effective for the company and the customer, more satisfying for the customer, and more economical and efficient for all.

Civil litigators, parties, and judges have long been dissatisfied with civil case management. In 2006, a group of experienced civil litigators and trial court judges assembled to launch an experiment in civil case management. Our goals were modest. We did not have the ability to change the existing rules of civil procedure, so we sought to work within them. Our collective instinct was that the trend of rule-based, automated management of civil litigation impaired rather than improved the delivery of distributive justice. We also suspected that the automation approach exacerbated rather than resolved the problems in civil litigation. We wanted to make the path to dispute resolution more efficient and trim away the most common distractions to let everyone involved focus their resources on the core of the civil dispute. Our suspicion was that a "high touch" approach of active and engaged case management would be more effective. We started a pilot as a test bed for experimenting with different techniques.

What we learned was that this modest goal leads to revolutionary realizations in civil case management. The lessons we learned reduced one participating judge's civil caseload by 58%. While a more rigorous quantitative study involving control groups is needed, this bespoke approach appeared to reduce substantially the judge-time required per case—reaping the double benefit of a lower caseload as well as less time required per case.

We started our project by surveying the various procedural approaches used around the country to improve civil case management. We looked at the rocket docket,[2] differential case management,[3] motions dockets,[4] trial-setting tripwire,[5] and many others. Fortunately, we had reflective people with real-world experience in each of the approaches that could assess firsthand the benefits and shortcomings of these approaches. We quickly realized we were trying to start our journey from the destination. We took a conventional step back and asked what drives the ***problems*** in civil litigation. We realized this was also too myopic. We stepped back further and asked what drives ***civil litigation***. Once we answered that question, a new approach revealed itself. However, we then had to start our experiment to realize that the true foundation lay in asking what drives ***human behavior.*** Over time, the pilot project revealed that the solution to the problems in civil case management lay, not in defining specific procedures, but in adopt-

Footnotes

1. The concept of "high touch" vs. "high tech" is drawn from *Megatrends* by futurist John Naisbitt (Warner Books, 1982).
2. For example, the United States District Court for the Eastern District of Virginia. For information, see http://www.leclairryan.com/files/Uploads/Documents/Rocket%20Docket%20EDVA%20FAQ.pdf.
3. For example, the United States District Court for the Northern District of Ohio. For information, see Local Rule 16.1 at http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/Rule161.pdf.
4. For example, the presentment process in the United States District Court for the Northern District of Illinois. For information, see Local Rule 5.3 at http://www.ilnd.uscourts.gov/_assets/_documents/Rules/LR2012.pdf.
5. The trial tripwire can take many forms ranging from an early deadline for all cases to set trial or prohibiting a trial setting until the case is fully prepared and certified as ready for trial. For one example, consider the trial-setting process in the state courts of Colorado stated in Colo. R. Civ. Pro. 16(b)(4).

ing a new philosophy of civil case management by pursuing individualized engagement based on what academics call an "intrinsic motivation" model.

The key building blocks to achieving both efficient and effective case management define a philosophy of civil case management. These three foundational blocks can be summarized as follows:

- Procedural Justice Matters—*How* One Charts the Course Is as Important as the Course
- The Verdict Is Not the Goal—One Must Determine the Destination to Chart the Course
- The Lawyer Is the Judge's Ally—Work with the Crew, Not Against Them

A philosophy built on these three principles, in turn, leads to four core strategies:

- Bring 'Em In and Engage, Engage, Engage
- Ask Why
- Streamline and Customize Case Management
- Engage Disputes to Eliminate Distractions

Implementation tactics for an individual judge will then be driven by a combination of these principles, the local legal culture, and the judge's skills and experience.

This philosophy and these strategies evolved over time through the test bed of the pilot. But as the individualized-engagement model evolved, anecdotal observations indicated it was remarkably more successful than the mainstream model of remote rule-based case management. A review of the latest research from the world of the behavioral sciences explained and confirmed the anecdotal observations and apparent results achieved in the pilot's field experiments. The ultimate proposal of this article is that future civil-case-management reform should follow the paths pioneered in the problem-solving courts; specifically, it should be informed by, and based upon, the empirical data now available explaining human behavior and motivation.

Section II of this article will provide the reader with a brief overview of behavioral and management research advances relevant to civil case management. Then, we will examine the primary existing model for civil case management with the aid of this research and the reader's experience with the mainstream existing model. If the idea of reading about behavioral science research is too soft and fuzzy, skip to sections III and IV. There, this article will propose a new model to inform future civil case management based on this research and, more importantly, real-world experiences. After discussing the philosophies and strategies of a new engagement-based model for civil case management, this article will delve into the nuts and bolts of implementation tactics through a case example in section V. Section VI then provides some thoughts on a path forward.

By the conclusion, you will know the strategies necessary to revolutionize your approach to civil case management. Instead of devoting your time to litigating the litigation, you will be able to clear away the distractions and focus your time on providing effective, productive court services to the parties. You can focus the bulk of your judicial civil time and attention on the meaty analyses requiring a judge rather than on the endless review of briefing on distracting issues. The lawyers in your case will also be able to streamline their work. In the end, your approach to civil case management will yield more effective, more efficient, and more satisfying solutions to your community.

Project management challenges the manager to move a group of people to accomplish a goal

PROCEDURAL JUSTICE AND DEVELOPMENTS IN BEHAVIORAL SCIENCE

A. JUDGES AS PROJECT MANAGERS

In 1986, the Administrative Conference of the United States adopted recommendations for addressing perceived problems in our litigation procedures. The adjudication process was believed to suffer from delays, excessive expense, and unproductive legal maneuvering. This, in turn, was seen as interfering with achieving substantive justice. The Conference called for judges to take away from the lawyer control of case management. The Conference noted that "many judges, informed scholars and other experienced observers now cite lawyer control of the pace and scope of most cases as a major impediment" to the litigation process.[6]

Moving a civil dispute through the litigation process to conclusion is an exercise in project management. The mid-twentieth-century view of the litigation process assigned the judge a passive role, if any, in that project management. The judge's role was to provide fair and impartial decisions of disputes (distributive justice) brought to the judge, and little else. As indicated by the Conference report, a major shift began several decades ago when the judge was increasingly expected to provide active management of the litigation. As the Conference observed in 1986, "[i]n the federal judicial sphere, and increasingly in the state judiciary, a consensus is developing that efficient case management is part of the judicial function, on par with the traditional duties of offering a fair hearing and a wise, impartial decision." Once the judge was assigned the role of project manager, a managerial philosophy had to be selected.

Project management challenges the manager to move a group of people to accomplish a goal. In addition to identifying the tasks required, project management requires influencing behavior, gaining compliance, and achieving acceptance of the manager's authority. How one approaches these tasks is based on the managerial philosophy of the manager.

B. TWO MODELS OF MANAGEMENT PHILOSOPHY

Those who study management and human behavior tend to identify two broad types of managerial philosophy or management models. The language varies by author, but they often differentiate between a traditional management model of extrinsic command and control and an emerging model of

6. Recommendations of the Administrative Conference of the United States, 1 C.F.R. § 305.86-7.

Tom Tyler . . . has spent more than two decades studying the question: *Why do people obey the law?*

autonomy or intrinsic motivation. In the context of analyzing civil case management, the traditional command-and-control or "extrinsic" model would describe a model of civil case management based on automated and self-executing generic case-management rules. The judge's role in the extrinsic model is to drive the participants through the rule-defined path and enforce those rules through sanctions. The model of autonomy or "intrinsic" motivation would describe the individualized-engagement model advocated in this article.

Two sample authors in these fields that are accessible to a law-trained audience are Tom R. Tyler and Daniel H. Pink. Tyler is closely connected to the field of law, while Pink's relevant work focuses on business management.

Tom Tyler is the founder and leading exponent of the procedural-justice movement. He is a psychologist who has spent more than two decades studying the question: *Why do people obey the law?* In his work, *Psychology and the Design of Legal Institutions,* Tyler explains our two models in the context of designing credible and effective systems of law.

Tyler describes the traditional model as one based on "social control" of human behavior through use of extrinsic rules that create a system of punishments and rewards for compliance with those rules.[7] He often refers to this as a "deterrence"-based model for directing the behavior of individuals.[8] He observes that this model is heavily dependent on an extensive system that allows leaders to monitor or surveil the behavior of individuals to distribute proper rewards and punishments based on rule compliance.[9] This surveillance component is a necessary foundation for an extrinsic system because the success of a deterrence model is largely dependent on the individual's belief that he or she is likely to be caught and punished for breaking the rules.[10] For example, I sit at the red light without moving because I expect something bad will happen if I run the light. Through a review of the existing research, Tyler demonstrates that the deterrence model is ultimately resource intensive and relatively ineffective in securing individual compliance and cooperation.[11] If there is no traffic around, I do not expect to be caught, and the light is particularly long, I may run the red light.

Tyler explains that the social-control model's reliance on punishment for violating rules results in participants being less likely to follow the rules when they are not under surveillance. The control model "create[s] an adversarial relationship," which leads the participants "to grow less compliant" with the rules and "less willing to help" (*i.e.*, less cooperative).[12] As the rules under a control model are simply imposed on the participants without their input or consent, the participants also see those rules as lacking legitimacy.[13] This, in turn, contributes to a reduction in compliance. Any young associate that has had to face an experienced and obstreperous opponent "alone" in the confines of a telephone conference to negotiate a deposition date or document production will recognize Tyler's academic explanation of the experience. Tyler concludes that the deterrence model "is a very high cost strategy [because of the implementation and policing resources required] that yields identifiable, but weak, results."[14]

Tyler describes the second model as one based on "legitimacy and morality."[15] By "legitimacy," he means a system that strives to win the consent, compliance, and cooperation of the participants through involvement. By doing so, the leader/manager gains authorization from the participants to lead and make decisions. "Legitimacy, therefore, is a quality possessed by an [individual], a law, or an institution that leads others to feel obligated to obey its decisions and directives."[16]

By "morality," Tyler means that the standards or rules governing conduct are internalized by the participants as private values—as their own feelings of responsibility and obligation.[17] Once this internalization is achieved, the participants self-regulate to comply with those standards.[18]

If I understand and accept that my community has decided that we should have a traffic light at this intersection because it is a dangerous blind curve and a fast heavy truck could be coming at any moment without warning, I accept the rule that we must stop when the light is red. I internalize this rule and believe honoring it is part of being responsible. I tend to honor the requirement to stop even when it makes me late and I cannot see a reason to stop on this particular night. As a result, I am more likely to stay stopped at the red light even if I am sure I will not get ticketed for running it and doubt I would get hit if I ran the light this time. Tyler explains:

> Self-regulation can occur based upon legitimacy, morality, and/or both.
>
> The police and courts, as an example, depend heavily upon the widespread voluntary compliance of most of the citizens most of the time. This compliance presumably allows authorities to focus their attention upon those individuals and groups whose behavior seems to be responsive only to threats of punishment. The legal system would be overwhelmed immediately if it were required to regulate the behavior of the majority of citizens solely through sanctioning or the threat of sanctioning.[19]

Morality and legitimacy are achieved, Tyler argues from the research, through following the precepts of procedural justice.

7. Tom R. Tyler, Psychology and the Design of Legal Institutions 9 (2008).
8. *Id.*
9. *Id.* at 11.
10. *Id.*
11. *Id.* at 12.
12. *Id.* at 17.
13. *Id.* at 22-27.
14. *Id.* at 12
15. *Id.* at 21-22.
16. *Id.* at 23.
17. *Id.* at 29.
18. *Id.* at 28.
19. *Id.* at 32-33.

The key dimensions of procedural justice are as follows:[20]

- **Voice:** The participant must feel heard in the proceedings;
- **Neutrality**: Decision-making must appear unbiased and principled;
- **Respect**: The participant must believe he or she was treated with dignity;
- **Trust**: The participant must believe the decision-maker is taking into account the participant's needs and sincerely trying to address the litigants' needs. The label "trust" for this parameter can be a miscue to one with a law degree. One researcher has referred to this parameter more descriptively as "helpfulness" rather than "trust."[21]

Even Tyler's elements of procedural justice can be boiled down to the simple ideas that a person will be more satisfied and likely to cooperate with decisions made by an authority if that person believes the decision was fair. The research tells us that the single most important factor in determining whether the person believes the decision was fair is not the decision itself. Instead, it is whether the person believes he or she had a chance to speak and be heard in the decision process.[22]

Interesting research by Lind, Kanfer, and Earley examined this point.[23] The researchers used the scenario of giving work assignments to personnel. Participants were given three approaches to handing out work assignments. In the first scenario, the participant was simply given an assignment. In the second scenario, the participant was told of a tentative schedule and then asked for feedback. The schedule was then adjusted to come closer to that proposed by the participant. In the third scenario, the researcher handed out the work schedule and stated it would not be changed. However, the researcher then asked for opinions from the participants. After receiving the opinions, the researcher stayed with the initial assignments. Predictably, the scenario in which participants were allowed to provide their input before the decision was made was viewed as the fairest (which, in turn, means it was the most likely to be followed). The surprising result for many is the perception of fairness for the third scenario, in which participants were told the schedule would not be changed, were then given a chance to provide input only after the decision was made, and then basically had all their input rejected when the researcher confirmed the original decision. This third scenario was still viewed as substantially fairer than the first, when no "voice" was permitted. Thus, even an admittedly "sham" opportunity to provide input makes a person substantially more likely to follow rules and procedures than simply imposing them on the person with no chance to speak.

In summary, Tyler concludes that a rule-making system (which is analogous for our purposes to a system for management of a civil lawsuit) is dramatically more likely to achieve acceptance, compliance, and efficiency through cooperation by using a fair system to allow the individuals being ruled (the disputants in our analogy) to participate in shaping those rules so that they will internalize the standards as their own. Tyler's 2006 research reveals that an individual's belief in the legitimacy of the rules at issue is five times more important to their decision whether to follow those rules than their perceived risk of punishment for breaking them.[24] His research further reveals that what he calls the "morality" factor is 15 times as important to compliance as the risk factor.[25]

Daniel Pink . . . is a respected writer on issues of interest to the business world such as organizational management.

Our second author is Daniel Pink. He is a respected writer on issues of interest to the business world such as organizational management. In his 2009 book *Drive: The Surprising Truth About What Motivates Us*, he labels the two management-philosophy models as Motivation 2.0 based on Type X behavior and Motivation 3.0 based on Type I behavior. For simplicity, this article will refer to Type X (think "X" for "extrinsic") and Type I (think "I" for "intrinsic"). Pink draws a now-familiar distinction between the models. "Type X behavior is fueled more by extrinsic desires than intrinsic ones. . . . Type I behavior is fueled more by intrinsic desires than extrinsic ones."[26]

Type X is the traditional model of management that has dominated business management for a century. In business management, Type X assumes that people will not do their work unless closely controlled, monitored, and driven by their manager. It assumes that employees are motivated through a system of providing rewards for desirable behavior and punishments for undesirable. Simply put, Type X-based management seeks to define the path for the employee to follow in detail and then rewards desirable behavior and punishes undesirable behavior to achieve a smooth-functioning employee "machine."[27] Advanced research on Type X-based management explains that rewards are substantially more effective than punishments in achieving results.[28] Type X-based management is an alternative description of the same "extrinsic motivation" principles described by Tyler as a "social control" or "deterrent" model.

A classic example of Type X-based management is a traditional twentieth-century manufacturing assembly line. The employee is placed at a station on a factory floor overlooked by a manager's window. The employee is given detailed instructions based on a time-and-motion study of exactly how to insert tab A into slot B. The employee must conform strictly to

20. Kevin Burke & Steve Leben, *Procedural Justice: A Key Ingredient in Public Satisfaction,* 44 Ct. Rev. 4 (2007).
21. Michael Rempel, Research Director at the Center for Court Innovation, presenting *The Role of the Judge* at the Annual Conference of Colorado Drug Court Professionals (April 10, 2012).
22. *See* Burke & Leben, *supra* note 20, at 12; Tom R. Tyler, *Procedural Justice and the Courts,* 44 Ct. Rev. 26, 28 (2007).
23. E. Allan Lind, Ruth Kanfer & Christopher P. Early, *Voice, Control and Procedural Justice*, 59 J. Personality & Soc. Psychol. 952 (1990).
24. Tyler, *supra* note 7, at 31.
25. *Id.*
26. Daniel H. Pink, Drive: The Surprising Truth About What Motivates Us 75 (2009).
27. *Id.* at 17.
28. *Id.*

Like Tyler in reviewing research on the rule of law, Pink reviews the available research from the fields of business management and behavior.

requirements defining when she arrives, what she wears, when she can take a bathroom break, when she can speak, etc., to allow the assembly line to move rapidly and consistently. The employee has given no input into any of this and no explanation of why the third finger on her left hand must be held at such and such an angle. The employee is always under observation, and every deviation from the defined path is sanctioned.

Like Tyler in reviewing research on the rule of law, Pink reviews the available research from the fields of business management and behavior. He concludes that Type X-based management is generally unsuccessful for most modern business environments and can make employees underachievers, as well as more likely to pursue unethical behavior.[29]

One of Pink's more intriguing findings is that paying bonuses for meeting specified goals actually harms the performance of an employee or group of employees over time when they perform work that requires more than rote repetition of defined steps.[30] This finding was based on pioneering research by Harlow and Deci.[31] Deci pursued a research model testing different ways of getting people to form various patterns with certain puzzle-like pieces. He divided them into two groups: one that was paid based on their level of performance and one that was not paid. He had the two groups assemble certain patterns over a three-day period. He ultimately found that the unpaid group performed markedly better than the paid group. Pink's Type I model explains why.

In a related finding, Pink concludes that goals imposed on people are frequently deleterious, while goals the person helps to set for his or her own reasons can be remarkably effective.[32] In short, he concludes that Type X-based management applied to any situation comparable to the tasks of civil litigation is counterproductive.

Pink explains Type I-based management as relying on the employee's own intrinsic motivations to achieve the manager's desired results.[33] While he uses different language, his explanation of the research on this form of management is remarkably similar to Tyler's procedural-justice concept. Pink identifies three elements of Type I-based management: autonomy, mastery, and purpose.[34]

Pink explains that the human being's natural state is to be autonomous and self-directed. Consequently, the more autonomous and self-directed a person can be, the more productive the person will be. While a manager must ultimately direct the goal for the benefit of the organization, the employees should retain as much autonomy as possible over what they do, how they do it, and when they do it.[35] As in the workload research regarding voice by Lind, Kanfer, and Earley, that automony can be minimal: it may be as little as an opportunity to be heard on the rules and production targets being set.

For his second element, Pink explains that motivating an employee most effectively requires a manager to recognize the individual's desire to be fully engaged. Human beings need to feel that they are making progress in their work. This feeling is a substantial motivator. Pink refers to this feeling of progress as "mastery."[36] People want to feel that they are honing their own skills.

In the context of civil case management, mastery may be served by giving the lawyers the chance to explain and, when appropriate, try their ideas on how best to take the case to conclusion. I once had one of those dozen-lawyer initial case-management conferences in a mechanics-lien case. One lawyer stepped forward to explain a system they had used in another case for streamlining the claims process and some suggested refinements. The other lawyers found the ideas intriguing. We discussed the process and implemented it for our case. Viewed through Pink's lens, this was a courtroom version of working with the participants' needs for mastery. More commonly, mastery for us will merge into the other two of Pink's elements. Even the example given could also be characterized as serving autonomy or purpose.

For his final element, Pink states that "[h]umans, by their nature, seek purpose—to make a contribution and to be part of a cause greater and more enduring than themselves."[37] Despite the high-sounding language, the "purpose" need not be to save the world; "purpose" need be only something beyond the individual's personal interest. For our purposes, "purpose" can be seen simply as involving the participants in defining the goals for the litigation and the steps in its management. The element can be served by discussing why any particular procedure, deadline, or page limit has been set where it is in this particular case (for example, "We set the deadline for supplementing disclosures on this date because of the parties' respective accounting cycles and the need to accommodate the accounting experts' tax-season schedules.").

One study reviewed by Pink illustrates the concept of "purpose."[38] He notes that one of the most underutilized words in management is "why." Adam Grant, a University of Pennsylvania psychologist, researched call-center employees—not the first group of employees that comes to mind when one thinks of jobs with a higher "purpose." He divided the employees into two groups. One group worked as normal. The other group read articles about the benefits and overall value of the work they would be doing. The group given a "purpose" for their work performed substantially better than the other group.[39]

29. *See id.* at 31, 56-57.
30. *Id.* at Chapter 2.
31. *Id.* at 5-9.
32. *Id.* at 35-38.
33. *Id.* at 75-79.
34. *Id.* at 219.
35. *Id.* at Chapter 4.
36. *Id.* at Chapter 5.
37. *Id.* at 223.
38. *Id.* at 137-38.
39. *Id.*

To return to the assembly-line analogy, recall the American automotive industry in the late 1980s and early 1990s. That factory floor was effectively the example of extrinsic management previously described and had been since Henry Ford perfected it. By the 1980s, there was considerable discussion of changing management philosophies in the American automotive factory to mimic those in a Japanese automotive factory. The "revolutionary" changes were to engage the line workers in discussions of how the assembly line was organized and the sequencing of the work and to get their input on the best ways for them to do their work. Managers were to have line workers identify ways each could better contribute to the final product. They were to treat each employee as a highly skilled master at their task rather than a disposable cog. Managers were to focus everyone on the need for high-quality work to keep the factory in business as well as the need for line workers to provide a product in which they could take pride. A key symbolic act was authorizing any person on the factory floor to halt the assembly line to fix a problem. Viewed through the prism of Pink's paradigm, these developments all focused on Type I motivation, serving the worker's need for autonomy, mastery, and purpose.

In considering Pink's discussion of "purpose" and Tyler's discussion of "voice," I am reminded of the Continental Army drillmaster "Baron" von Steuben, who famously complained about American soldiers:

> You say [to a Prussian soldier], "Do this" and he does it, but [in America] I have to say, "This is why you ought to do that," and *then* [the American soldier] does it.[40]

The Baron, despite deriding it, was actually far ahead of his time in management philosophy.

While each approaches the issues from a different perspective, Tyler and Pink reach the same conclusion after reviewing extensive research into human behavior. Both conclude that, whether designing a legal system or a management system, one will achieve substantially more efficient, effective, and rewarding results by designing the system based on intrinsic rather than extrinsic motivation.

C. THE TWO MODELS APPLIED TO CIVIL CASE MANAGEMENT

1. Extrinsic-Model Civil Case Management

Decades have passed since the Administrative Conference of the United States observed that our litigation systems suffered from widespread dissatisfaction and procedural problems that were ultimately impeding the judiciary's core function of delivering just results. The primary recommendation of the Conference was for the judiciary to undertake the role of project manager to move litigation through to conclusion.

Court systems have largely accepted this new obligation to be project managers. In civil litigation, court systems have generally approached this task by adopting rules aimed at creating a more defined path for civil litigation. Rules adopted at the jurisdiction level and at the local level set timelines for each phase of litigation. Generic deadlines were established for filing briefs, as were standardized page limits. In the 1990s, perceived abuses of discovery were addressed with limits on the number of the various discovery tools that could be used. Also, affirmative-disclosure rules were added to move the cases down the path. Later, codes of prohibited deposition conduct were developed. Some of these codes managed the very words to be spoken during the deposition at certain points of conflict. Limits were placed on the numbers and length of depositions. Some courts set prerequisites to setting trial dates. Others set aggressive trial dates and then applied a formula to set other deadlines based on that trial date. A system of sanctions for straying from the defined litigation path has also evolved over time. Development of Rule 11 was the initial approach. The affirmative-disclosure model was accompanied by a prohibition (which evolved to be rather porous) on use at trial of information not timely disclosed. Fee shifting based on frivolous and groundless litigation was developed and expanded. Many jurisdictions also expanded the judge's power to impose sanctions in discovery disputes on a largely discretionary basis. Some courts developed "fill in the box" forms for summary-judgment motions that narrowly restricted presentation of such motions. More recently, discovery has continued to be trimmed back, and a focus is developing on restricting or eliminating expert witnesses as a cost-saving measure.

[T]he management model the courts have been using is the same management model that has dominated American governance and business management for a century: the extrinsic model.

Each of these trends has followed the theme set by the Conference in 1986. They each focus on reducing participant control, reducing flexibility, and reducing direct involvement between the judge and the participants to yield a more automated management system. In the terminology of Pink and Tyler, they primarily seek to reduce participant autonomy and voice.

As explained by Tyler and Pink, the management model the courts have been using is the same management model that has dominated American governance and business management for a century: the extrinsic model. The dominant approach to civil litigation management has relied on what is essentially a set of boilerplate timelines and limitations backed up by extrinsic sanctions for violation and, to a lesser extent, a degree of incentives for compliance. Our approach has been very much like Henry Ford's factory floor. The approach casts the judge in the role of drover herding the case and participants down a generically defined path of gates and chutes from as remote a position as possible.

Tyler and Pink's research would predict that the dominant model applied to civil case management would result in poor self-regulation by participants, extensive time spent on sanc-

40. Christopher Hibbert, Redcoats and Rebels 217 (1990).

Too frequently, the community has tasted the civil court's pudding and rejected it.

tioning non-compliance, extensive resources devoted to some form of surveillance system, and widespread dissatisfaction with the system of management as well as the results. More pointedly, they predict that our standard civil-case-management model would encourage unethical behavior. The reader can evaluate the validity of these predictions.

The reader's own experience should be sufficient to detail the shortcomings in the extrinsic model for civil case management. Any time judges assemble to discuss civil case management, someone will inevitably observe that "there is nothing civil about civil litigation." This observation will be followed by a period of telling horror stories about egregious behavior by lawyers in civil cases. A similar assembly of civil litigators will yield similar tales of obstreperous behavior by opposing counsel. The litigators will add to these stories disturbing tales of arbitrary restrictions and timelines imposed on them by autocratic judges or court systems that all but barred them from any reasonable opportunity to present the merits of their case. An assembly of sophisticated civil-litigation clients will yield these categories of stories as well as considerable discussion about the staggering costs of these frustratingly ineffective experiences.[41]

The original cliché was that the proof of the pudding is in the eating. The steady trend for several decades now has been civil disputants increasingly turning to "alternate dispute resolution." That trend has many positives, but the judiciary must be mindful that in turning to other fora, the disputants are turning *away* from the courts. They do not reject our civil courts in favor of other fora because of their overriding satisfaction with our quality and credibility. Too frequently, the community has tasted the civil court's pudding and rejected it.

The body of work on human behavior exemplified by Tyler and Pink also explains some of the reasons for the dissatisfaction with the existing system. The participants are given no voice and no autonomy. Participants are given no role in defining the purpose of the proceedings. Paths, deadlines, limits are generically set with no accommodation (or, rarely, very little) for the unique needs of the participants.

Tyler notes that such an extrinsic-compliance model requires that the participants be certain they will be sanctioned for violating the rules and rewarded for compliance. This, in turn, requires an extensive and heavily resourced system of surveillance. Civil litigation management systems at the courthouse, however, have limited mechanisms for direct surveillance and ever-dwindling resources. The "surveillance" in civil litigation is usually the report of the opposing lawyer ("Moving counsel failed to comply with the duty to confer before filing the current motion, and it should be stricken for that reason alone")—and compliance or violation can be highly subjective at times ("I attempted to confer with opposing counsel but could not obtain a response; opposing counsel is the one in violation of the duty to confer"). Consequently, our civil management systems devote substantial time to exchanging adversarial and counterproductive letters that are meant primarily to shape the "record" that may be presented to a judge someday. Moreover, in practice, our sanction system is relatively toothless and the reward system relatively illusory. Consequently, even accepting the limits that can be achieved by an extrinsic system, widespread criticism and dissatisfaction exists with what is, in reality, a poorly executed and poorly resourced extrinsic system.

2. Intrinsic-Model Civil Case Management

This article proposes pursuit of the intrinsic model, a model based on active engagement with the participants, using the principles of procedural justice. The cornerstone of modern developments in behavioral and management research, exemplified in this article by Tyler and Pink, is that a leader will achieve substantially more by engaging on an individualized basis with those to be led and giving the participants as much input as reasonably possible. The research predicts that an engagement-based model of case management will require fewer resources than the existing model and will result in the participants having greater satisfaction with and trust in our court system.

One does not need the research to predict this result, however. Common sense and life experience make the same prediction. Anyone reading this article has likely already reached the conclusion that the dominant model for civil case management of the last few decades is unsatisfactory. Life experience demonstrates that being treated like a number and being herded through the line at the archetypal Department of Motor Vehicles makes people less cooperative, less compliant, and less satisfied with the results they receive.

Applying this research to court systems is not new. Intrinsic-management models, specifically in the form of procedural justice, have now been used for a considerable time in the drug-court model (including problem-solving courts, treatment courts, and collaborative courts). Because of their usual model of grant funding, drug courts have been particularly well vetted by empirical research. That testing research confirms the predictions of greater cooperation and compliance with court direction when case management is based on an

41. In fact, there have been a number of surveys that confirm the widespread dissatisfaction among members of the bar as well as their clients. *See, e.g.*, FINAL REPORT OF THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009):

> In short, the survey revealed widely-held opinions that there are serious problems in the civil justice system generally and that the discovery system, though not broken, is badly in need of attention. Judges increasingly must serve as referees in acrimonious discovery disputes, rather than deciding cases on their merits. From the outside, the system is often perceived as cumbersome and inefficient. The emergence of various forms of alternate dispute resolution emphasizes this point.

intrinsic model.[42] The intrinsic model is also gaining adherents in the realm of domestic-relations cases.[43]

Our pilot program provided a real-world laboratory to identify mechanisms for implementing this engagement model to civil litigation. While a controlled experiment and further study is required, our observations of those mechanisms in action suggest the promised rewards are real. More importantly, taming the process allows the participants and the judge to stop litigating the litigation. In turn, this allows participants to focus on resolving the core disputes and allows the judge to spend her or his time on improving the court's delivery of distributive justice—that fair and just result the community needs. The remainder of this article shares the practical lessons our pilot taught us in trying to implement an engagement model.

THE PHILOSOPHICAL FOUNDATIONS

For those readers that skipped the section giving the high-altitude view of developments in behavior research, the ultimate lesson is easily summarized and is supported by common sense as well as the research. Your child needs an important medical procedure, but it is unusual and you are not sure of your family's health-insurance coverage or if any prerequisites to coverage must be addressed. Do you want to call the insurance company and get (a) a prerecorded voice telling you to push 1 or 2 to select among options that seem to have no application to your problem, (b) have a live person answer the phone in a hurried voice only to say "please hold," return after several minutes, distractedly ask, "what department?" with the sound of a clicking keyboard and multiple other voices in the background, and then transfer you without explanation before you even complete a sentence only to find you have been transferred to voicemail for watercraft claims, or (c) have a live person answer the telephone in a pleasant and professional voice, ask you how they can be of help, demonstrate that they are listening to you and understanding what you are seeking, explain to you who they think can help and why, give you that person's name, title, and direct-dial number, and then offer to transfer you to the person? If you answered (c) and you can follow the "golden rule" of applying that answer when others come to you with their cases, you can save reading all those research studies. The philosophical foundations of an engagement-based model of civil case management are described in this section.

A. PROCEDURAL JUSTICE MATTERS—*HOW* ONE CHARTS THE COURSE IS AS IMPORTANT AS THE COURSE

In the context of a civil-case-management model, we can focus on Tyler's elements of voice and trust as well as Pink's elements of autonomy and purpose.

Tyler is the founder and leading exponent of a movement known as procedural justice. For our purposes, the procedural-justice movement can be summarized as teaching the lesson that litigants care as much (and, proponents would argue, more) about whether they were treated fairly as whether they win.[44] This research also tells us that the single most important factor in increasing compliance, cooperation, and satisfaction with court rulings is the quality of the judge's interaction with the participants.[45] A successful civil-case-management model must address the need for a quality interaction between the participants and the judge.

Tyler and Pink identify the elements needed to ensure a model that will promote quality interaction between leader and team. Tyler defines them as voice, neutrality, respect, and trust. Pink defines them as autonomy, mastery, and purpose.

In the context of a civil-case-management model, we can focus on Tyler's elements of voice and trust as well as Pink's elements of autonomy and purpose. For this discussion, these are all ultimately different aspects of the same idea. Every person (read lawyer or client, depending on the stage of the proceeding) has an ingrained need to feel heard and addressed as an individual. Voice acknowledges that the individual wishes to have a chance to speak *and be heard*.[46] Trust acknowledges that each individual has unique needs, one of which is to feel those needs are being addressed.[47] Pink adds that people need to feel that they have some input on what is being done and that there is a purpose to what they are being asked to do. The less these aspects of an individual's need to be acknowledged are addressed, the more dissatisfied, uncooperative, and non-compliant the person will be.

Tyler states that his research specific to court systems demonstrates that the converse is also true. The more the individual participant's need to be acknowledged is served, the more the person is satisfied.[48] This increased satisfaction remains robust ***even when the person does not get the outcome wanted***.[49] The result is that the single most effective tool in get-

42. Burke & Leben, *supra* note 20, at 6.
43. *See, e.g.*, Gene C. Colman, *Procedural Fairness and Case Conferences*, 20 CANADIAN J. FAM. L. 379 (2004) (discussing procedural-fairness principles applied to family-law proceedings).
44. Burke & Leben, *supra* note 20, at 6. *See also* Brian Bornstein & Hannah Dietrich, *Fair Procedures, Yes. But We Dare Not Lose Sight of Fair Outcomes*, 44 CT. REV. 72 (2007) (discussing importance of outcome and disputing contention that procedural justice is more significant factor in predicting satisfaction than distributive justice).
45. *See* SHELLI B. ROSSMAN ET AL., THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS (Shelli B. Rossman et al. eds., 2011); M. SOMJEN FRAZER, CTR. FOR COURT INNOVATION, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER (2006); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW (2002); Burke & Leben, *supra* note 20, at 6.
46. Burke & Leben, *supra* note 20, at 12-13.
47. *Id.*
48. *Id.* at 7.
49. *Id.* at 6.

Civil case management should be crafted to give the parties an effective resolution (distributive justice) as efficiently as possible.

ting compliance with court requirements is for the participant to be heard as an individual. The perceived fairness of the procedure used to reach the decision is seven times as important as the perceived fairness of the decision (the outcome) to predicting participant acceptance. [50]

This behavioral science research confirms that high touch works better than high tech for some issues. Realizing that procedural justice matters leads inevitably to the second philosophical pillar for our model: To serve participant needs, one must understand the participants' purpose.

Think of the civil-litigation judge as an itinerant small-cargo-ship captain where the ship's crew is supplied by the owner. During the litigation, the judge has the ultimate authority and control over the ship. However, the owner is the one that decides whether a cruise will take place and determines the destination. The owner hires and fires the crew. The owner is also paying the expenses of the ship, and the crew's ultimate loyalty follows their paychecks. The wise captain consults the owner and crew about the timetable, destinations, and course. He also consults the crew about any specific needs they may have. That owner and crew will be much more cooperative and satisfied with the captain if they have been consulted and their needs addressed.

B. IN LITIGATION, THE VERDICT IS NOT THE "PURPOSE"—ONE MUST DETERMINE THE DESTINATION TO CHART THE COURSE[51]

With this philosophical pillar, Pink's research and model more directly address the point. One of Pink's elements for an intrinsic model of management is "purpose." The person or persons being managed must feel that the work they are doing has a purpose and that it is a purpose they accept as theirs. A person that sees no purpose in his or her actions or has a different purpose than the manager will lead to difficulties. An effective civil case manager will take into account the need to provide purpose.

Ask the low-level lawyer why she is litigating a case, and she will say, "That's my job." Ask the middling lawyer why he is litigating a case, and he will exclaim, "I'm in it to win it." Ask the wise lawyer why she is litigating, and she will say she is serving her client's goal; she will then explain what that goal is and how the litigation serves that purpose, as well as how she and her client plan to achieve the goal in the end. A friend of mine used to put it another way: "a lot of lawyers chasing judgments are like dogs chasing a car—they don't know what to do with one if they catch it or why they chased it in the first place." Surprisingly few lawyers seem to understand that winning a verdict is almost never the party's purpose in pursuing civil litigation. The party's purpose, the client's purpose, is to solve a problem—to achieve a specific goal. The purpose of the litigation needs to be to help solve that problem—to serve the client's ultimate goal.

The goal of the business client may take many forms, but it usually boils down to profitability. The goal in the neighborhood dispute is usually each party's version of quiet enjoyment of the party's property. The goal of the real-estate litigant is a title that is clear and usually marketable, which is most likely serving, in turn, another concrete goal such as sale or financing. The goal of the personal-injury plaintiff is to address his or her perceived needs resulting from the accident. In some cases, the client's goal is purely a matter of vanity. Getting a judgment is only one step, and far too often a pyrrhic step, toward the client's actual goal. The party's actual goal is what drives litigation, not winning a verdict. Understanding this basic truth is the ultimate keystone to achieving efficient and effective civil litigation management. For if the litigation is driven by the clients' goals, civil case management should also be given the purpose of serving the collective legitimate goal of the parties.

This basic concept is also expressed in the procedural-justice movement. As noted above, one dimension of procedural justice is called "trust" (and can be described as "helpfulness" for our purposes). This term refers to the need of the participant to believe that the court has an interest in serving the participant's needs.[52] To achieve "trust," the court must seek to address actual, individualized purposes rather than assume a ubiquitous purpose of a favorable verdict.

To return to our mythical question of why litigation participants do what they do, ask the judge for the purpose of civil case management and most will say "to reach the end." Consequently, civil case management under the traditional model is too frequently designed like the automated telephone system—designed to get people to the end of the telephone call with as little effort from the entity receiving the call as possible. Like that caller, far too many people get nothing out of the litigation experience so managed—at least, nothing beyond termination of the call after a great deal of frustration and a very large telephone bill.

However, under an intrinsic model, the purpose of the litigation drives its management. Civil case management should be crafted to give the parties an effective resolution (distributive justice) as efficiently as possible. If the goal is to provide parties with the most effective resolution available, the judge must attempt to determine the goals of the parties—the purpose of the litigation. Identifying the goals of the participants to the litigation—even if only the goals that participants are willing to reveal—can allow the judge to identify an effective

50. *See generally id.* at 12-13 (noting that higher satisfaction leads to higher compliance).

51. For simplicity, the term "purpose" is used in this article to reference both the desires and the needs of the participant. The two are often different. Depending on the circumstances and the relative practicality of the participant's desires and needs, either may be the dominant factor driving the judge's actions.

52. *See* Burke & Leben, *supra* note 20, at 6 (discussing the "trustworthy authorities" dimension).

resolution that is within the court's ability to provide. That, in turn, allows the judge to define the purpose of the litigation. When necessary, the judge can also re-set participants' unreasonable expectations to the kinds of resolutions the court can actually provide. Moreover, identifying an effective and available resolution can allow the judge to identify the most efficient path to that resolution—if you don't know the destination, you cannot chart the course.

Civil case management can learn valuable lessons from its colleagues in criminal and domestic case management. As referenced earlier, these fields are seeing rapid growth in what they call "problem-solving" courts or "collaborative" courts. While one can debate at length the specifics of these courts, their foundational insight is irrefutable. The problem-solving-court movement is based on the realization that a person's participation in a court case is usually a symptom that is driven by an underlying problem. If that problem can be addressed effectively, everyone is better served. Additionally, as long as that problem is not addressed, the person will continue to consume court and community resources.[53] The same general concepts apply to civil litigation, though hopefully with considerably fewer substance-abuse and mental-health issues.

A critical first step in a problem-solving-court case is for the participants to articulate collectively the goal. Having recognized a goal, the participants then identify (as best they can) the issues that prevent the client from achieving that goal.[54] Problem-solving courts follow this method on the macro and the micro levels. Again, the same conceptual approach is highly effective in civil case management. Whether focused on the litigation as a whole or an individual issue that has arisen, the civil judge that takes a few minutes to have a "live" discussion with the participants to identify the current goal and the impediments will find his or her cases running substantially smoother and requiring remarkably few court resources.

In summary, civil litigation is driven by trying to achieve a client's goal. Effective and efficient civil case management is driven by recognition of those goals and identifying the impediments to achieving them. While the parties' goals will be highly varied, the goal is rarely as simple as paying the full "sticker price" for litigation and winning a verdict after trial. Consequently, a justice-delivery system should strive to provide its customers with effective and efficient resolutions addressing their goals or, at the least, their needs. Systems that ignore their customers' goals will continue to generate more dissatisfaction and wasted resources than justice. They will also continue to undermine public confidence in the judiciary as a credible method of resolving disputes. A civil court should be seen as a problem-solving court rather than a verdict assembly line.

To revisit the analogy of the itinerant cargo captain, the captain cannot assume delivery by the fastest course is always the goal. The owner may need a particular sequence or market timing to serve other obligations. If the captain does not learn of the owner's goals, the captain will not likely be successful in delivering the most efficient and effective service to those goals.

A civil court should be seen as a problem-solving court rather than a verdict assembly line.

C. THE LAWYER IS THE JUDGE'S ALLY—WORK WITH THE CREW, NOT AGAINST THEM

Pink notes that at the heart of the traditional model of business management is a view that the worker is the enemy and, if not closely supervised, will accomplish nothing. A similar premise about lawyers underlies the dominant model of civil case management. The Conference observed in 1986 that lawyer control of case management was the problem. The Conference's goal was to take control away from the lawyer—the apparent enemy. Also as noted, a common complaint today is that "there is nothing civil about civil litigation." At the heart of the traditional models of civil case management is a view that the lawyer is the root of the problem.

However, in an intrinsic-motivation-and-engagement model, the lawyer is a key participant in effective and efficient case management. This can be one of the greatest leaps of faith a judge interested in an engagement model must take. However, years of experimenting with this model in our pilot courtrooms suggest it works. Tyler and Pink's research not only predicts that it will work, it also explains why it works.

The effectiveness of this strategy is again rooted in the principles of procedural justice and serving participant needs and goals. The secret for the judge seeking efficient and effective case management is to realize that the individual lawyer is as much a participant in the process as the party. In fact, for many of the most distraction-prone issues in the litigation, the lawyer is the primary participant. Thus, procedural-justice research is as applicable to the lawyer as to the client. The judge can achieve considerable results by recognizing the value of serving the lawyer's needs for voice and trust. Despite the stereotype that popular media and much of the legal profession have built, even civil litigators are human beings that respond positively to being treated respectfully and individually. And, like other human beings, they respond poorly to being smothered with boilerplate and ignored.

This is a philosophy that is easy to test and implement. In the modern era of civil litigation, face time with the judge is extraordinarily rare. The growth of the bar and technology make face time between lawyers relatively uncommon as well. This isolation and modern digital communication leads to a degree of false courage and hyper-partisanship. These factors give the judge considerable power to leverage his or her time

53. *See generally* West Huddleston & Douglas B. Marlowe, Nat'l Drug Court Inst., Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States 1-10 (2011) (discussing reduction in new case filings and reduction in other public services resulting from problem-solving courts).

54. *See generally* Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 Fordham Urb. L.J. 1055, 1085 (2002) (discussing behavioral contracting and the need to tailor systems to individual circumstances, which, in practice, is done by identifying the individual's goals and obstacles to be addressed in achieving those goals).

[T]he most precious . . . gift one can bestow upon another person is one's . . . undivided attention.

to resolve issues dividing the lawyers. The simple expedient of the judge meeting in person with the lawyers and demonstrating that the lawyers have the judge's full attention is a remarkable elixir.[55] Disputes that can consume dozens of hours of expensive attorney time as well as dozens of pages of dense legal briefs begin to melt away.

In a very different context, Father Mike Surufka discussed the challenges of addressing difficult and debilitating problems with his parishioners. He described the "transformative power" of simply listening as follows:

> [T]he first step is always to listen, to see what is actually happening in the life of this person. That has more transformative power than just about anything. For somebody really to know that they were heard at a very deep level.[56]

The truth is that in the modern world (in and out of court), the most precious and persuasive gift one can bestow upon another person is one's genuine and undivided attention.

One cannot be too Pollyannaish. We must recognize that, whether consciously or unconsciously, the lawyer's goals are not always the same as the client's. The judge must be mindful of this distinction in working with the lawyers. A useful tactic is to require the lawyer to articulate the client's goal at every interaction. This exercise helps keep the client's goals foremost in the minds of all and helps the individual lawyer as well as the judge prioritize those client goals.

Returning to our ship captain, the captain may be in charge of the ship, but the crew does the bulk of the actual labor. In our example, the captain gets a new crew with each ship, and the crew members are more loyal to the owner that pays them than a single-voyage captain. Working with that crew and communicating with them to earn their trust may not always be the key to surviving the trip, but it will always be the key to an efficient voyage with a cohesive crew.

THE STRATEGIES

These philosophical foundations point to a better model of case management, a model with an engaged judge pursuing effective and efficient individualized case management. This case-management philosophy can be implemented by following four simple strategies.

A. BRING 'EM IN AND ENGAGE, ENGAGE, ENGAGE

As noted earlier, face time with the judge is exceedingly rare today and, as a result, is one of the most powerful tools available to the judge. The whole idea of the engagement model and the core lessons from Tyler and Pink require direct engagement with the participants to provide voice and define purpose. This need not be a lengthy and involved exercise, either. The research from drug courts tells us that a judge need spend only three minutes with a defendant to satisfy the desire for voice. In civil litigation, the time requirement will vary significantly by the issue being addressed, but the judge should not assume he does not have time to engage. Based on the experience in the pilot, the judge will gain time. Bring the participants into the courtroom for a live discussion as early in the case as possible, and then bring them in when any issue seems to be developing. Engagement simply cannot be achieved through documents—and a few minutes of face time can avoid hours of reading unnecessary briefs and seeking clarification.

The judge should use every interaction with the participants to demonstrate that she is engaged with their case. The judge should use each interaction to foster a culture among the team of collaborative problem solving. Through the judge's interactions, she will set the expectations of the participants as well as demonstrate the elements of procedural fairness. She will, thereby, gain the participants' cooperation, compliance, and ultimate satisfaction with the result.

A "bring 'em in" strategy requires the judge (in person or through trained staff) to maintain engagement by monitoring the developments in the case shown by the pleadings. If briefing on a legitimate substantive issue is unclear, avoid the distraction of a misunderstanding in a ruling or unclear further briefing by spending five minutes in person or by telephone with the lawyers to get clarification. Making time to squeeze in a live interaction with the relevant participants on an expedited basis before the judge drives home or during lunch will pay substantial benefits to his schedule in the long run.

A few years ago, I had a civil case filed by a prisoner challenging an administrative decision by the prison officials. Having a status conference that involves a pro se prisoner can be a logistical challenge and unpleasant. So, I disregarded our engagement philosophy and followed a more mainstream approach. The case raised some complex issues, and the briefs were like ships passing in the night on some issues. I thought I could decipher the issues, and I ruled on the briefs without ever having direct contact with the participants. The plaintiff prisoner appealed my ruling. The appellate court followed the same philosophy I had, ruling on ambiguous briefs without ever having direct contact with the participants to resolve those ambiguities. The appellate court deciphered the briefs dramatically differently than I had. The appellate court remanded the case to my court with instructions that were indecipherable to me based on my understanding of the case. At this point, I realized I was caught in the fallacy of trying to

55. *See* NAT'L DRUG COURT INST., THE DRUG COURT JUDICIAL BENCHBOOK 51-52 (Douglas B. Marlowe & William G. Meyer eds., 2011) (discussing the importance of the court's interaction with participants to reinforce perceptions of equitable treatment); Douglas B. Marlowe et al., *The Judge Is a Key Component of Drug Court*, 6 DRUG CT. REV. 1, 1-34 (2004) (discussing the value, if any, of frequent status hearings and judicial intervention).

56. See *id.*; *see generally* Heidi Glenn, *As Social Issues Drive Young from Church, Leaders Try to Keep Them*, NAT'L PUB. RADIO (Jan. 18, 2013), http://www.npr.org/templates/transcript/transcript.php?storyId=169646736.

achieve efficiency by avoiding engagement. Before either side could file a motion or a brief, I issued an order to set a status conference and identified the issue to be addressed as clarifying the parties' understanding of the issues on remand. Despite my experience, I was a bit worried about the procedural havoc a sophisticated pro se prisoner plaintiff could cause if given the opportunity. As I took appearances for the telephone status conference, I could hear similar concerns in the form of aggressiveness from the prison's attorney. As the pro se party was the plaintiff, I took a deep breath and gave the prisoner the first chance to give his view of the issues. He spoke for less than three minutes. At the conclusion of the three minutes, we were all on the same page and could see clearly the path forward.

At this point, the case was about one and a half years old. The case had occupied time and resources in my court as well as the appellate court. The case had occupied prison and attorney-general resources. The case had also occupied the prisoner during that time. Much of that one and a half years of litigation was wasted and could have been avoided by me investing those few minutes for the status conference at the beginning. We quickly packaged more clearly the key legal issue for appellate review (which was what would be necessary for the needs of both sides in the case). We later received a well reasoned and helpful appellate opinion resolving the novel legal issue. Given the unique history and issue in the case, I held a further status conference. I was rewarded with strong expressions of satisfaction with our legal system from both the prison lawyer and the pro se prisoner—as well as a stipulated concrete end to a case that could have spanned several more years.

B. ALWAYS ASK WHY, OR, KNOW THE GOAL TO SET THE PURPOSE

As noted, the purpose of the civil litigant in pursuing litigation is not the goal of obtaining a verdict. Instead, civil litigation is driven by the goals of the parties to the litigation. The closer the judge[57] can get to understanding the civil-litigation participants' separate goals (their reasons for pursuing the litigation), the more efficiently the judge can guide the litigation to an effective resolution. Do not misunderstand this as converting the judge into a counselor of some kind. The judge's job is not to be a therapist, business consultant, or mediator. Neither should one confuse the judge understanding the participants' stated goals with adopting those goals as the purpose of the litigation. To serve procedural justice and intrinsic motivation, the judge need only demonstrate appreciation and reasonable accommodation of the parties' separate goals in setting the judge's purpose for the case. The judge's job is to identify the most effective resolution that is proper for a court to provide and then reach that resolution as efficiently and productively as possible. Identifying the participants' stated goals serves only to inform the judge in accomplishing this task. Resolving the lawsuit often will not resolve the parties' competing goals. The litigation is only one aspect of that contest, and the judge is only responsible for resolving the litigation dimension of the problem. However, the more the judge understands the participants' underlying goals, the more the judge can identify what the courthouse can legitimately provide to the participants that will be productive. Once the judge identifies what the courthouse can provide, the judge can get the case focused on an efficient and effective path to that resolution.

Once the judge identifies what the courthouse can provide, the judge can get the case focused on an efficient and effective path to that resolution.

Put another way, Pink refers to the word "why" as the most underutilized word in business.[58] It is also the most underutilized word in civil litigation. A judge should frequently ask the participants "why." Why is your client pursuing this litigation? Why are you filing that motion? Why does your client want to oppose that motion? Why do you want additional time? Why do you oppose granting additional time? Why does your client want that discovery? Why does your client want to resist that discovery? Why will trial take that many days?

By way of example, if the parties truly need a trial, they usually only need the trial on a small number of central disputes. The judge can streamline the discovery and the pretrial proceedings to focus the proceedings on those genuine issues and get the trial done as quickly as possible. If the parties need an appellate ruling on a narrow question of unsettled law for the benefit of their industry, the case can be structured to get to the ruling without wasting resources on any more ancillary issues or discovery than absolutely necessary. If the real goal of the side that will pay is to put off the payment until the next quarter, and this is practical for the receiving side, the case can be managed to do as little as possible until the next quarter and then ramp it up rapidly if needed. If the goal of one party is to delay the inevitable inappropriately, the case can be put on a rocket docket and aggressively policed for delaying tactics. In the same vein, if the party's goal is not legitimate or not available through the courthouse, the judge can disabuse that party of that illegitimate goal or, if unsuccessful, manage the case to a quick resolution.[59]

The judge should also keep in mind that the first answer to the question is often not truly the answer to the question. A rule of thumb popular among business-management consultants is that a leader must ask herself why she wants to pursue a policy five successive times to get down to the real purpose. Only then, when she has peeled back the layers to the core rea-

57. The closer the ***lawyer*** gets to understanding his or her client's true goal (and/or needs) and how to achieve it, the more effective, the wiser, and the more successful the lawyer will be.
58. PINK, *supra* note 26, at 137.
59. I can recall more than one early case-management conference in which I asked what a party's goal was, only to hear a goal utterly unrelated to the litigation. I would then ask how the lawsuit would accomplish the stated goal. Some cases largely ended as a result of asking that question, though a few weeks might have been required before that happened. On rare occasion, I found myself explaining to a party what issues a court could and could not address in the lawsuit.

The Swedes have a concept called "lagom," [that] means neither too little nor too much.

son, can she effectively communicate to her organization a purpose that can become a shared goal. A judge need not necessarily put the question to the participant five times, but she should be willing to ask a follow-up "why" one or more times to get to the core purpose.

The strategy of asking why works on the micro level of each individual procedural or discovery issue as well as, if not better than, it works at the macro level of the overall path to resolving the litigation, and it is considerably easier to implement. This is particularly true for the judge with limited experience with civil clients and the nature of their true goals. The good news for the judge with limited civil experience is that substantial gains in docket efficiency can be achieved by focusing primarily on the micro level, the level at which every judge has sufficient experience and knowledge to apply these principles.

This strategy is also well suited for simple and low-risk tests of the overall civil-case-management approach proposed in this article. Pick an isolated issue or case and give this approach a trial run. The test need be no more sophisticated than asking each side to identify its goals and its concerns in a real-time discussion—ask each "why," and then ask again. With surprising frequency, a path to resolution will reveal itself almost immediately without any further action by the judge. The speed with which that path to resolution can be accomplished will also be surprising when compared to the time needed for the judge to digest all those briefs and attachments filed under an extrinsic-model, management-by-boilerplate system.

C. STREAMLINE AND CUSTOMIZE, PURSUE "LAGOM"

For courts, we now exist in a world of continuing resource scarcity and rising productivity demands. Courts must work smarter in case management. Unfortunately, most current trends among judges in civil case management assume that generic and remote case management (management by boilerplate) promises reduced courthouse workloads. This promise is illusory and, in practice, usually counterproductive. This philosophy equates more prepackaged case management with less work for the judge. This philosophy emphasizes the "fire-and-forget" rules that are billed as self-executing and are said to require no involvement from the court. The approach creates a rigid path (or, in differential case management, a small selection of paths) leading to trial and is said to free the judge of any involvement other than conducting the trial. The promises made by this self-executing approach to heavily prepackaged case management are an alluring temptation to overworked judges. The extensive body of research supporting the procedural-justice movement and intrinsic-motivation model directly refutes this premise, demonstrating that boilerplate justice reduces compliance rather than raising it.[60]

If one talks to the lawyers doing the actual litigation, they report that an inordinate amount of their expensive time and their clients' resources is spent on navigating (both through and around) those "self-executing" rules. Those lawyers also reveal that they frequently ignore those complex layers of rules and simply resort to self-help. If one talks to the judge in a candid mood, the judge will quickly reveal that he or she spends a great deal of time administering those "self-executing" rules, much like the parent negotiating with the three-year-old about how many peas satisfy the requirement that the child take one bite.

If one spends a few minutes reviewing the discovery motions filed in a court that embraces the self-executing-rule philosophy, the misnomer will become readily apparent. Inevitably, pages and pages of briefing are devoted to disputing the meaning, application, and exceptions to those extensive rules that were supposed to be self-executing. One is inevitably put in mind of the old speaker's cliché that the rules of golf are but a few pages while the decisions interpreting those rules occupy volumes.

The judges do not like these process disputes, the lawyers do not like these process disputes but feel forced into them, and the clients always know that process disputes are a waste of their money and resources. The model of ever-deeper layers of boilerplate and ever-less individual engagement of the judge with the participants is counterproductive. The model simply promotes litigating the litigation instead of pursuing a productive path to a credible resolution.

Moreover, experience teaches that these elaborate procedures frequently prove unnecessary. Returning to discovery disputes (the bane of the civil judge's docket), many judges have experimented with elaborate requirements and limitations. Compliance requires at least an hour of attorney time on one side for the narrowest and simplest of disputes. However, in most instances, a five-minute telephone call between counsel and the judge could resolve the issue. Ultimately, efficiency is achieved by *eliminating*, not multiplying, the unnecessary.

The research behind the procedural-justice movement should teach us that serving the participant's need for individualized treatment increases court productivity while ignoring that need increases court workload. Civil litigation is driven by the goals of the participants; civil case management should be as well.

The Swedes have a concept called "lagom."[61] The term means neither too little nor too much. Lagom is a standard that is reminiscent of Goldilocks evaluating porridge, chairs, or beds. The judge interested in efficient and effective case management should strive to achieve lagom in the time and resources he or she devotes to each case. The judge should also seek lagom in the time and resources of the parties that are consumed. Also, the judge should seek lagom in the degree of disruption to the wider community resulting from the pendency of the litigation. The question is not how many trials have been held, how many cases have been resolved, or how many experts retained; the right questions are whether the court has given the parties resolutions needed, whether the

60. *See* Burke & Leben, *supra* note 20, at 7.

61. *See* Posting of Hanne to LexioPhiles, http://www.lexiophiles.com/english (execute a search for "what lagom really means"; then select the second search result) (Sept. 19, 2011).

parties have accepted and used those resolutions, and how efficiently those resolutions were provided.

D. ENGAGE THE SMALL DISPUTE TO ELIMINATE THE DISTRACTION

This strategy shares a common root with streamlining but addresses more directly the judge's attitude toward dispute resolution. Many court systems faced with rising caseloads and fed up with seemingly endless and picayune squabbles over discovery and other pretrial motions erect substantial barriers between the lawyers and the judge—the court's version of that automated telephone-answering system. Effectively, this type of system is designed to suppress disputes rather than resolve the issues. Rather than dispute suppression, the judge should pursue a policy of engagement.

Dispute suppression is neither efficient nor effective case management. These efforts often backfire on the judge by intensifying and multiplying the disputes when they finally reach the boiling point. Also, dispute suppression is fundamentally unfair to the parties. In most disputes, one side will be working from a position of relative weakness. If the court's goal is simply to suppress disputes so that issues will not be brought to the courthouse, one side is likely to have a substantial advantage in the court's absence.

Instead, the judge should affirmatively engage the discovery and procedural disputes. Doing so quickly and efficiently eliminates them as distractions and focuses the resources of the parties and the court on the core issues in the case. Eliminating these distracting side trips quickly and efficiently keeps everyone on the central path to resolution.

Consider the example of a typical discovery dispute. The lawyers exchange a request and an objection about a discreet set of records. The lawyers then craft letters under a local rule requiring them to confer, letters that primarily serve a posturing role. Due to that false courage that results from the lawyers interacting digitally, the letters drive them to harden their positions. The lawyers are moving quickly by litigation standards, and these opening exchanges consume only a few weeks. One side then files a motion, pouring pent-up agitation and frustration onto the pages and consuming hours of research and crafting time. The opposing lawyer receives the opening motions and stews on it. The discovery dispute is sufficiently central to the overall discovery effort, and the rhetoric is heated enough that all other discovery halts as a result of the dispute. The opposing lawyer submits a response brief at the deadline, typically about three weeks after the motion was filed. The lawyers confer with their clients. Each has a conscious or unconscious eye toward justifying to their clients the bill for the time spent on the discovery dispute and explains how obstructionist the other party/lawyer has become in the case. The moving lawyer then prepares and files a reply brief, raising the level of animosity yet again and adding other complaints about the opponent's behavior to strengthen the motion. This, in turn, leads to a side trip from the discovery distraction to a dispute over whether a sur-reply brief will be permitted.

These various motions drone on for weeks, sometimes months, consuming substantial party resources. The judge notices the rising tide of discovery and procedural pleadings. But, overwhelmed by a daunting caseload and schooled in the idea that such disputes are little more than ego-driven jousting between civil lawyers, keeps shuffling them to the bottom of the priority list. As the lawyers receive silence from the courthouse, they fill the void with more pleadings and an ever-spiraling level of animosity. When the judge finally decides to tackle the pile of pleadings, she must devote hours to reviewing and re-reviewing the dense briefing. The briefing is so distracted by battles between the lawyers, her primary chore is separating the wheat from the chaff. The question inevitably on her lips throughout hours of reviewing these briefs is "what is the issue they actually want me to decide?" The judge's frustration grows as her scarce time ticks away, and she ends up issuing a relatively rushed ruling. While legally correct and adequate, the ruling gives little explanation and demonstrates little analysis of the individual case. Given the length of briefing, the abrupt and minimalist ruling leaves both lawyers dissatisfied with the result and complaining loudly to their clients about the broken civil litigation system.

Dispute suppression is neither efficient nor effective case management.

Consider how this all-too-typical discovery issue is handled under an engagement strategy instead of a suppression strategy. The court has a rule prohibiting the counsel from filing a discovery motion until first getting the court's permission at a live status conference. A corollary of this rule is that the judge makes herself available to the parties within two business days of being requested. The lawyers exchange a discovery request and objection. The lawyers then connect by telephone. As they cannot resolve their dispute, they jointly call the judge's clerk. The judge's clerk works them in during the lunch break in the ongoing jury trial the same day. The two lawyers appear as scheduled. The judge asks each lawyer what the lawyer is trying to accomplish and to identify the lawyer's concerns. The lawyers nearly always reach a resolution at that stage. If they do not, the judge may have to ask more pointed questions. If no agreement is then reached, the judge nearly always has enough information to issue a ruling immediately. The dispute has interrupted the litigation path to resolution for a matter of days once the objection was issued. The dispute has occupied less than 10 minutes of the judge's time. The dispute has consumed minimal party resources. The dispute has generated no meaningful hostility or impediments to relations between the parties or the lawyers.

More importantly, the handling of this dispute has established a culture of cooperative problem solving in the case. Future distracting disputes have largely been eliminated for that case and, to a degree, for other cases involving the same participants. The court is also established as a credible means of resolving disputes.

This example is not theoretical. This example unfolded countless times during the last seven years of the engagement-based civil-case-management project in our court.

A VIEW OF THE REALIZED MODEL

Tactics for implementing these strategies must be individualized to the local legal culture and the judge's strengths. Some-

Efficient and effective case management through judicial engagement means less judge time devoted to the civil caseload rather than more.

times, the tactics must be individualized to the personalities of the participants or specific issues within a case. The more experience the judge has in an engagement model of civil case management, the larger the judge's toolbox of tactics available. The point of this model of case management is that each case must be approached as an individual set of challenges. Thus, each case is unique and will require its own mix of tactics.

In the most general of terms, the engaged judge should

- convene a case management conference with all participants as early as possible,
- establish a culture within the case of a team approach to resolving problems as quickly as possible,
- identify how (or whether) the litigation will serve the goals of the participants,
- evaluate the management needs of the case with the participants, and
- streamline the discovery-and-procedural-motions process.

What follows is a description of a sample implementation of the model.

Phase Implementation by Case Issue Rather Than Case Type. First and foremost, the judge must decide where to start. One of the advantages of the management-by-engagement approach is that implementation can be scaled to the judge's individual needs and resources. If the judge is nervous about a full-scale implementation, she can define a scope of implementation to fit her comfort level. However, manufacturing complex systems for diverting types of cases for implementation should be avoided. In other words, the judge should not create an *automated* system of rules to implement his *engagement* model. One should learn from the mistakes made in our pilot program. We learned that, in the long run, time spent on defining types of cases for implementation will be wasted and often generate unnecessary opposition.

We started our civil-case-management pilot project with the premise that a judge simply does not have time to apply an engagement approach to all cases. This is also the most common objection raised by judges hearing about this model for the first time—"I don't have time for this." Consequently, our pilot followed the lead of many civil-case-management projects. We spent considerable time researching, negotiating, deciding, and defining what cases would be included in the pilot and what cases would be excluded. Our goal was simply to divert what we thought would be a manageable number of cases from the general pool of cases. However, defining the scope of cases in a pilot inevitably involves one in hotly contested political battles between segments of the bar. This consumed considerable time and expended substantial blood-pressure points. Anyone reading this article has likely observed similar undertakings. This article does not describe the specific design or operation of our pilot because, in hindsight, all that work was unnecessary and, worse, counterproductive. To the extent engaging in those discussions had any impact, they made the success of the project more difficult by generating unnecessary angst over distracting and political side disputes between segments of the bar.

Once I had experience with our pilot and learned the case-management approach described in this article, I found that our organizing principle had been wrong. Efficient and effective case management through judicial engagement means *less* judge time devoted to the civil caseload rather than *more*. The trick is applying the judge's time at the right point in the case and in the right way—a stitch in time saves nine. Consequently, I expanded beyond our pilot population and applied these philosophies to my entire civil caseload.[62] The result was a lower caseload and less time required for each case. I saw my civil caseload drop by 58% once I started managing by engagement.

The easiest and most effective means of implementing management by engagement is to start by case issue. The judge must train his staff to find discovery motions as soon as they are filed. Upon the filing of such a motion, the judge should have his clerk contact the lawyers and "bring 'em in" on an expedited basis. As the judge gains comfort with an engagement approach, he should start bringing cases in for early case-management conferences. If the judge does not feel he can call all newly filed cases in, he should choose any method convenient under his administrative system for identifying cases and bringing them in—even a random system would be fine. As the judge gains experience, he will quickly learn that finding time to bring in all his cases produces a net gain in time available for civil cases.

Many judges handling civil dockets have limited experience with civil litigation and are reluctant to pursue management at the macro level. Experienced and inexperienced civil judges have concerns about trying to manage the overall case to the perceived legitimate goals of the parties. The good news is that a judge can reap the vast majority of the benefits of civil case management by engagement without ever expanding beyond the micro level—applying it simply to scheduling, procedural, motions, and discovery disputes. Management by engagement at the macro level carries a greater risk of moving in the wrong direction or overstepping the proper bounds of the judge's role. Management at that level is also rarely needed. Thus, a judge should rarely engage in it unless the circumstances are crystal clear, and it should be discouraged until the judge is fully comfortable with engaged management at the micro level.

Upon Case Filing. Once a judge has decided to apply the model to an entire case, the model starts from the day the case is filed. The more aggressive devotees of the extrinsic model would trigger an exhaustive form case-management order at the outset of the litigation to lay down the ground rules. With

62. However, I did exclude the routine collection cases such as credit-card collection cases that regularly ended with a default judgment. I "engaged" with those cases only when a defendant entered an appearance.

an engagement model, the judge also needs to set the tone from the outset. As the authority figure, the judge will be building a culture within the community of that case, whether she realizes it or not. That culture will determine how participants approach issues in the future. At the outset of the case, the judge should start reflecting that this case will be guided by an actively engaged judge. Instead of responding to a filing with silence or with an automated extrinsic-model boilerplate case-management order, the judge should issue an order directing the plaintiff's counsel to set an initial case-management conference within a relatively brief deadline. The order should also note briefly that participants should be prepared to address the issues in the case and set a schedule for resolving them. I would require the conference within 45 days of the filing, knowing that I may or may not have all defendants by that time but also knowing that if I didn't, that would be an issue to address rather than a reason to delay the conference. Remember, under the engagement model, the judge is taking affirmative, even aggressive, control of the management of the case—the judge is just going to use the tools of procedural justice and intrinsic motivation to facilitate that control.

Avoid Lengthy Boilerplate Case-Management Orders. Remember that "perfect" boilerplate initial case-management order? The idea is to have the participants in each case feel as though they are being treated individually. Nothing invalidates that effort faster than receiving an order that is reminiscent of a cell-phone service agreement. No matter how uniform the judge's case-management approach, the judge should make her written case-management orders look as short and individualized as possible.

I started civil case management with a standard order that had checkboxes so I could quickly use one form to address nearly any issue likely to arise in a case. I would just check the applicable box and send out the order. It was a very efficient system for issuing orders, but this efficient tool worked against the efficiency of the overall system. Each party received several pages of order even if the applicable portion was but a single sentence. I found a low familiarity with the substance of the orders I issued. Like that cell-phone service agreement, nobody was bothering to read my efficient boilerplate orders. I switched to an order that still drew from a list of standardized phrases, but the actual order issued to the parties eliminated everything other than the truly applicable language. Most orders went from a few pages to a couple of sentences. As predicted by the procedural-justice research, familiarity and compliance with the streamlined orders rose noticeably.

Better yet, the judge should address case-management standards in person at the initial case-management conference. People are inundated by documents these days, and most of them are boilerplate with little application, so they do not get read. A judge will be more effective if she explains in a live discussion the procedures used in her courtroom rather than to try and issue a tome that will only be checked later to argue a violation. Consider the irony of a common order used today that explains at length what qualifies as a genuine, good-faith satisfaction of the obligation of counsel to confer before bringing a dispute to the court. The order usually explains that a live conversation is required between the lawyers, rather than an exchange of voicemails, emails, faxes, or form letters. The irony is that this mandate of effective live communication is communicated through a boilerplate form, the very means of communication being banned due to its inherent ineffectiveness. The judge should leverage her time; she should invest a little face time to explain the process and reap the benefits of a smoother case down the road.

The most significant and productive 15 minutes of work by the engagement-model judge is the initial case-management conference.

The Initial Case-Management Conference. The most significant and productive 15 minutes of work by the engagement-model judge is the initial case-management conference. In the conference, the judge sets the standards to which the participants will rise or fall. The judge establishes the tone and culture of the case. (Silence from the bench will also set a tone and culture for the case—one that is contrary to the interests of the judge and the community.)

The judge should start the "live" conference by taking appearances and making sure any clients are introduced. The judge should greet each person by name, specifically including clients if present. The judge should briefly explain the philosophy he plans to pursue in management of the case. Assuming the judge has adopted the approaches to motions described below, those processes and their reasons should be explained. The judge should explain his commitments to the case as well as what he expects of the lawyers. He should explain that most cases, no matter how complex, usually boil down to just a couple of key issues to be addressed. He might also explain that these issues may or may not include an issue for resolution by the court. The judge should state his goal for the conference of having a candid discussion to identify the critical path for the litigation to reach a resolution of value to the parties. If the judge feels the need, he should also try to set the lawyers at ease by explaining that the session is intended for brainstorming and that statements will not be considered admissions or binding unless a party explicitly states it is agreeing to be bound.

Next, the judge should turn to each side and ask them to explain the two or three core issues they think the case boils down to. He should ask any follow-up questions to help him understand, and he should not hesitate to reveal any confusion he may have. The judge should demonstrate his attention and engagement in the discussion. As part of this discussion, the judge will be asking the "why" questions and trying to determine the parties' goals and reach consensus on a "purpose" for the litigation.

Next, the judge should build on the purpose defined for the litigation to start charting the course. Depending on the information revealed so far, the judge will want to ask about anticipated motions, discovery needs, expert needs, any potential obstacles to timely completion, and what is needed to make settlement discussions productive. The flow of these discussions will vary depending on the case. The judge should always ask the participants to identify as specifically as possible the steps they plan to take, keeping in mind the value of asking "why" when appropriate and getting consensus on the

I learned to ask the lawyers to propose target dates before I offered dates. I was consistently surprised how frequently they agreed on trial targets sooner. . . .

purpose and/or value of any step. The judge should then ask when the party can take the step and when the other side can take a responsive step. Throughout these discussions, the judge is honoring the participants' needs for voice, helpfulness, autonomy, mastery, and purpose. These discussions should then be brought to conclusion with specific timelines—noting that the timeline may include a date for deciding on a future step if setting the date for a potential future step is premature.

In most initial status conferences, the path will be sufficiently clear that the judge can go ahead and determine a closure plan for the litigation. Frequently, this will be the trial date, discussed below.

With practice, an initial case-management conference on a standard personal-injury case with lawyers new to the model takes only 15 minutes. With lawyers that have been schooled in the model on both sides, it can literally be done in as little as 5 minutes. In the spirit of lagom, a complex case may take an hour and may require more than one setting as parties are joined and issues evolve.

Trial/Closure Dates. The classic wisdom of judges from time immemorial is that nothing resolves a case like a near and certain trial date. The problem-solving-court model disagrees, emphasizing that the conclusion must be reached when the defendant is ready and that times will vary significantly by person. Here, our experience suggests the traditional approach to civil case management is the more effective path. A firm trial/closure date is important as a symbolic end date. The firm trial/closure date is important under an intrinsic-motivation model for two reasons.

First, communicating to the participants that the litigation process will have a definite end serves the procedural-justice element of engendering trust. In the current environment, the participants need to know the court is sensitive to the limits of their resources and the need to conclude litigation. At this time, participants generally do not have this impression of the civil-litigation process.

The second reason is more foundational. Too few judges and litigation participants appreciate that every litigation involves a silent partner, the community. The community has a fundamental interest in having an effective and credible mechanism for resolving disputes peacefully. Maintaining the credibility of the court system for resolving civil disputes is critical. A court system that permits—or worse, encourages—Sisyphusian endless litigation does not provide its community with a credible means of peaceful dispute resolution and thereby destabilizes that community. Charles Dickens did not describe the *Jarndyce v. Jarndyce* lawsuit in *Bleak House* as an ode to the credibility of the English Court of Chancery. He used this example of protracted and self-consuming litigation as a scathing indictment of the court system and the damage it did to the community.

Judges managing civil cases must remain mindful that they not only owe a duty of effective and efficient resolution of cases to the direct participants, they owe the community a duty of maintaining the availability to all of a credible means of resolving disputes, whether large or small. Ultimately, this is the role of the courts. The courts provide a safety valve to a community by providing a credible method of resolving individual disputes peacefully. A community that does not have a credible institution for resolving disputes peacefully is not sustainable.

Therefore, the judge should set a trial/closure date as early in the case as possible. The procedural-justice variation on this guidance is that the judge must give the participants voice in the setting of the case schedule and trial date (or other procedural closure date if a trial is not required). More importantly, the judge must make sure the participants felt heard in the setting of the schedule, even if their proposal was not adopted.

To satisfy procedural fairness, the judge should conduct the trial/closure-date selection live when the schedule for the case is set. I started on the bench with a very experienced clerk. She had a host of rules and tactics to deal with traditional telephone trial settings and approached them as a battle of wills. (Never give a trial date beyond X months. Never give more than three trial dates. Know that they will always take the last date given. At the first sign of a problem, threaten them with involving the judge. After X follow-up calls or Y days, make them talk to the judge or pick a date for them.) She was usually a gentle and persuasive "closer," yet she still spent considerable time on the chore of setting trial dates. I then spent considerable time on the disputes or requests to reset that followed. We shifted to a procedural-justice approach to trial settings, and I handled them live at the initial status conference. Suddenly, the process reduced to a few minutes of my time and mere seconds for my clerk. Eventually, I learned to ask the lawyers to propose target dates before I offered dates. I was consistently surprised how frequently they agreed on trial targets sooner than I had planned to force on them. I remember one contract dispute where they agreed to set trial in two months at a conference held one month after the case was filed.

Once the trial date is selected, the judge faces an often nerve-wracking challenge. Nearly every court is required to set a trailing trial docket, which creates a tension between keeping trial dates and the knowledge that only one case can be tried at a time. The principles of intrinsic motivation tell us that a forthright and candid discussion with the participants at the outset is the right approach. Statistically, a judge could set as many as 20 cases for trial on a given day and still have high confidence that only one will need to go to trial. We usually set eight per trial day. I would then explain to the participants that the court would move heaven and earth to give them their trial date, to include finding another judge if available at the last minute. I then explained, truthfully, that after six years handling a civil docket, I had never once continued a civil trial for lack of judicial resources to try it on schedule. I went on to explain that because of volume, continuing a trial would inevitably happen someday. I then explained how I would decide which case would be continued (greatest need would go, not oldest) and why I could not make that decision until the last moment. Motions to continue trial dates all but disappeared. Calls to my clerk asking, "where do we stand?" on the

trial docket also largely disappeared. The research behind procedural justice likely explains why.

Subsequent Case-Management Conferences. At the conclusion of the initial case-management conference, the judge must decide if scheduled follow-up conferences will be needed. If a critical piece of information is expected from a third party or a largely dispositive motion is to be resolved by a certain time, the judge should consider setting a status conference just after that key date to help keep the case moving. While a useful tool, relatively few civil cases will actually require these. However, the offer alone from the bench helps define a culture of engaged problem solving.

Ban Written Discovery and Procedural Motions. At the initial case-management conference, the judge should explain that no party may file a discovery or procedural motion until conferring live with the other lawyer(s) and then collectively conferring with the judge. The judge must then commit to be available for such a call quickly, say within two business days of getting it. The strategies section includes a discussion of this approach. The following is a transcript of a typical discovery conference.

Judge: Counsel, how can I help you today?

Jones: I have not received financial records we requested, and we cannot proceed with our expert's work without them. With our schedule, we need those records by next week.

Smith: The request was dramatically overbroad and seeks highly sensitive and irrelevant records.

Judge: Ms. Jones, why does your client want these records?

Jones: We need to know what business they've actually been doing over the years.

Judge: Why do you need *these* records? What specific information are you seeking?

Jones: We need to confirm their claim that they did $1 million in business through six orders with Company X. My client does not trust the disclosure, so we need to see the P&L to be sure they are telling us everything. Judge, this is a damages and credibility issue, and the records are clearly within the scope of discovery.

Judge: Mr. Smith, why is your client opposing this discovery?

Smith: We have given them everything they are entitled to in disclosures, and we've told them about the orders. They are asking for our entire financial records, and that is highly confidential information. They are in direct competition with us, and we're not willing to provide that information.

Judge: Ms. Jones explains that her client wants to confirm the disclosure made in the pleading with original records. If you have already disclosed it, would those records still be confidential? Why wouldn't your client provide that confirmation?

Smith: We don't oppose giving copies of confirming source documents. But, judge, they asked for our P&L. The P&L doesn't even show the individual orders. And it obviously shows the overall economics of our company, which is confidential and not within the scope of discovery.

Judge: Does your client have documents such as work orders, invoices, and payment records that would confirm the disclosure in the pleading?

Smith: Yes, and we can make those available.

Judge: Ms. Jones, would that get your client the information he needs?

Jones: Judge, we don't trust that they will give us everything, but that would be a good start. These parties were partners, and there is a great deal of bad blood between them. We'd want to verify if they told us the sun rose in the morning.

At the conclusion of the initial case-management conference, the judge must decide if scheduled follow-up conferences will be needed.

Judge: Ms. Jones, is there someone at defendant's operation that your client does trust?

Jones: My client trusts Ms. Donaldson in accounting.

Smith: I'm sure my client would agree to have Ms. Donaldson do the search and gather the records for production. She could also provide an affidavit attesting that these are all the transactions with Company X.

Jones: That would get us what we need.

Judge: When can we get this done?

Smith: By Friday.

Jones: That would be acceptable.

Judge: Thank you, counsel, for your work resolving this issue.

Whether procedural, discovery, or even substantive law, these conferences follow a simple formula. The judge should plan to get the participants together live for a "real time" discussion rather than by filings. The judge should find out the purpose behind each side's action, whether it is a request or an objection. Usually, a solution presents itself to the participants. On rare occasions, an issue will have to be decided by the judge. In most cases, the judge will have sufficient information to make the decision right then. If not, a narrowly tailored schedule can be set to get the judge any information or materials needed to allow a decision.

Expand the Ban to Substantive Motions. Once the judge has established that no discovery or procedural motion may be filed until after the movant has consulted with the other side and discussed it with the judge, the judge should consider expanding that procedure to all motions. The substantive briefing that results will be much more focused and useful to the judge.

Re-Purpose the Duty to Confer and ADR Obligation. At the initial case-management conference when the judge discusses her motions procedure, the judge should use the chance to re-iterate her expectations of a collaborative approach to managing the case. She should explain that the participants are required to confer before bringing any issue to the court. In her usual explanation that a live discussion is required, the judge should go one step further to explain the *purpose* of the obligation to confer. She can explain that this obligation to confer is expressed in two ways. First, the lawyers must discuss any disagreement before asking the

The goal of this article is to change fundamentally our entire approach to litigation management.

court to help. Second, the named parties must pursue some form of alternate dispute resolution. She should explain that these should not be seen as requirements that people compromise. Instead, they are requirements by the court that the parties refine, narrow, and understand their disputes so they can be efficient in bringing them to the court for resolution. The judge should impose these obligations for purely selfish reasons, to cut 50 pages of briefing down to the core 6 pages actually needed.

The judge must also help each party see the discussion obligation for the purely self-interested value it offers. These discussions are an opportunity for each participant to refine and understand their dispute. Discussing the potential summary-judgment motion with the opponent allows the lawyer to understand which elements are really in dispute, what the other side's arguments are, and how best to structure his own brief and argument. The cost of that briefing may easily be cut in half by a thorough discussion with the opposing side. More importantly, the effectiveness of that briefing may be increased exponentially by the same discussion. Mediation should be seen as an opportunity to test each side's arguments with an experienced neutral and refine that argument based on the feedback received. If these discussions result in an acceptable and economic settlement of the issue or case, all the better.

Young lawyers and parties new to the court system find these explanations particularly insightful and helpful. What they often see as a requirement based on the judge's desire to avoid making a decision and an inappropriate effort to force the parties to compromise suddenly becomes a valuable opportunity.

Trial-Management Conference. The judge should conduct a live trial-management conference shortly before the trial. The judge should use her intrinsic-motivation tools to define the issues and flow of the trial as well as to establish the procedures for the different aspects of trial.

Finally, Set Standards for Yourself as Well. Succeeding in effective and efficient case management is not merely a matter of setting and maintaining expectations for the lawyers; the judge has to have high standards as well. First, the judge must commit his staff to answering the telephone whenever possible and returning messages within one business day in all other cases. A common complaint among lawyers in many states is that the court's telephone is never answered, and voicemails are not returned for several days. If the judge expects the lawyers to be responsive to his team, the judge's team needs to be responsive to the lawyers. Second, the judge must commit to resolving the distractions on an expedited basis and carving out time to do so even when inconvenient—short-term pain for long-term gain. The judge must also commit to ruling on fully briefed issues on a timely basis.

We published a standard order advising all counsel that if an issue had been fully briefed and no ruling was received within 30 days, the movant was directed to contact the division clerk to advise us, as well as to file a pleading. This was done to demonstrate a commitment to timely rulings and to relieve the angst felt by lawyers with a need for a ruling debating whether to risk the wrath of the judge or clerk by calling to ask for one. While I was annoyed the first few times a law office called four days after 150 pages of briefing had closed asking for a ruling, I soon realized it was a compliment that we had the docket running so efficiently that experienced lawyers actually expected rulings from this division that quickly.

A PATH FORWARD

For those readers that skipped section II because the behavioral-sciences discussion sounded too soft and fuzzy, now is the time to go back and read it. The goal of this article is not just to provide the judge with yet another package of case-management tactics that sound vaguely promising. The goal of this article is to change fundamentally our entire approach to litigation management. For decades, judges, litigators, and commentators have approached civil case management as an exercise in subduing spiraling costs and incivility. The dominant paradigm is that extrinsic control is the answer. This paradigm has largely been based on the instincts of a control-based culture (the law) akin to Hobbes' *Leviathan*. The surface-level purpose of this article is to propose shifting from an extrinsic-control philosophy of litigation management to a philosophy of self-regulation based on an intrinsic model of management and the principles of procedural justice.

The more fundamental purpose of this article is to propose that future civil litigation management should be based on research that explains human behavior—and how to manage it. Over the last several decades, litigation-management reform efforts have been based largely on instincts and anecdotes.[63] When empirical data have been referenced, it has generally been symptomatic research rather than root-cause research: Litigation expenses and delays were studied and tactics were developed to suppress those unwanted symptoms. However, litigation managers have rarely looked beyond unwanted symptoms to the behavioral sciences to understand causes. Only by looking to core causes can a system achieve meaningful progress in improving the process of litigation as well as enhancing the quality of the substantive result (distributive justice). Our colleagues in problem-solving courts have pointed the way to a new path to conflict management and resolution by stepping outside the lore of the law and gaining insights from the solid research of behavioral science and insights from that analogous world of enterprise/project management. The core hypothesis of this article is that future civil-case-management reform should be based on empirical research explaining human behavior first and accounting studies of the litigation process second.

Two potential bridges exist between the old approach to litigation management and the approach proposed here. First is the problem-solving-court movement. Problem-solving courts

63. Admittedly, our pilot project also originated from this same core. Only later, as we sought to understand what was happening, did we turn to the behavioral sciences for enlightenment.

have evolved dramatically in the last decade and are on the edge of becoming mainstream approaches to substance abuse in many spheres. These courts have more than a decade of experience in applying the knowledge of the behavioral sciences to the court system. Judges and other personnel in problem-solving courts have worked through the challenges of applying the concepts of procedural justice to the real world. Many of these judges have also learned how to digest material from the very different world of behavioral science. More importantly, the political and social interest in criminal-justice progress has meant extensive, well-funded studies have been done of what works and does not work in problem-solving courts. Any judge interested in making meaningful progress in any form of litigation management should seek the insights offered by our colleagues in the world of problem-solving courts.

The second bridge is the current trend in the dialogue about civil case management. In this article, I have used the word "trend" in the statistician's sense of the word, a tendency or direction shown over time or data points—in this case, the pursuit of an extrinsic-control model in various forms over several decades. However, the term also has a pop-culture meaning of the very latest idea being discussed—what's hot. What's hot among many commentators on civil case management is a budding movement called "proportionality." The proponents of "proportionality" advocate the need to focus the litigation at the outset through active judicial involvement. They also promote the need to eliminate distracting litigation steps that have become rote and serve little productive purpose. Additionally, the Rule 1 project of the Institute for the Advancement of the American Legal System ("IAALS") calls for empirically based efforts to improve the civil justice system. IAALS is a vocal proponent of proportionality.

Proportionality's focus on an engaged judge that tailors discovery to individual case needs could serve as an excellent training ground for judges. Proportionality is, nonetheless, merely a means in service of a larger end. If the end being pursued is creating a new tactic serving an extrinsic model that seeks only to make litigation a faster and cheaper road to trial, it will achieve little more than the "rocket docket" or "differential case management" have achieved. To use Daniel Pink's taxonomy, we need to move to Motivation 3.0 rather than just refine the existing model to Motivation 2.1.[64] If proportionality is viewed as a stepping stone to gain the skills needed to implement a genuine intrinsic-motivation model (Motivation 3.0) as discussed here, it can be the pathway to dramatic improvements in litigation management and gains in community confidence in our court system.

Every litigation involves a silent partner: the community. The community has a fundamental interest in having a mechanism for delivering dispute resolutions. This mechanism must be credible. For our purposes, that community credibility has two components. First and foremost, it must be effective—meaning that it is accepted by the participants and the community as a fair result that actually resolves the issue. Second, it must be delivered efficiently—if justice is only available to a well-funded few or after interminable delay, the delivery system is not a credible mechanism for the community.

Judges managing civil cases must remain mindful that they not only owe a duty of effective and efficient resolution of cases to the direct participants, they owe the community a duty of maintaining the availability to all of a credible means of resolving disputes fairly, whether large or small. Ultimately, this is the role of the courts. The courts provide a safety valve to a community by providing a credible method of resolving individual disputes fairly and peacefully. A community that does not have a credible institution for resolving disputes fairly and peacefully is not sustainable.

The strong trend in recent decades to move civil litigation to alternate-dispute-resolution systems is the greatest claxon calling us to change our approach.

A pernicious result of the decades-long drift in our civil litigation system is the corrosive effects of large numbers of clients settling cases based exclusively on the costs of litigation. When expense—rather than the merits of a dispute—is consistently the driving motive in dispute resolution, the system ceases to function as a credible mechanism for the community to resolve disputes. Without a credible means of reaching peaceful dispute resolution, the community must eventually cease to function.

The converse is also true. If the system's primary focus becomes cheap-and-fast resolutions where perceived justice and fairness suffer, the system again lacks credibility. If cheaper and faster are the primary goals, one might as well install a computer terminal using a random-number generator to resolve civil disputes.

The strong trend in recent decades to move civil litigation to alternate-dispute-resolution systems is the greatest claxon calling us to change our approach. Arbitration is the most common alternate, and it is a system with few procedural or substantive protections for achieving distributive justice. Also, the degree of quality one gets in arbitration is heavily influenced by one's economic resources—not a healthy trend in a nation founded on the goal of equal access to justice for all. People are not flocking to the benefits of arbitration; they are fleeing the negatives of our current litigation process.

I do not believe these are signs of a dispute-resolution system that is structurally wrong—*i.e.*, that our adversarial system is the wrong model. My confidence in the basic design of our court system has never been stronger. Instead, I think they are signs that our approach to managing the human beings in our court system suffers a basic philosophical flaw—the pursuit of an extrinsic-command-and-control model instead of an intrinsic-motivation model. Reform cannot focus merely on reducing the costs and delays of delivering distributive justice; it must do so while serving the participants' need for procedural justice, or it will continue to suffer a systemic lack of credibility. The path ahead is the intrinsic model.

64. *See* PINK, *supra* note 26, at 75.

CONCLUSION

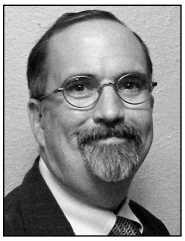
Criticism of the inefficiencies and delays within the current civil litigation system is widespread. Many tactics have been tried in recent years to ameliorate the perceived negative characteristics of our litigation system—suppress distracting discovery and motion disputes as well as uncivil conduct by lawyers while pushing cases to move faster to trial. Nonetheless, dissatisfaction with civil litigation remains widespread in the community as well as among participants. Prior civil-litigation-management efforts have clung to a traditional enterprise-management philosophy based on extrinsic command and control. A new approach is needed.

Many have recognized that the time is ripe for a significant change in how we manage civil litigation. For example, a primary reason IAALS exists is to improve our system. The Conference of Chief Justices adopted a resolution in late 2011 encouraging pilot projects to improve civil case management. The question is what will drive the next revision to civil case management.

Civil-litigation-management reformers should take their cue from their colleagues in the problem-solving-court movement. They should look beyond the traditions of the legal sector for insights. They should move beyond asking what parts of the current civil litigation system we want to suppress and ask the broader questions of what drives human behavior and how we can use that knowledge to make our litigation system work better. They should look to the empirical data available in the behavioral sciences. That data, most accessible to the legal professional through the procedural-justice movement, tell us that we should move to an intrinsic model of litigation management.

An intrinsic or engagement-based model will eliminate or minimize distractions, reduce resources required for each case, reduce caseloads by achieving faster resolutions, and free judges to provide more thoughtful and well-crafted rulings. An intrinsic model will also increase participant acceptance of and satisfaction with the resolution ultimately reached.

By engagement through an intrinsic model, judges can achieve efficient and effective case resolutions that still deliver just results. Moreover, management by engagement will increase the parties' satisfaction with the case results and, correspondingly, increase the public's confidence in our court system. So, engage today.



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The Effective Litigator—Concentrate on the "Why"

by David S. Prince

In Taylor Swift's song "Blank Space,"[1] a player in the game of romance talks to her latest lover. Taking for granted that the affair will involve tumult of epic proportions, she promises magic and madness, assuring only that "You can tell me when it's over if the high was worth the pain." Too many of us in the litigation profession sound to our clients—the real people we are hired to help—like the reckless gamer in "Blank Space," indifferent to whether the case will leave the client breathless or with a nasty scar.

Know the Goal

Early in my career, I was lucky enough to gain a client's perspective on litigation. I served with a committee of mixed professionals that managed several dozen litigation cases. Collectively, we were the client. At one meeting, our litigator reported the results of a court appearance that morning. He explained in glowing terms how he had successfully fended off several attacks by the opposition, avoided discovery, gained time for several new rounds of offensive discovery and depositions, stopped an attempt to accelerate the case, and shut down a ploy to get a pretrial ruling on a pivotal legal issue. This discussion followed:

Chair: When do you think we'll have a ruling from the court on the issue?

Litigator: We've probably gained another nine months—I'd say twelve to fifteen months total before we'll have judgment. You'll have clear title then and can do as you like with it.

Chair: As of today, our best possible case is a net gain of about $250,000. Our worst-case scenario is a $10,000 loss. Other than your fees, our holding costs on this are just over $45,000 per month.

In case the math went by you, our litigator delivered to us, with great pride, a guaranteed financial loss of over a quarter-million dollars. He was genuinely surprised when the committee did not congratulate him on what he saw as his tactical successes in court. He had trouble understanding that his "successes" nearly assured a net loss on the case even before we considered his substantial fees and assuming he actually achieved our best-case scenario. He was caught up in the fight of litigation and lost sight of the ultimate purpose of that litigation.

Analogous scenarios unfold daily. Far too frequently, lawyers, and sometimes clients, fail to grasp that a favorable final ruling from a court is but a means to an end. No client is ever satisfied simply posting a favorable ruling on his or her wall. A lawsuit win is just one step, one tool available, to achieve a client's goal. Motions, discovery, hearings, and trials are also only means to an end—and that end is not winning the case but advancing a client's real-world purpose. When the steps in litigation are not carefully designed to solve a problem, they are simply expensive means of facilitating self-inflicted pain on participants.

An effective lawyer starts any potential engagement by gaining a crystal-clear understanding of the client's goals. That lawyer has a thorough and honest discussion with the client about what the lawsuit can and cannot achieve. The lawyer makes sure that he or she understands the client's interests—that is, the real-world components of the stated litigation goal. The lawyer explores various options (not just a court ruling) of advancing the client's interests related to the stated goal, as well as the potential costs (both in terms of money and resources) of pursuing each option.

The truly wise lawyer then pursues a discussion with the client, trying to model and understand the interests of the other parties. Collectively, they identify likely overlapping and competitive interests. The truly wise lawyer helps the client develop a strategy for advancing the client's interests, only one aspect of which is litigation. That strategy exploits the parties' overlapping interests and helps formulate a plan to address the competing interests.

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Judges' Corner is published quarterly to provide information Colorado judges would like to disseminate to attorneys. If you would like to suggest topics or write an article for this Department, please send an e-mail to Coordinating Editor Stephanie Dunn, Colorado Court of Appeals Judge, at stephanie.dunn@judicial.state.co.us.

Once a sound strategy has been developed to advance the client's goal, the litigation strategy can be mapped to focus resources on the necessary pieces and trim away the distractions. Every step, every letter, and every communication from that point forward should be measured against whether it advances the client's actual interests, not just whether it is an available battle tactic. When lawyers have not taken these steps to identify the "why" of the litigation or of an individual dispute, a thoughtful judge can and should help them do so.

Interest-Based Communication Counts

The general idea that we are more effective if we approach a dispute by focusing on the interests of the parties has long been recognized in the business and communication worlds. Among the best-known proponents of this approach were the authors of the perennial bestseller from the 1980s *Getting to Yes: Negotiating Agreement Without Giving In*.[2]

Communication is critical to an interests-based approach to problem solving. Problem solvers must frequently ask themselves and any other party: "Why? What is your purpose? What do you actually need?" In the world of business leadership and communications, a popular training exercise called "veginots" is used to illustrate the value of interest-based negotiation and the communication it requires.[3]

In veginots, two opposing parties are selected. Each is told why he or she needs to obtain a mythical crop called a veginot. Each competitor understands that his or her own work is critical to public health and safety, that a limited worldwide veginot supply exists, and that the party must have them all. Neither is told anything about the competitor except that the person also wants the veginot. Both are then left in the "pit" with the competing directives to obtain the world supply of veginot. Both are also given a substantial budget to buy out the other side—but no authority to sell. If the parties interact from the perspective of a zero-sum game whose outcome is to be determined by power, dominance, or financial gain (the traditional approaches to litigation), they both end up being thwarted since neither has any leverage. However, if just one takes a few moments to explore what each actually needs, they both learn that one needs only the rind of the veginot while the other needs only the nut of the veginot. Thus, with no cost to either and practically no added logistical challenges, they can both go forward to save the world and live happily ever after.

True, the veginot exercise sets up the participants to believe they are opponents. In this way, it is manipulative, relies on each side having imperfect information, feeds the human tendency to jump to conclusions, and promotes our tendency to assume the worst about the motives of others. But that is also the real world of litigation.

One may be justly skeptical of the veginot exercise. It is simplistic and idealistic in creating a situation where the opponents can walk hand-in-hand into the sunset. But while the core dispute leading to litigation will rarely be as prone to a win–win solution (I have, however, seen the utopian joint walk into the sunset play out in real-world litigation several times[4]), the lesson of seeking common interests is no less valuable. The value is in helping you provide more productive, effective, and efficient service to your client.

Interest-Based Applications in Litigation: Working With Your Conflict Partner

Take, for example, discovery. Many years ago, my division adopted an interest-based approach to discovery issues. When a dispute develops, instead of written motions, the lead counsel meet with me to talk. We follow a simple formula. Each lawyer briefly explains his or her view of the dispute. I then ask each side to identify the core dispute in the overall litigation. Next, the requesting party explains what information his or her side needs and why—the purpose in seeking this discovery. In my experience, the other side usually responds with an acceptable suggestion as to how a legitimate need for information can be satisfied.[5] If the dispute continues to the next step, I generally ask the resisting party to

explain his or her side's concern—the purpose in opposing the discovery request. A satisfactory solution nearly always becomes apparent.

This approach recognizes that, like it or not, the participants are partners in resolving the conflict. Once the lawyers and I model this approach, I rarely see another discovery dispute in that case—or in any other case involving those lawyers. Instead, they explore with each other their clients' needs and interests and, in the world of discovery where the rules are well understood, they find an adequate solution addressing the interests of each. More important, each lawyer has improved the effectiveness of his or her client's litigation dollars and saved everyone involved invaluable blood pressure points.

A second example is the obligation to meet and confer. A wise lawyer embraces every communication with the other side as an opportunity to pursue interest-based solutions. I frequently receive requests to be excused from the obligation to confer because the movant already knows the other side opposes the relief, "so conferring would serve no purpose." The requesting lawyer fails to understand his or her true purpose in conferring with the other side—the real value of conferral. The purpose is not simply to ask whether the other side opposes the request, but also to explore the other side's position, understand their argument, and learn which pieces of the request are in dispute, which are not in dispute, and why.

For instance, wise lawyers confer on an irreconcilable motion for summary judgment and walk away from such a conference able to reduce twenty-five pages of formulaic and dry briefing addressing fifteen points of possible dispute to ten pages of enlightening discussion of the two points actually disputed. This, in turn, allows the lawyers to be more efficient and focused. More important, they minimize their risk of frittering away one of the most valuable and irreplaceable resources in litigation—the time that the judge can devote to each motion. The wise lawyer walks away from such a conference knowing he or she has accomplished much for the client. The ineffective lawyer can see only that the motion was not resolved.

Alternative dispute resolution is yet another example. I see frequent requests to excuse the parties from our district's required alternate dispute resolution because they feel the case cannot settle. But the potential to settle a case is only one of the opportunities to serve the clients' interests offered by mediation. Mediation provides a forum for frank discussions about the strengths and weaknesses of a case, as well as the parties' actual interests and goals. These discussions can help identify where interests overlap and, where they are truly at odds, understand the contours of those points of friction. This allows the lawyers and clients to focus on possible resolutions through negotiation, court ruling, or other means. Should the case continue, mediation can help give the wise litigator a coach, in the form of the mediator, to help hone the litigator's ultimate presentation to a judge or jury.

This interest-based approach will yield substantial rewards with the litigation as whole. Cases resulting in the true "veginot win–win" may be few and far between, but in my experience, nearly all complex cases can be boiled down from ninety-five elements spread over twenty-two causes of action to a handful of core disputed points. By pursuing an interest-based approach, you will find (1) many opportunities to streamline the litigation, (2) many distracting tactical disputes that can be avoided, and (3) some unexpected opportunities for your client.

The Takeaway

For judges, take the time to help litigators focus on finding the "why" of the litigation and individual points of dispute. You will be rewarded with less time devoted to litigating the litigation and more time to focus on the substantive dispute, as well as better input from the lawyers on those disputes.

For litigators, take the time to work with your client to identify your client's goal for the litigation and to understand your client's interests that lead to that goal—your client's purpose. Measure every step you take in the litigation against the standard of serving those interests. As part of that approach, explore the other side's interests in the litigation as a whole and with respect to each subsidiary dispute that arises along the way. Focusing on the parties' respective interests rather than the combat in litigation opens a whole new world of opportunities to better serve and thereby win the confidence and loyalty of your client. When faced with your bill, your client will be much more likely to conclude that the high was worth the pain and, hopefully, few clients will feel they were left with a nasty scar.

Notes

1. *1989* (Big Machine Records, 2014).

2. Fisher and Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books, 1983).

3. "Veginots" is based on the work of Robert House of Suffolk University, Boston, Massachusetts. *See, e.g.*, Cultural Competencies: Principles of Global Virtual Teams, byuipt.net/PGVT/index.php?path=/lessons/04/02.php#Harper.

4. For example, three parties were locked in "hardball" litigation regarding an annexation agreement covering a large collection of land parcels. For two years, they spent their resources jockeying for power in the litigation to gain advantage over the other. One party hired new litigators. The new lawyers pursued interest-based discussions with their conflict-focused client (the most difficult discussion) and then with the other parties. All shared a common primary purpose of clearing obstacles and starting development so they could get to cash flow. In short order, they identified a collaborative path and were pursuing actual development within six months.

5. For example, in a dispute between market competitors, the parties fought over a request to produce profit and loss statements. When asked to explain why he sought the discovery, the requesting lawyer explained a need to track specific purchase orders. The opposing lawyer immediately explained that the requested documents would not provide this information but offered the proper record that would track the needed information without triggering his client's confidentiality concerns. From the bench, I have found the vast majority of discovery disputes to be easily solved by similar interest-based discussions. ■

by Hon. Jack Zouhary

Ten Commandments for Effective Case Management

Does active judicial case management mean that a judge is on the backs of the lawyers throughout the case? Not at all. Active 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. I have found that the more time I spend on a case at its outset, the more time I end up saving later on (and money saved for the clients). Case management is all about prioritizing time and resources—devoting attention where needed. It "takes a village" to case manage, and a judge's chamber staff is intimately involved. We try to meet biweekly to review a decisional list—our bible—which outlines those cases that need attention, particularly those with key dates for motion deadlines, rulings, and trials.

1. One Size Does Not Fit All

Each case is unique. The justice system needs to be flexible and considerate of lawyers and parties so that cases can proceed efficiently and cost effectively. These principles guide my case management. Judicial accessibility binds these principles together. This means a judge should be available throughout the life of a case—especially early in the process. How early? My staff reviews the complaint when it hits the docket. We review it for jurisdiction, making sure the case is appropriately brought in federal court and for any likely issues with service. Our standard order asks the lawyers to exchange information and documents, and it asks them to be prepared to discuss the case in some detail at the initial conference. We also make an assessment of whether settlement talks might be productive at the initial conference and, in this regard, inquire of counsel whether there already have been settlement discussions and if they would like to set aside extra time at the conference to either begin or continue such discussions.

2. In Defense of Disclosures

To ensure a meaningful conversation about a case schedule, I usually require Rule 26(a) disclosures *prior* to the initial conference. These disclosures cannot be superficial. Since documents and names are exchanged and each side's cards are laid out on the table, this allows for more realistic input into scheduling dates. It also minimizes litigation expense by avoiding ritualistic or form discovery requests. By reviewing the pleadings beforehand and often asking counsel to rank claims and defenses, I too am prepared. "Speaking" complaints and answers—those that contain factual details—are helpful in fully understanding the case. In addition, I encourage the presence and participation of parties so that they have a firsthand view of my role and how the case will be handled. Counsel of course are free to recommend or request that party presence be excused to save costs or because in-person settlement talks are premature. Counsel can attend by phone if necessary to save costs.

3. E-discovery Made Easy

Complex cases, such as class action, patent, and antitrust are not amenable to early full disclosure. In those cases, disclosures are allowed in stages, and we require that e-discovery has parameters so that it does not delay (or worse, overtake) the case schedule. It is helpful to focus in terms of key players, not documents, and the computers they use (office computer, home laptop, Blackberry, etc.) and key phrases for the search. As long as information is preserved, a review can be postponed until necessary—a significant cost savings. I urge proportionate discovery in traditional cases and especially for complex cases—balancing the need for information with the burden, expense, and potential importance of that information.

4. Civility

To further minimize litigation cost, I strongly encourage cooperation among counsel. Studies have shown that collegiality among lawyers minimizes expense and allows for more efficient case handling. In this regard, I encourage counsel to abide by the American College of Trial Lawyers (ACTL) Code of Pretrial and Trial Conduct, copies of which sit in our chambers reception area. (Copies were provided to attendees at the recent U.S. Court of Appeals for the Sixth Circuit Judicial Conference.) I

Hon. Jack Zouhary was appointed a federal district court judge in Toledo, Ohio, in 2006. He currently serves on the Institute for the Advancement of the American Legal System (IAALS) / American College of Trial Lawyers (ACTL) Joint Task Force on Discovery, and recently was appointed to the Judicial Conference Committee on Rules of Practice and Procedure. He has served as a visiting federal judge in Michigan, Texas, Arizona, California, and Connecticut, and by assignment on the Sixth and Ninth Circuits Courts of Appeals.

also make it mandatory reading for lawyers who wish admission *pro hac vice*. If I detect excessive or combative filings, I will initiate a phone conference to address expectations.

5. Firm Trial Date

Dates that are set at the initial conference are not "dictated" by me; rather, they are agreed upon by all counsel. I adhere to the recommended track set forth in the local rules. This means if the case is designated "standard," the trial date will usually occur within 15 months from the filing of the complaint. At the initial conference, we set the target month (and year) the trial will be held. Everyone knows there is a finish line. I tell the parties that I respect the importance of their case and that their trial date will not be "kicked" for another case. Later, when we agree on an exact date, I may offer a backup date within two weeks, depending upon the docket congestion. I have yet to disappoint. Trial lawyers and their clients appreciate a firm trial date and a ready judge.

6. Hold That Motion!

Summary disposition motions are not appropriate in every case, although some lawyers (or clients) feel otherwise. I usually do not assign a dispositive motion date at the initial conference. Litigants rarely know whether there is a disputed issue of material fact until at least some discovery has taken place. On the other hand, where there has been some pre-suit discovery (e.g., administrative proceedings in a wrongful termination case), the parties may already know there are disputed facts. We address the need for a dispositive motion date at a later telephone status 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.

7. Pick and Choose

Not every motion requires a "law review" opinion. Frequently, lawyers prefer a prompt decision so the case can move forward (or not). Sometimes this is handled at the initial conference, a later telephone conference, or a hearing with a decision "spoken" from the bench followed by a brief order. This is especially true for discovery disputes, many of which can be resolved during a telephone conference. Our Local Rule 37.1 prohibits the filing of a motion to compel unless the parties represent that they have in good faith attempted to resolve their differences. And then, we require only a faxed joint letter setting forth the position of all parties. We follow up with a telephone call usually that same day or the next. On the rare occasion where the discovery dispute deserves briefing, we of course allow it. The key is to make every effort to prevent such a dispute from lingering or disrupting the case schedule.

8. What's the Difference

Depending on the nature of the case, there may be one or more status telephone conferences. During these conferences, I receive an update from counsel, set additional dates, and address problems. I also use this time as an opportunity to slow down for a moment and determine whether parties wish to discuss settlement. It is my personal philosophy that whether a case settles or goes to trial is not as important as whether the parties at least consider settlement along the way. If the case is tried, the parties should know what their real differences are—is the gulf $1 or $1 million? And, of course, there are those cases

where the principle at stake demands a trial. A trial is not a failure of the system. After all, we are trial judges with courtrooms equipped with advanced technology and a jury box inviting use as envisioned by the Declaration of Independence and the U.S. Constitution.

9. Be Prepared

For me, the courtroom bench is my desk. One of my major disappointments has been the decline of the jury trial. As a consequence, when a case goes to trial, lawyers do not know what to do (e.g., how to effectively communicate with and persuade a jury). To provide lawyers with courtroom experience, especially young lawyers, and to keep the docket moving, I utilize hearings and oral arguments on certain dispositive motions. This allows lawyers the opportunity to appear in the courtroom and speak. It allows me an opportunity to resolve some sticky issues by pressing counsel at argument. I almost always send a list of questions to counsel before the hearing, and usually these questions help to focus the discussion. We do not use an appellate court format, but rather a point/counterpoint format that allows lawyers to reply directly and immediately to their opponent's comments. This also allows me to test the facts or law.

10. First Impressions

During trial, we come in contact with the public yet again, either as parties or as jurors. We reach out to jurors in questionnaires before they come to the courthouse for the trial. By striving for a court system that provides a favorable jury experience, we can help to educate potential jurors, while helping to combat the negative impressions that are often felt by jurors. Also, conversations between the court and counsel *before* a trial begins help to minimize down time *during* trial, which in turn helps me devote my full attention to the trial. This procedure reflects a basic respect for the jurors' time, as well as for the time and expense of the parties.

Conclusion

For those familiar with raising children, you know that each child is different, and treating them fairly does not mean you treat them each the same way. What works with one child may not work with another. The same can be said for cases on our docket. Each case is unique in some way, and may require different handling. And just as parents cannot take all the blame or credit for successful, well-adjusted children (whatever that means), neither can we as judges take all the blame or credit for successful case management. Trial lawyers and courthouse staff are an integral part of the team that must work together. Justice Stephen Breyer remarked recently that cases do not belong to the trial lawyer—they belong to the justice system. And the best perspective I have been given is that my courtroom is not mine—I am merely a placeholder until I hand the gavel to my successor.

We are, after all, a service industry, not unlike the family grocery store where I worked growing up. If we don't "sell well," customers will take their disputes elsewhere—outside the court system. This is exactly what happened over the past two decades with the rise of private mediation. But private mediation should be a supplement, not a substitute. Our court system, long admired and envied the world over, must be responsive to our "customers." The courthouse doors deserve a welcome mat, which is why we try to rule on pretrial motions and deposition objections before trial, why we try to have a draft of the jury instructions on counsels' table the first day of trial, and why I say to litigants at the last conference before trial begins: "My staff and I look forward to hosting you." ⊙

MSPB continued from page 37

Under laws comparable to the Whistleblower Protection Act that mandate hearings before ALJs, appellants routinely prevail in far greater numbers than do those whose hearings are held by MSPB attorney examiners. For example, under an array of whistleblower statutes administered by the U.S. Department of Labor, ALJs routinely decide in favor of appellants in one-third of appeals. ALJs acting under other types of statutes and in other agencies have similar records.

ALJs are far from perfect, and in fact are frequently accused of pro-agency bias. The primary motive for such alleged bias is that despite their statutory independence and professionalism, the ALJs are likely to identify with their employer, the government. Lacking such protections and qualifications, MSPB lawyers are far more likely to indulge such inclinations, in addition to other inherent biases they may share with ALJs, such as class and race.

Does the fact that the board and the court of appeals routinely affirm the administrative judges suggest that their initial decisions, biased or not, are correct? No, because MSPB administrative judges have broad discretion to determine legal and factual issues, to control discovery, to admit or deny evidence and witnesses, to rule on objections—in essence, to create the record that is before the reviewing tribunal. Further, their factual findings are upheld if there is "substantial evidence" in the record to support them.

Finally, and perhaps most significantly, findings concerning the credibility of witnesses are deemed "virtually unreviewable." Ironically, these highly deferential standards are taken directly from the APA standards of review as applied to hearings conducted by ALJs, and from appellate court rules regarding findings by U.S. district court judges.

Any reform that does not mandate hearings before qualified ALJs rather than agency lawyers, or at least eliminate appellate deference to the latter, will leave whistleblowers and other federal employees searching for due process and equal justice under the law.

Endnote

[1]5 C.F.R. § 1201.4(a) (2012).

WORKING SMARTER NOT HARDER

HOW EXCELLENT JUDGES MANAGE CASES

RULE ONE INITIATIVE

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EMPOWERING IMPROVEMENT. ADVANCING EXCELLENCE.
INSTITUTE for the ADVANCEMENT of the AMERICAN LEGAL SYSTEM
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"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.)

WORKING SMARTER NOT HARDER

HOW EXCELLENT JUDGES MANAGE CASES

January 2014

IAALS—Institute for the Advancement of the American Legal System

John Moye Hall, 2060 South Gaylord Way, Denver, CO 80208
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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 continuous improvement of the process and culture of the civil justice 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 civil justice system.

Rebecca Love Kourlis	Executive Director
Brittany K.T. Kauffman	Director, *Rule One Initiative*
Natalie Anne Knowlton	Project Manager & Co-Author
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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.

American College of Trial Lawyers

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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.

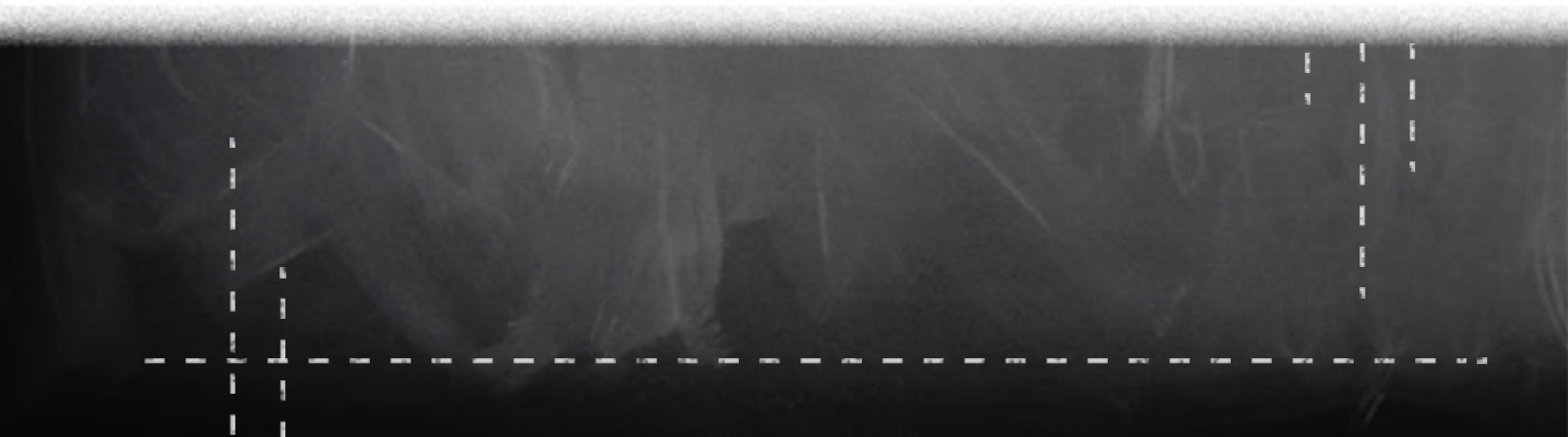


TABLE OF CONTENTS

EXECUTIVE SUMMARY

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

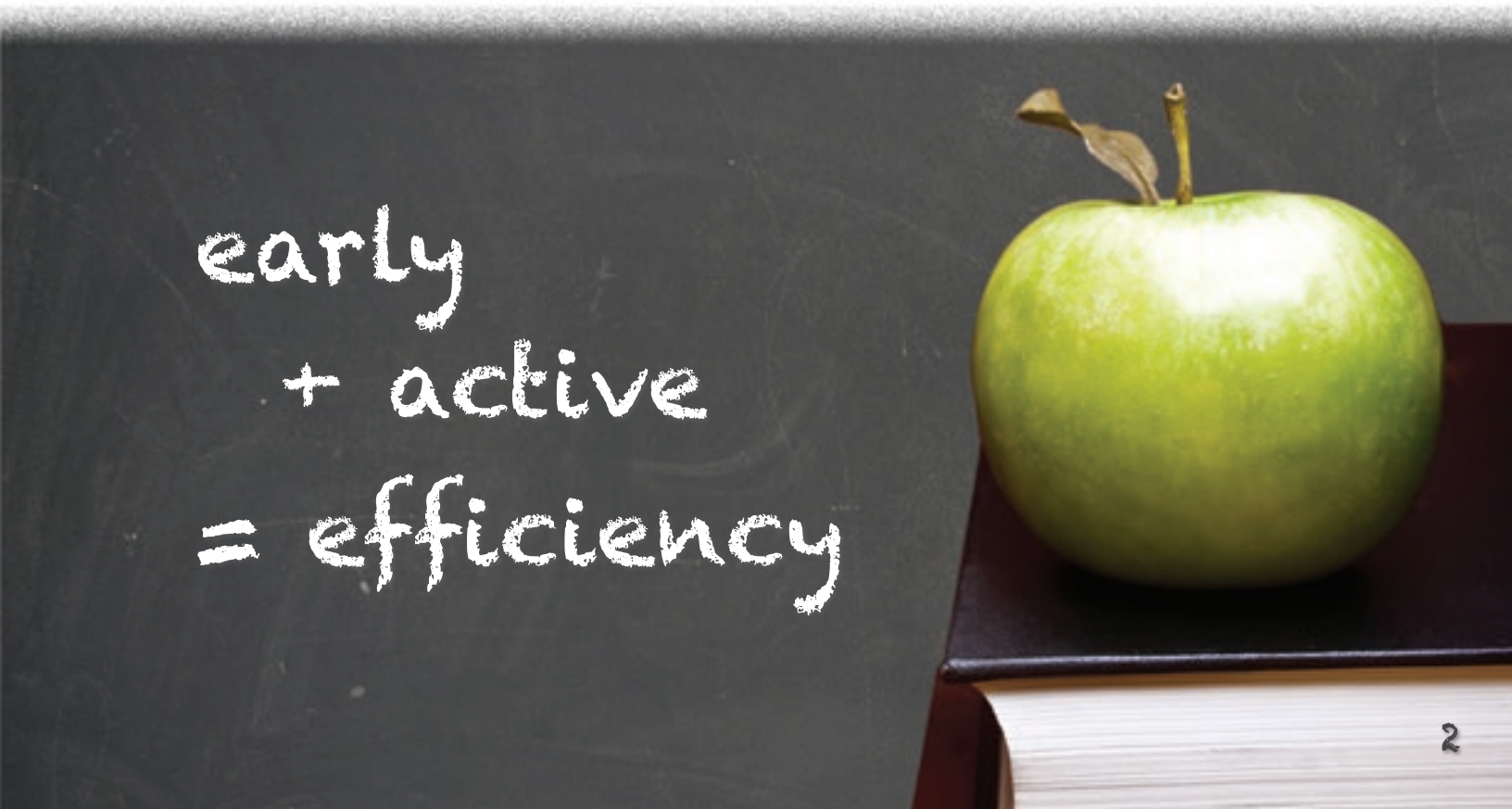
interviewed also overwhelmingly believe that prompt rulings on motions, including those announced from the bench, can dramatically expedite progress in cases, reduce litigants' expenses, save judicial time and resources, and enhance ultimate resolution.

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.



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,

1 Fed. R. Civ. P. 1.

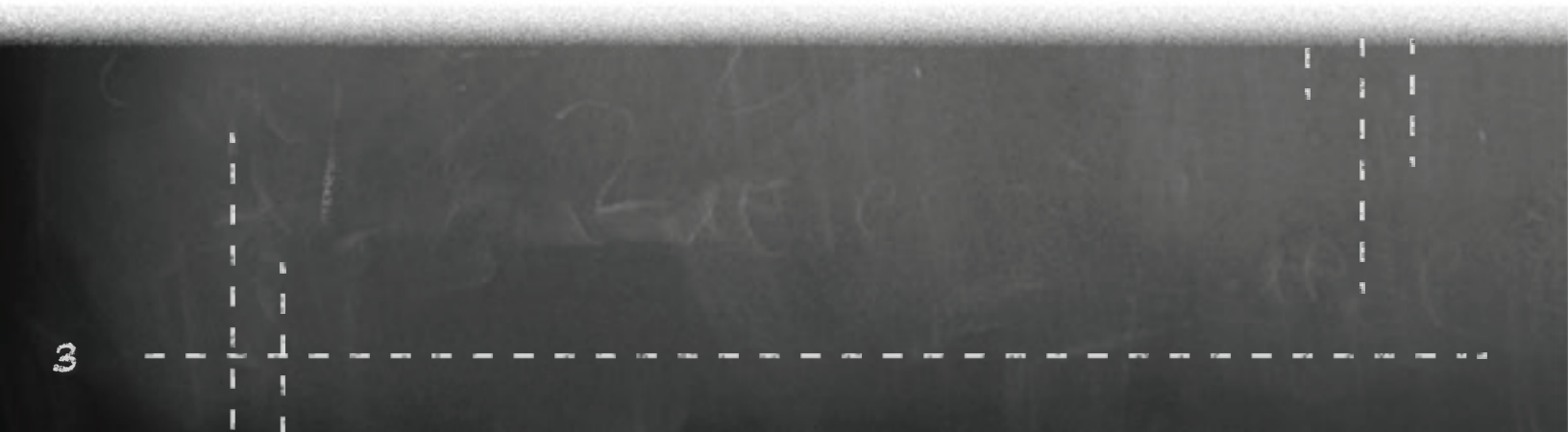
2 Fed. R. Civ. P. 16, advisory committee note, amend. (1983) (referencing Steven Flanders, Fed. Judicial Ctr., Case Management and Court Management in United States District Courts 17 (1977)).

3 Fed. R. Civ. P. 26, advisory committee note, amend. (1983).

4 Fed. R. Civ. P. 26, advisory committee note, amend. (1993).

5 Fed. R. Civ. P. 1, advisory committee note, amend. (1993).

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.[7]

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.[8]

In recent years, the Federal Judicial Center,[9] the U.S. Judicial Conference,[10] the National Center for State Courts,[11] and IAALS, among others, have been bridging this gap by distributing information on effective case management practices. This report offers civil trial judges a qualitative look at the successful case management practices their peers across the country are using, and provides lawyers with potential techniques to incorporate into their own pretrial case management practices.

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7 *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).

8 Unless otherwise noted, all quotations were taken from interview notes, on file with authors.

9 *E.g.*, Fed. Judicial Ctr., Benchbook for U.S. District Court Judges (Mar. 2013), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf; Barbara Rothstein et al., Fed. Judicial Ctr., Managing Discovery of Electronic Information: A Pocket Guide for Judges (2012), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/$file/eldscpkt2d_eb.pdf.

10 *E.g.*, Judicial Conference of the U.S., Comm. on Court Admin. and Case Mgmt., Civil Litigation Management Manual (2010), *available at* http://judicial-discipline-reform.org/docs/Civil_Litigation_Manual_Jud_Conf.pdf.

11 Nat'l Ctr. for State Courts, CourTools – Trial Court Performance Measures, http://www.courtools.org/ (last visited Dec. 20, 2013).

BACKGROUND

IAALS and the ACTL[12] 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,[13] 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.

13 The ACTL Task Force and IAALS jointly issued an *Interim Report* (2008) detailing the results of a survey of ACTL Fellows, a *Final Report* (2009) setting forth 29 Principles for reform of the civil justice system, and a set of *Pilot Project Rules* (2009) that reduce the Principles set forth in the *Final Report* to rules for jurisdictions interested in pilot testing new approaches. These reports are available for download free of charge at: http://iaals.du.edu.

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.

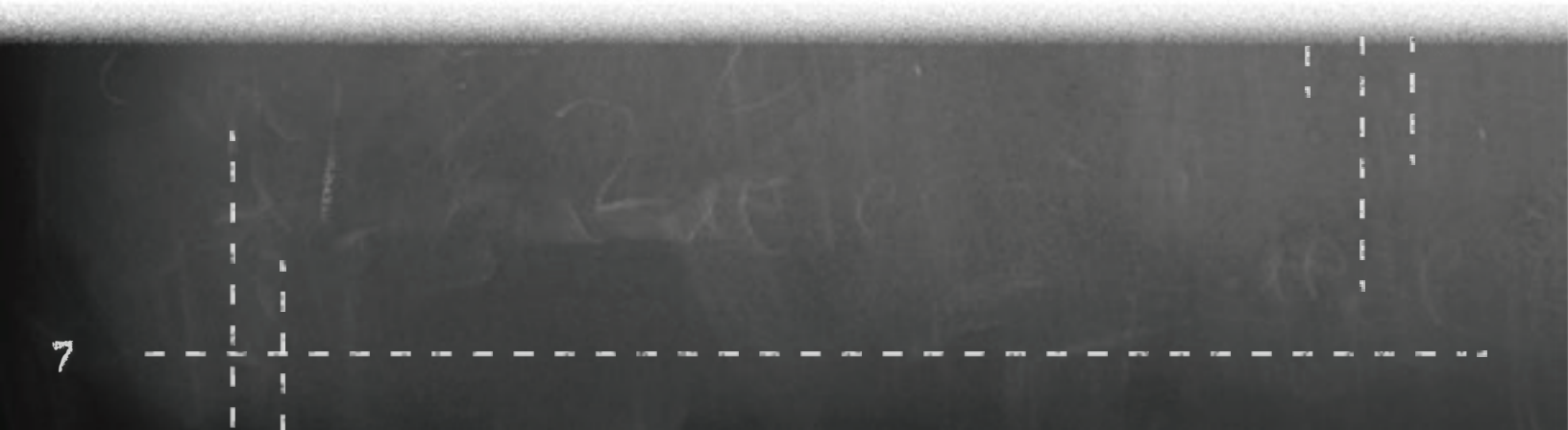
THEME ONE

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.

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."[14] Judge

14 Hon. Jack Zouhary, *Ten Commandments for Effective Case Management*, 60 Fed. Law. 38-40, 38 (2013), *available at* http://www.fedbar.org/Federal-Lawyer-Magazine/2013/March/Focus-On/Focus-On-Ten-Commandments-for-Effective-Case-Management.pdf.

"Active 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."

— Judge Jack Zouhary (N.D. Ohio)

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. Slights, 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.

"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.)

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

"The vast majority [of case management conferences] are in person and that is my personal preference.... 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 Robert L. McGahey, Jr. (Colo. Dist. Ct.)

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."[18]

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 Slights 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.

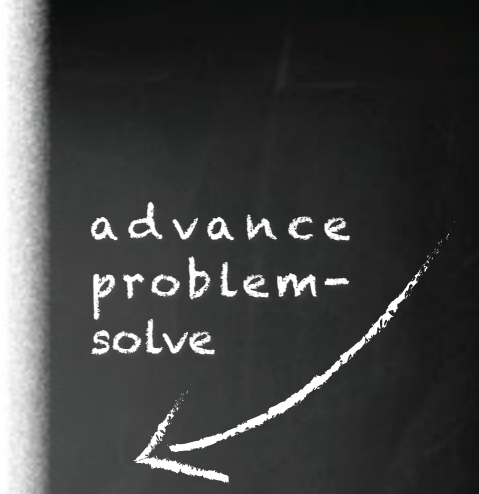
In some situations, Judge Flanagan will ask parties to formulate a schedule for the three most important witnesses, telling them to start with those depositions and afterward reassess what they will need. Sometimes parties will obtain what they want after this first tier and there is little reason to 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.

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19 Default Standards for Discovery, Including Discovery of Electronically Stored Information §1 (b), *available at* http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf (last visited Dec. 20, 2013).

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), *available at* http://www.delawarelitigation.com/files/2012/01/ChancCtguidelines.pdf.

"In my experience, if I require senior lawyers to meet and confer before they bring the dispute to the court, it gets worked out."

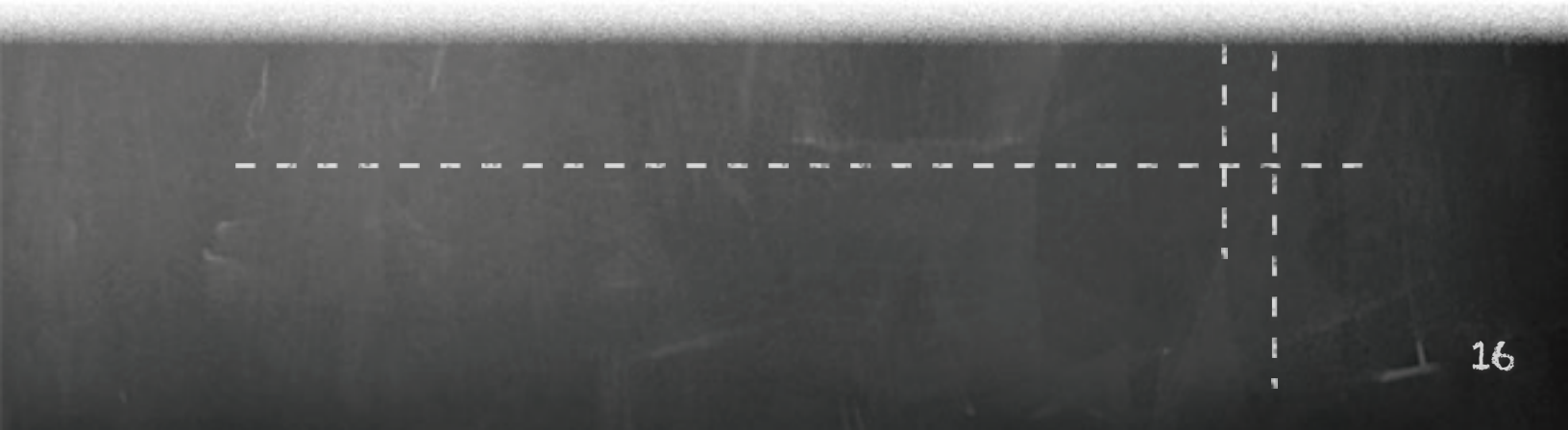
– Chancellor Leo E. Strine, Jr. (Del. Ch. Ct.)

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."[23] 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."[24]

23 Robert McGahey, Jr., Pretrial Order § IV(5) (2012) (on file with authors).

24 Richard A. Frye, Civil Practice Guidelines § II(A)(2), http://www.fccourts.org/gen/webfront.nsf/BD900720CABC400D852574FB006E96B3/3FCEB6245F34BFAB8525750D005F8B80?Open (last visited Dec. 20, 2013) (emphasis in original).

"I will be as flexible as I can on other matters, but the trial date will not move."

– Judge Brett M. Spencer (Ohio Ct. Com. Pl.)

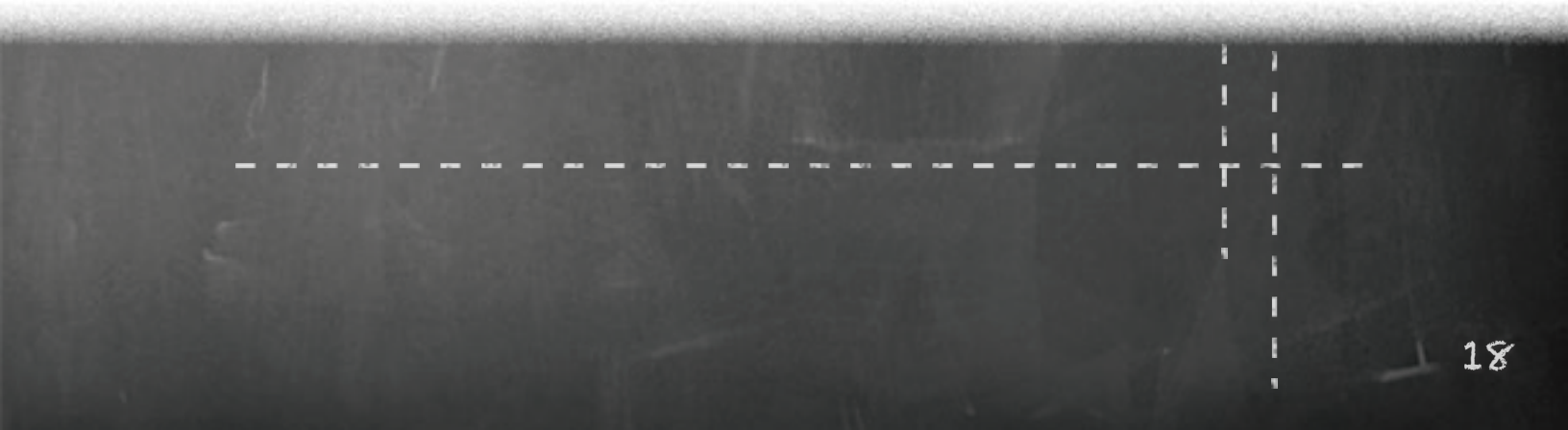
Some judges are generally more lenient about granting continuances. Says Judge McAuliffe, "my personal view is that it's not my case, it's the parties' and the lawyers' case. They know more than I'll ever know so if they want a continuance and it's not crazy, I will defer." A few state court judges cited 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 Slights'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 Slights 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.

"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."

— Judge Matthew F. Kennelly (N.D. Ill.)

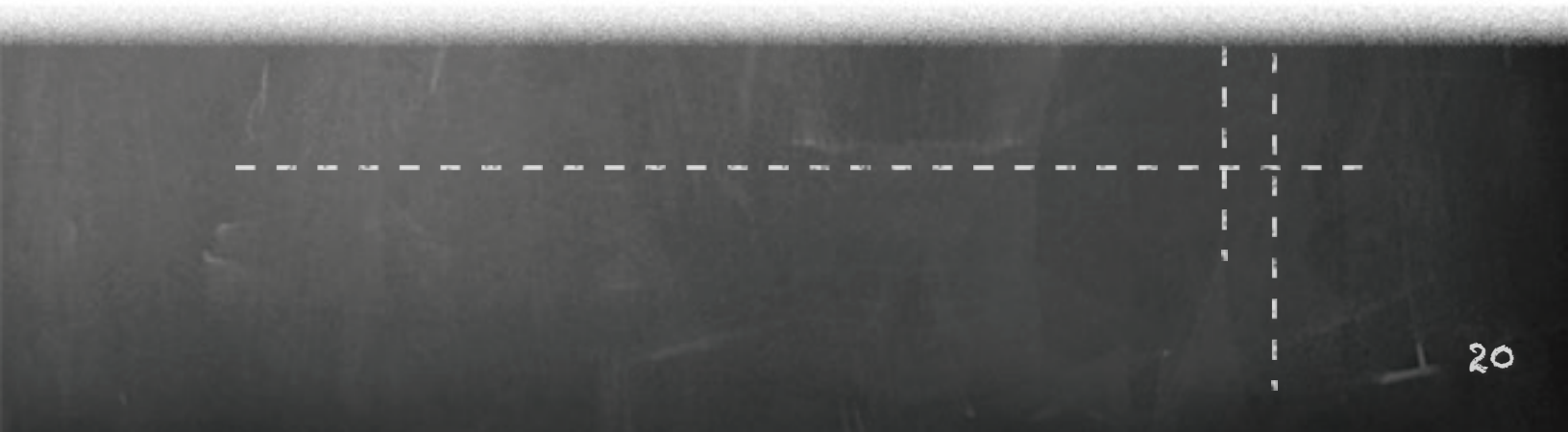
In over 90 percent of Judge Spencer's cases, lawyers prefer to arrive at dates that everyone can accept. Judge Gaughan—who served on the state bench before becoming a federal district court judge—has found federal cases to be, generally speaking, more discovery-intensive than state court cases. Thus, 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."



THEME THREE

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

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

"Avoiding unnecessary motions and permitting only necessary motions to go forward is the best way to avoid cost and delay."

– Judge Phyllis J. Hamilton (N.D. Cal.)

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.)

"I think all motions that are filed need a response.... The rules say litigants should respond in an appropriate time and we try to do the same."

– Chief Judge Michael P. McCuskey (C.D. Ill.)

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."[27] 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.[28] 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

27 R. Brooke Jackson, Practice Standards 3 (rev. June 4, 2013)(on file with authors).

28 Leonard P. Stark, Scheduling Order for Non-Patent Cases § 3(g) (rev. Jan. 2011), *available at* http://www.ded.uscourts.gov/sites/default/files/Chambers/LPS/Forms/Form_Scheduling_Order-Non-Patent_Rev-01-11.pdf.

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.

29 Zouhary, *supra* note 14, at 39.

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 provision[30] 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.

> "If there is anything of an evidentiary nature that can be resolved before trial, resolve it."
>
> – Chief Judge Robert S. Hyatt (Colo. Dist. Ct.)

30 *See* Cal. Code Civ. P. § 128.7 (2013).

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.

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.

"Cases get done faster when there are good relations among the attorneys—that's far more important than anything the court can do."

— Vice Chancellor J. Travis Laster (Del. Ch. Ct.)

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]

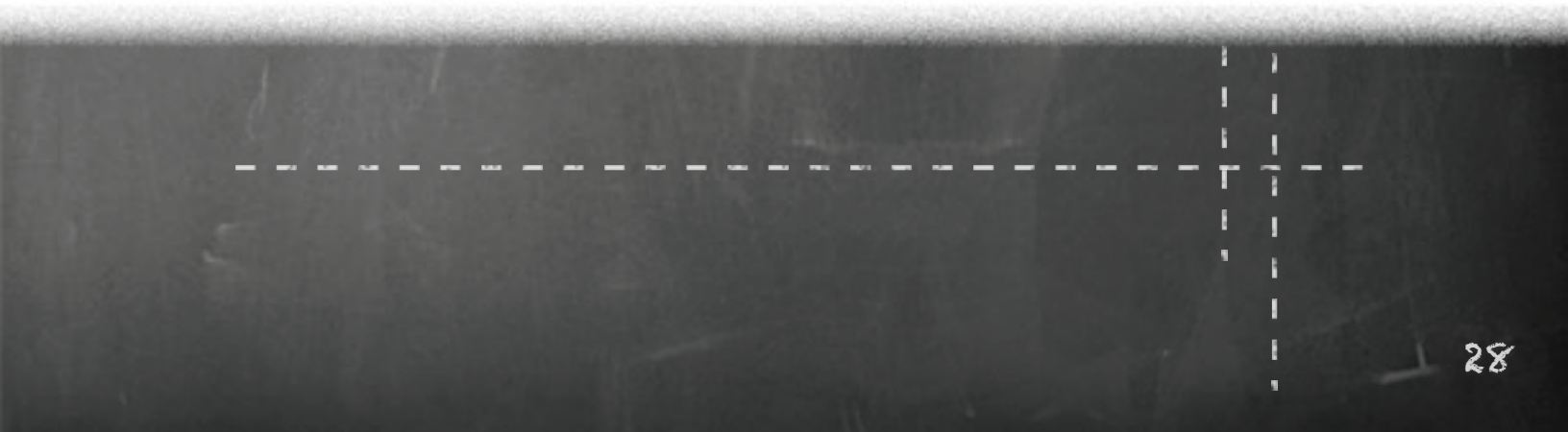
While acknowledging the importance of active judicial management in preventing disputes from festering, says Judge Bailin, "ultimately, if you set up a structure that is clear and people understand it and they are expected to follow it, then you are much less likely to spend a lot of time getting people 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."

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.

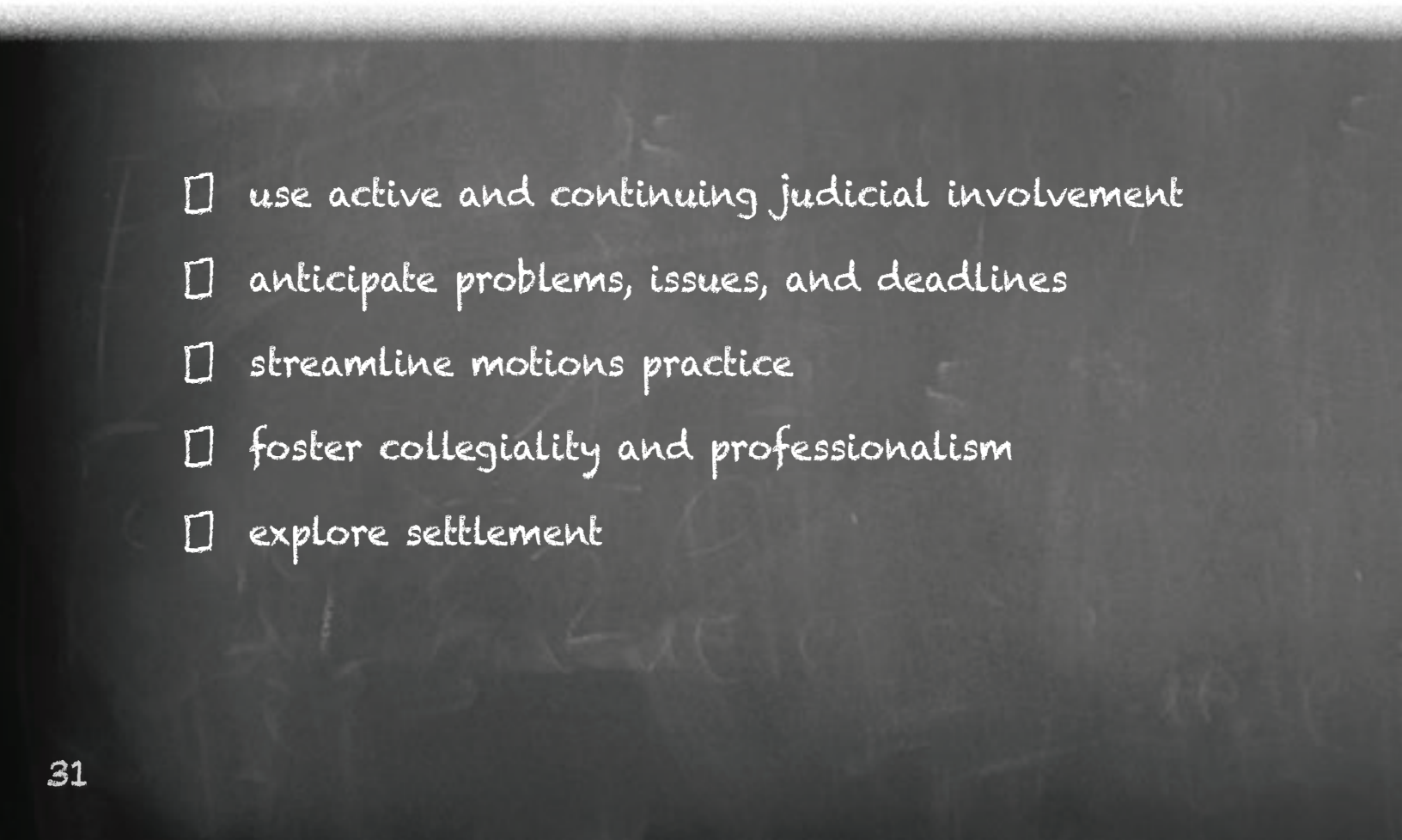
Many interviewed judges approach parties early about settlement. While Judge Frye is not adverse to having people try cases, from his perspective, "most will settle and the economics of civil practice generally dictate people at least explore settlement, if not do it, as early as possible." Given this 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.

> "Most will settle and the economics of civil practice generally dictate people at least explore settlement, if not do it, as early as possible."
>
> – Judge Richard A. Frye (Ohio Ct. Com. Pl.)

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.



APPENDICES

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

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

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.]

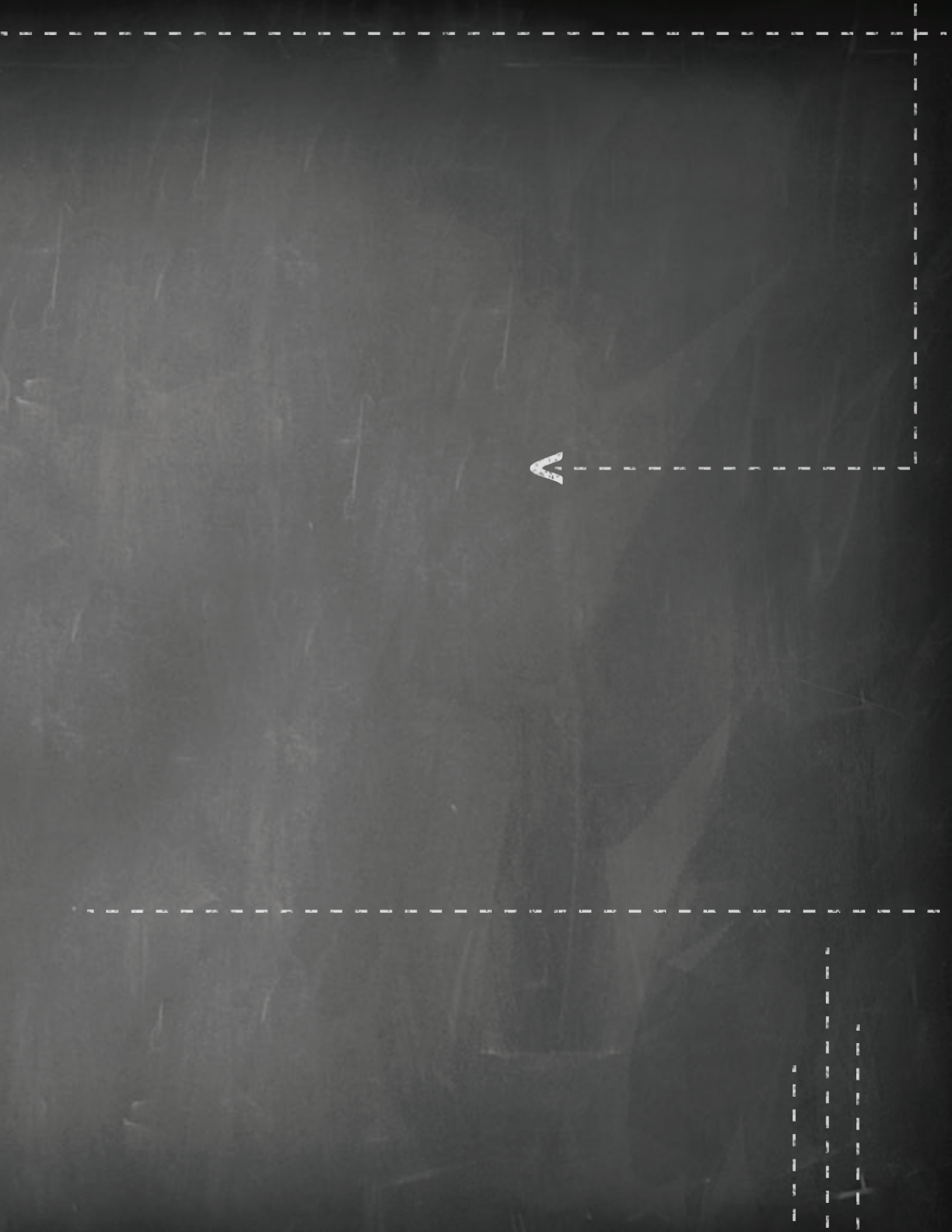
Discuss discovery expectations and limitations.

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.



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A Study of Civil Case Disposition Time in U.S. District Courts

Donna Stienstra

Federal Judicial Center

2016

Contents

Introduction

This report summarizes the Federal Judicial Center's research on the Most Congested Courts (MCC) Project conducted for the Judicial Conference Committee on Court Administration and Case Management.[1] The report describes the Center's development of a new type of civil caseload analysis, the use of that analysis to identify courts with slower and faster disposition times, and the findings from interviews with selected districts with slower and faster disposition times.

Overall, during this project, the Center:

- developed a new method for identifying districts that are not keeping up with their civil caseloads, as measured by case disposition time;
- developed an analysis of civil case disposition time, by nature of suit, for each of the 94 district courts;
- interviewed the chief judge and clerk of court in seven courts with slower disposition times and seven with faster disposition times to understand the factors that affect civil case disposition time; and
- further refined the analysis of disposition time into a useful analytical tool, a civil case disposition "dashboard." Each district court received the dashboard for its civil caseload in August 2015.

This final report completes the project. The report presents a history of the MCC Project, an overview of the Center's development of a new method of caseload analysis, and findings from interviews with the fourteen district courts selected for the study.

MCC Project Origin and Goals

In 2001, the Judicial Conference asked the Court Administration and Case Management Committee to monitor the caseloads of the district courts, identify districts

1. We had valuable assistance and guidance from the CACM Case Management Subcommittee at key stages of the project and thank the members for their help: Judge Richard Arcara (chair), Judge Roger Titus, Judge Dan Hovland, Judge Marcia Crone, Judge Sean McLaughlin, Judge Charles Coody, Larry Baerman, clerk of court representative to the committee, and Jane MacCracken, staff to the committee. I especially appreciate the participation of Judge Arcara, Larry Baerman, and Jane MacCracken in the interview process. Their participation was invaluable in conducting the interviews and interpreting the information obtained. I also owe a great deal to the chief judges and clerks of court in the fourteen study courts. They were most generous in their time and in the information they shared during the interviews. And I am very grateful to my colleague Margaret Williams for the civil caseload analysis, which provided the basis for selecting the study courts, and which she subsequently developed into the very valuable analytical tool, the "dashboard" (see Attachment 2).

with significant caseload delay, and offer assistance to those districts. The Administrative Office (AO) developed a composite measure of caseload delay, ranked the 94 district courts on this measure, and designated the most delayed 25% as the "most congested courts" (MCCs). Approximately once every two years, the committee then sent a letter to the chief judge of each MCC to alert the court to its ranking and to suggest a variety of remedies, including such actions as use of visiting judges, attendance at workshops, and consideration of case-management practices recommended in guides and manuals.

Some districts responded with explanations for their status, others with polite thanks, and some not at all. Over the first ten years of the committee's efforts, it became clear that membership on the list of MCCs changed little and that the committee's letters had limited effect. The committee decided that it needed a new approach to the problem of courts with caseload delays and asked the Center to develop a new method for identifying and assisting courts with lengthy civil case disposition times.

The New Analysis for Identifying District Courts with Delayed Civil Case Disposition Times

The new method compares the average disposition time for each case type within a district to the average disposition time for each case type nationally. To develop the measure, the Center first calculated a national average disposition time for each of the nearly 100 nature-of-suit (NOS) codes across all 94 districts combined for the most recent three-year period (called the national average). The Center then calculated the average disposition time for each nature-of-suit code for each district for the same period.[2] In the final step of the analysis, the Center compared each district's average disposition time for each nature-of-suit code to the national average.

To help districts understand the analysis, the Center developed a graphic presentation that relies on colors to show a district which cases it is disposing of faster or slower than the national average—deep red for very slow, pink for slow, yellow for near the national average, light green for fast, and deep green for very fast. The Center used tables and bar charts to present the results of the analysis (see Attachment 1[3]). Because of the graphic presentation—the colors in particular—districts

2. To reduce risk that a year of unusual activity would skew averages, the Center chose a three-year time frame. Longer or shorter time frames could be used, as could other comparisons, such as averages for courts of the same size or in the same circuit.

3. The initial version of the analysis grouped the civil natures of suit into four categories (or "quartiles")—faster, fast, slow, and slower natures of suit—and included an average disposition time for criminal felony cases as well. The more recent analysis—the case disposition dashboard—does not group the natures of suit into quartiles nor include the criminal felony caseload

quickly understand where they are having problems disposing of cases and where they are doing well. More recently, the Center has developed a case disposition dashboard for presenting the results of the analysis. The dashboard also provides disposition times graphically and relies on the same color scheme, but it uses a simpler graphic and also presents more information by providing the specific cases included in each NOS group (see Attachment 2 for a description of the dashboard).

Using either approach, the new analysis identifies districts that have fallen seriously behind the national average in disposing of their civil caseloads, districts that are doing much better than the national average, and exactly which types of cases are most seriously delayed in the districts with delayed civil case disposition times. The new analysis does not, however, provide a single score or a method for ranking districts. Rather, it requires examination of each district to see whether a district has either a large number of case types that take more than 15% longer to dispose of than the national average or a smaller number of case types that take much, much longer (e.g., 100% longer) than the national average to terminate.

Interviews in Districts with Delayed Civil Case Disposition Times

Based on a recommendation from the Center, the Committee agreed that the better approach to assisting courts with caseload delays would be to interview them rather than to send letters. The committee also agreed that each district should receive its own caseload analysis, since the committee members themselves had found the graphics exceptionally helpful in understanding their own courts' caseloads. Working with the new case disposition analysis and the Case Management Subcommittee, the Center identified districts that differed from the national average in either having a high number of civil case types that were delayed or in having extreme delay, even if in a smaller number of civil case types. Of the initial set of fourteen districts that met these criteria, the subcommittee selected seven that were seriously delayed. Then-chair of the committee, Judge Julie Robinson, sent these districts the Center's new case disposition analysis and an invitation to be interviewed, which all seven districts accepted.[4]

Because the issue of delay was potentially sensitive, the committee agreed that it would be helpful to the Center's research staff to have a judge member of the committee participate in the interviews. In the end, each interview was conducted by a judge member, the clerk of court representative to the committee, a member of the

4. Because of the confidential nature of some information provided by these districts, they are not identified in this report.

committee staff, and myself.[5] In each district, we interviewed the chief judge and clerk of court to try to understand more fully why their civil caseloads had become delayed and what kinds of targeted assistance might help them dispose of civil cases more quickly.[6] Because the seven districts were geographically disbursed, we conducted most of the interviews by telephone.

Typically each chief judge opened the discussion with an explanation of the district's caseload challenges and steps the district had taken or was planning to take to address caseload delays. Most of the districts had prepared talking points—and, in some districts, documentary material—for the interview. The interview team had not asked the districts to make such preparations, but they clearly were well prepared for the interview and wanted to open by providing information they felt was important for the committee to know.[7]

Then, if the chief judge and clerk had not already addressed the case types that were both seriously delayed and accounted for a sizable portion of the district's caseload, the interview team asked the chief judge to talk about how these cases are handled by the court and why they might be delayed. This invitation usually generated considerable additional discussion.

The interviews generally lasted at least an hour and provided abundant information about problems encountered and actions taken by the seven selected districts. The chief judges and clerks of court were welcoming to the interviewers and generous in the information they provided. Without exception, they found the caseload analysis very helpful, particularly in identifying problems at the detailed level of individual case types. Several said the tables had opened up a dialogue in their court about how the court handles its cases, not only cases that were delayed but other cases as well, and had already led to some changes in procedure. Also without exception, the chief judges said they appreciated the committee's inquiry and offers to help.

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5. The committee member was Judge Richard Arcara, who also chaired the Case Management Subcommittee; the clerk of court representative was Larry Baerman; and the committee staff member was Jane MacCracken.

6. The interviews took place between March and September 2013. In several districts, additional judges or court staff joined the chief judge and clerk for the interview.

7. Attachment 3 provides an example email showing the information sent to a district before the interview to help the chief judge and clerk of court understand the nature of the interview. The graphics sent for these interviews were the initial type prepared by the Center—i.e., the bar graphs and tables shown in Attachment 1—and not the more recently developed electronic dashboard shown in Attachment 2.

Challenges Identified in Districts with Delayed Civil Case Disposition Times

We relied on two sources of information for understanding civil case disposition delays in the seven courts selected for the study: the Center's caseload analyses and information the chief judges and clerks of court provided during the interviews. In reviewing the caseload analyses and talking with the courts, we focused on the case types that were both the most delayed and included the greatest number of cases. Because of their numbers, these case types have a larger impact on a district's overall disposition time, and, more importantly, delay in these cases affects a larger number of litigants.

The caseload analyses revealed how seriously delayed each district's caseload was and the case types that accounted for delay. Delays were very substantial in each district, even in case types that are typically disposed of quickly nationwide—for example, in one district the faster case types were disposed of 81% more slowly than the national average, and in another these case types were disposed of 72% more slowly. In addition, the caseloads were delayed across many different case types.

From the caseload analysis, we could see a pattern across the seven districts. The most commonly delayed case types—i.e., found in five or more districts—were prisoner petitions to vacate a sentence or for habeas corpus, along with employment civil rights, Employees Retirement Income Security Act (ERISA), insurance, and "other" contract cases. Prisoner civil rights, foreclosure, and "other" statutory actions were delayed in four of the seven. Districts also had delayed disposition times in case types with large numbers of cases specific to that district—for example, marine personal injury cases in a district on a harbor; medical malpractice cases in a major medical center; copyright, patent, trademark, and antitrust cases in districts that are economic centers; and Social Security and consumer credit cases in districts that had experienced rapid increases in these case types. The two central points from this analysis were that in the courts with delayed case disposition times (1) delay was found across a large number of case types and was not limited to a few case types, and (2) several case types involving large numbers of litigants (e.g., prisoner cases, employment civil rights cases, and ERISA cases) were delayed in a majority of the seven districts.

From the interviews, we learned not only the districts' assessments of their problems but also that they were aware of their court's caseload delay before being contacted by the committee and had been taking steps to resolve it. With regard to the specific reasons for delay, each district offered a number of explanations, some that had caused problems generally for the district and some that had caused problems for specific case types. Although there were idiosyncratic explanations and conditions in

some districts, the reasons cited can be grouped into several categories keeping in mind that these are perceived, and not quantitatively measured, causes of delay.[8]

Criminal caseload

Four of the seven districts said their criminal caseloads were particularly demanding, because of either the sheer number of cases or case complexity (e.g., terrorism or death-eligible cases).

Circuit law

Circuit law required several districts to be deferential to the pleadings filed by pro se litigants. This deferential treatment of pleadings resulted in the courts having to deal with more amended complaints and, often, substantial motion practice and discovery disputes that do not occur in districts where circuit law is less deferential to the pleadings of pro se litigants.

Number and/or complexity of civil filings

In several districts, specialized litigation had emerged from economic activity in the district—e.g., litigation involving patents, financial and medical institutions, and contracts—and had given rise to voluminous and complex motions. In several others, specialized law firms had developed to litigate Social Security, ERISA, and consumer credit cases, and as a consequence more such cases were being filed.

Resources

Three of the seven districts with delayed civil disposition times had long-term vacancies and several had no or few senior judges. Altogether, the seven courts with delayed disposition times had 64 judgeships and 434 vacant judgeship months for the five-year period from 2010 to 2014 compared to seven courts with fast disposition times (see below), which had 79 judgeships and 303 vacant judgeship months.[9] Most of the districts also identified too few staff as a cause of delay, particularly too few pro

8. Although the districts provided explanations for some of their delayed case types, they also were sometimes unsure why a case type might have a longer-than-average disposition time. This was generally true, for example, for ERISA and Fair Labor Standards Act (FLSA) cases.

9. Numbers are from the Federal Court Management Statistics, which can be found at http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics. During the same years, the two groups of courts did not differ, on the whole, in the number of weighted filings. For example, three of the courts with delayed civil case disposition times had weighted filings averaging 500 to 600 cases per judge, well above the standard of 430 cases per judge used as an indicator that a district merits an additional judgeship, but three of the courts with fast civil disposition times had weighted filings averaging over 600 cases per judge (Federal Court Management Statistics).

se or staff law clerks who could help with voluminous complex motions or with prisoner litigation. Although the districts have looked for and often benefitted from outside assistance, they have found it difficult to get help for the most voluminous parts of their caseloads because of limits on the number of staff law clerks allocated to the courts and the reluctance of visiting judges to take a caseload consisting of motions and/or prisoner cases.

Human resource quality and organization

Four of the seven districts had had problems with the quality or organization of human resources, including law clerk problems in chambers, poor organization and lack of oversight of pro se law clerks, poor quality of pro se law clerks, and an underperforming judge.

Case-management practices

Two districts described case-management practices that delayed civil cases—in one, a tradition of judicial deference to lawyers, including lax enforcement of case schedules, and in another the liberal granting, until recently, of continuances.

Steps Taken by the Districts to Reduce Delayed Civil Case Disposition Times

Each of the seven districts had taken steps to try to solve the problem of civil caseload delay. These efforts fall into several categories.

Efforts to reorganize or reallocate work

Three districts with significant delays in prisoner litigation tried to improve the service provided by their pro se law clerks, experimenting with time limits, reallocating work between pro se law clerks and chambers staff, and reassigning oversight responsibility for the pro se law clerks. One district, for example, had used the pro se law clerks to make sure pleadings in pro se cases were in order and to screen for *in forma pauperis* compliance under the Prisoner Litigation Reform Act (PLRA). When the court transferred this screening to the clerk's office, it reduced the screening stage from four to five months to four to five days. This district also moved responsibility for nonprisoner pro se cases from the pro se law clerks to the magistrate judges. This district realized no improvement in civil disposition times, however, by putting magistrate judges on the civil case-assignment wheel. In another effort to improve judicial resources, one district changed the assignment system for senior judges to make assignments more predictable; as a result, the senior judges took more cases.

Efforts to enhance resources

The districts with delayed disposition time have used a number of approaches to increase their staff and judge resources. Three districts have secured additional law clerks to work on motions, pro se cases, and Social Security cases. One district reported reducing its habeas backlog 39% by devoting two pro se clerks to these cases. In another approach to resolving prisoner cases, a district had started working with a local law school clinic, which provided law students legal experience through work on pro se cases. One district turned to recalled magistrate judges, two others relied heavily on their own magistrate judges, and another benefitted from a large number of senior judges. Another strategy, relied on by three districts, was the use of visiting judges. Most of the districts, however, noted the reluctance of visiting judges to do the work that most needs to be done—i.e., deciding motions. One district had been able to secure visiting judge help with motions only by giving visiting judges full control of the cases through trial.

Efforts to change or enhance case-management procedures

The districts with delayed disposition time had also adopted a number of case-management practices they hoped would improve civil case processing. One had recently adopted a package of new case-management practices that included standardized discovery, standardized dates, and mandatory mediation for some types of cases; case-management orientation and appointment of a mentor judge for new judges; and early conferences with lawyers and thus early identification of difficult issues in complex cases. Several districts in the same circuit had adopted electronic service to the U.S. Attorney's Office and the Department of Corrections in state habeas cases; one of these districts reported a 60-day reduction in the time to serve. Four of the districts had mediation programs for civil cases, and one had recently started a differentiated case-tracking program. This district had also realized a reduction in case delay since ending the routine granting of continuances.

Efforts to provide assistance to pro se litigants

Two districts had made particular efforts to provide assistance to pro se litigants to help resolve these cases more quickly. One had established a mediation program at the court for pro se litigants and also provides a grant each year, from its attorney admissions fund, to support the local federal bar association's pro se clinic. A second provides mediation for pro se litigants in employment cases through collaboration with a local law school. This district has also established an outreach program to the bar and provides a day of training, involving the district's most respected judges, for attorneys who volunteer pro bono for pro se cases. The court reported that this program has greatly expanded the pro bono attorney pool, and over 100 cases have been

provided full representation, saving considerable judge and staff time. This district coordinates its pro se assistance through a pro se office established by the court.

Future Assistance Suggested by Districts with Delayed Civil Case Disposition Times

In addition to efforts already made, the districts with delayed civil disposition times made suggestions for further actions that might help them dispose of their civil cases more quickly. These suggestions fall into two broad categories.

Resources

Most of the districts noted, first, the need for more judgeships and/or the need to fill vacancies. All recognized the limited prospects for such help, particularly new judgeships, and went on to identify other types of useful resources. All seven districts called for more law clerks. In some districts, additional law clerks would provide help with voluminous motions. In others, additional law clerks would help meet the demand of pro se cases. Districts with temporary law clerks called for a change in how these law clerks are funded and allocated. They specifically suggested that the law clerk program become permanent and that appointments be long enough to permit law clerks to become competent in the work. Another district suggested a visiting law clerk program. Two districts also called for more assistance from visiting judges but with an emphasis on visiting judges who are willing to handle motions.

Guidance and information on best practices

The districts had several suggestions for assistance or guidance that might be provided to courts with problems of caseload delay, as well as to courts generally. The Administrative Office and/or Federal Judicial Center might provide guidance, through a website or resource center, on how to use pro se law clerks more effectively, including position descriptions, advice on oversight and supervision, and options for organizing the pro se law clerk function and allocating pro se cases. The AO and Center might give the courts guidance on judicial case-management practices, with particular emphasis on the methods used by judges who dispose of cases quickly. The AO and Center might also develop electronic tools that would help courts pull more information out of caseload data. The courts also suggested development of guidance on using mediation and setting up electronic service for prisoner pro se cases. When asked how best to disseminate information, a chief judge suggested that judges and clerks are more likely to pick up information at workshops—such as new judge training, the annual district and magistrate judge workshops, and the annual clerk of court conference—than to go online to search for information.

Interviews in Districts with Fast Civil Case Disposition Times

The committee had been inclined to conduct interviews in the fastest or "most expedited" districts, in addition to the delayed or "most congested" districts, and the interviews in the districts with delayed case disposition times confirmed the importance of doing so. First, the courts with delay had asked for information about practices used in districts with fast disposition times, but also, under its responsibility to identify and disseminate best practices, the committee wished to collect and publicize steps the courts were taking to resolve civil cases expeditiously.

Using the caseload analyses and working with the Case Management Subcommittee, the Center identified a set of districts that dispose of their civil cases much more quickly than the national average. The subcommittee selected seven of these districts for interviews. These districts, which are representative of large, medium, and small districts and were distributed across the country and circuits, were the following:

- Central District of California
- Southern District of Florida
- District of Maine
- Western District of Missouri
- Northern District of Texas
- Western District of Washington
- Eastern District of Wisconsin

Then-chair of the committee, Judge Julie Robinson, sent a letter to the chief judges in these districts, inviting them to participate in the Most Congested Courts Project as examples of districts that were able to dispose of civil cases quickly. The letter included the Center's caseload analysis for that district. Each chief judge responded positively to the invitation. The same team of four interviewers then spoke by telephone with the chief judge and clerk of court in each district, this time focusing on steps the districts had taken to dispose of civil cases quickly.[10]

As in the courts with delayed civil case disposition times, typically each chief judge opened the interview, but in these districts the focus was on practices and rules used to move civil cases expeditiously. The chief judges and clerks were well prepared for the interviews and most proceeded through a list of practices and rules they thought might explain why their civil case disposition time was fast relative to the national average. The interview team was particularly interested in fast disposition times in case types that had long disposition times in most of the courts with delay,

10. The interviews took place in October and November 2014. In one or two districts, additional judges or court staff joined the chief judge and clerk for the interview. Attachment 4 provides an example of information sent to each district shortly before the interview to inform them of the nature of the interview.

and if a chief judge or clerk did not address those case types, the interview team asked about practices that might explain the fast disposition times.

The interviews generally lasted at least an hour and provided a great deal of information about case-management practices and rules in the seven districts. The chief judges and clerks of court were very responsive in providing information and offering further assistance if needed.

Procedures and Practices in Districts with Fast Civil Case Disposition Times

As in the districts with delayed disposition times, we relied on the Center's caseload analysis and our interviews to develop an understanding of courts that dispose of their civil cases quickly. The caseload graph and tables showed that the districts were not only expeditious overall but were expeditious across most types of cases. In fact, one of the districts disposed of every type of civil case, except four, near or faster than the national average. What explains the fast disposition times in these districts?

We looked for common case-management and case-assignment practices across all seven districts, thinking there might be specific practices, used by all, that could become concrete guidance for other courts—for example, having a uniform case-management order used by all judges; having magistrate judges on the civil case-assignment wheel (or not); using R&Rs (or not); or providing mediation through a court-based process. We did not find that kind of uniformity across all, or even some, of the districts with fast civil disposition times or even across all judges in some districts. However, while we did not find a single set of procedures or a package that, if adopted, would be the key to expeditious civil case dispositions, we did identify common characteristics across the courts with fast civil disposition times—most importantly, sufficient judicial resources, but also a commitment to and culture of early case disposition. This commitment and culture were manifest in several ways: early and active judicial case management, a court-wide approach to managing cases and solving problems, and extensive use of magistrate judges and staff law clerks. In the discussion below, keep in mind that as in the districts with delayed civil case disposition times, we are presenting the courts' perceptions, and not a quantitative analysis, of the causes of fast civil case disposition times in these districts.

Sufficient judicial resources

In all but one of the districts, the chief judges pointed to an essential factor in their fast civil disposition times—sufficient judicial resources. Several chief judges noted this factor right at the outset of the interview. Not only were the districts fortunate to have had few vacant judgeship months, but they also had either a long-term, experienced bench, senior judges who still took a significant caseload, or both. In one dis-

trict where judicial resources were not as substantial because of a long-term need for additional judgeships, the court had maintained its fast civil disposition times through exceptionally long hours by judges and staff (but with the negative consequences of ill health and early judicial retirements).

Culture of early case disposition

In addition to sufficient judicial resources, all of the chief judges in the courts with fast civil disposition times were emphatic about their culture of early case disposition. Most of the courts were intentional about this culture—i.e., they pursued it deliberately, were committed to maintaining it, and spoke of it as central to the identity of the court. This commitment is expressed through fairly standard case-management practices—early judicial involvement in the case; early setting of a schedule; early identification of cases that can be disposed of by removal, remand, or dispositive motion; prompt decisions on motions so, as one chief judge said, "the lawyers can do their work"; and no continuances, which is generally achieved in these districts by requiring counsel to submit a proposed case schedule and then holding them to it. Above all, as described by the chief judges, their districts emphasized very early judicial involvement and control and very firm respect for the schedule.

Institutional approach to case disposition

The courts with fast civil disposition times have a number of court-wide practices and rules in place that support early judicial case management and enforcement of deadlines. But, significantly, most of these courts are not characterized by uniform practices across all judges, which some might expect to be a hallmark of a court that disposes of its civil cases quickly. One chief judge described the court's bench as "highly individualistic" and another chief judge said the court was marked by "fierce individualism." Only two of the chief judges pointed to uniform time frames and uniform case-management orders as part of their courts' approach to civil litigation. Otherwise the courts' practices, and those of individual judges within any given court, vary considerably—for example, whether or not they hold Rule 16 scheduling conferences or in-person hearings on motions. But in these districts, several other factors that support expeditious civil case processing are shared court-wide:

- The local rules emphasize early case management.
- The judges are committed to joint responsibility for the court's caseload. "If someone falls behind," said one chief judge, "we help each other out." "We're a team," said another. In one of the districts, a court-wide committee reviews the caseload and, if bottlenecks are seen, makes adjustments in case allocations.
- The courts assertively use reports on the status of the caseload to monitor individual judge and court-wide performance. These reports are detailed, and

in most districts the court's own internal reports, not only the Civil Justice Reform Act (CJRA) reports, identify the judges by name. The reports are issued frequently and are discussed at court meetings or individually between the chief judge and each other judge. The purpose and effect of the reports is to provide a case-management tool and to encourage judges to keep their own caseloads within the court's norms.

- The courts have a history and culture of problem solving—or, as one chief judge said, "always wanting to improve." The caseload reports are an example of tools used by the courts to routinely examine how they are doing, but these reports are only one example of the kind of constant review used by these courts. Most of the chief judges described study groups and task forces that had taken on one or another issue—for example, delays in Social Security cases, problems of attorney access to prisoners located in distant prisons, and frequent appellate court reversal of prisoner cases involving medical malpractice—and had developed solutions for the problems. Many of these courts have also developed innovative approaches to such perennial issues as discovery disputes and voluminous summary judgment motions (see below for examples).

Extensive and effective role for magistrate judges

The role of magistrate judges varies greatly across the seven courts with fast civil disposition times—for example, in several districts they are on the wheel for assignment of a portion of the civil caseload, and in others they are not; in some they handle all civil pretrial matters, and in others they do not; in some they are responsible for the prisoner and/or Social Security caseloads, and in others they are not. Regardless of the specific duties of the magistrate judges, the chief judges noted their courts' determination to use that resource to the fullest possible extent and described the magistrate judges, in the words of one judge, as "an integral part of the team." They also emphasized the high level of respect accorded the magistrate judges by judges and attorneys, as well as efforts made to increase that respect—for example, by giving the magistrate judges work that puts them in the courtroom to heighten their visibility and enhance their authority. Magistrate judges also participate in court governance, including, in one district, the critical committee that monitors case flow. Whatever a court's approach may be, according to the chief judges, full integration of the magistrate judges is central to expeditious case disposition.

Experienced and highly skilled staff law clerks

Many of the courts with fast civil disposition times also benefit from long-term, highly experienced staff law clerks. They typically handle the court's pro se and prisoner caseloads and over time have developed efficient systems for screening these cases

and moving them toward disposition. These systems vary from district to district, but the staff law clerks were typically described as being very good at "triaging" this caseload and keeping it current.

In addition to these characteristics that are common across the courts, the judges told us of a number of practices they believe have helped their courts reduce delay in civil cases or solve a particular problem, such as a sudden rise in Social Security cases. We briefly describe these district-specific practices, along with several procedures adopted to more efficiently handle some of the types of cases that are often slower in the districts with delayed civil case disposition times.

Calendars and scheduling

In the Southern District of Florida, the majority of judges follow a term calendar—i.e., the year is divided into 26 two-week terms. Immediately on case filing, the judge reviews the case, then brings the attorneys in two to four weeks after an answer is filed to set a schedule for the case. The trial date is set for a specific two-week period, with most trial dates set within one year of case filing. Approximately 12–15 cases are set for each two-week trial term.

The judges in the District of Maine assign all civil cases to one of seven tracks, each with its own timelines and distinct, uniform scheduling order.

The Western District of Missouri designates two weeks of each month for criminal trials to ensure compliance with the Speedy Trial Act.

In the Western District of Washington, civil trials are conducted on a clock. At a pretrial conference 10–14 days before trial, the judge and attorneys determine the number of days and hours for trial. A clock starts when trial begins; each morning the judge announces the number of minutes left to each side. Side bars are assessed against the losing side. The process not only streamlines trials but also provides predictability for jurors and attorneys and prompts greater cooperation among attorneys to avoid being docked time.

Discovery

To control discovery, the District of Maine gives cases on the standard track four months to complete both fact and expert discovery. In all cases, attorneys must attempt to resolve discovery disputes on their own and, if they cannot, must talk with a magistrate judge, who attempts to mediate the conflict. Only with the magistrate judge's consent may they file a discovery motion.

In the Western District of Missouri, Local Rule 37.1 prohibits the filing of discovery motions, which is intended to prompt attorneys to resolve discovery disputes on their own. If attorneys determine that they must file a discovery motion, they must

include a justification for the motion. A teleconference is then scheduled by the judge.

Under a set of guidelines issued by the court, the Western District of Washington encourages attorneys to use the court-promulgated "Model Agreement Regarding Discovery of Electronically Stored Information." The model agreement is in the form of an order that can be issued by the assigned judge and includes general principles and specific guidance on electronic discovery, with an attachment that includes additional provisions for complex cases.

The Western District of Washington developed "Best Practices for Electronic Discovery in Criminal Cases," which provide a general set of best practices, as well as guidelines for multidefendant cases and an e-discovery checklist.

Summary judgment

Under District of Maine Local Rule 56, unless attorneys in standard-track cases file a joint agreement on core matters related to summary judgment, they may not file summary judgment motions without a prefiling conference with the judge, which at minimum narrows issues and sometimes bypasses the need for a summary judgment motion altogether.

In the Northern District of Texas, Local Rule 56.2 permits only one motion for summary judgment per party unless otherwise directed by the presiding judge or permitted by law.

In an experimental procedure being used by one judge in the Eastern District of Wisconsin, attorneys may opt for a streamlined summary judgment process—the Fast Track Summary Judgment (FTSJ) process—to reach an early dispositive decision. In this process, the judge tolls unrelated discovery and parties must comply with a number of limits, including page limits on affidavits.

Motions generally

Under Local Civil Rule 7, judges in the Western District of Washington must rule on motions within 30 days of filing. At 45 days, attorneys may remind the judge to rule. This practice ensures that cases with no merit are seen and decided quickly.

Mediation

The Central District of California provides three forms of settlement assistance to civil litigants: referral to a magistrate judge or district judge for a settlement conference (in practice, most referrals are to magistrate judges); selection of a mediator from the extensive private mediation market; or selection of a mediator from the court's panel of approved mediators. Except for a few exempt case types, all civil litigants are expected to select one of these forms of settlement assistance and to file

their selection with the assigned judge prior to the Rule 16 scheduling conference. The local rules set a default deadline for the scheduling conference, subject to changes ordered by the judge after consultation with counsel. The judge issues a referral order at or soon after the Rule 16 conference.

The Mediation and Assessment Program (MAP) in the Western District of Missouri randomly assigns all civil cases, excluding a limited number of case types, to one of three types of mediation providers: the court's magistrate judges, the MAP director, or a mediator in the private sector. Parties are required to mediate their case within 75 days of the "meet and greet" meeting required by Federal Rule of Civil Procedure 26(f). Parties may ask to opt out of the mediation process or may ask to use a different form of ADR through a written request to the MAP director.

Other

The Central District of California relies on a number of committees to govern the court. The Case Management and Assignment Committee is one of the most important. Each of the district's divisions is represented on the committee, which is composed of district judges, magistrate judges, and court staff. The committee, which has four scheduled meetings a year (and more as needed), monitors the caseload and keeps it in balance, using caseload reports from the clerk and concerns brought to the committee by judges to diagnose problems and develop solutions.

The District of Maine has for many years assigned a single case manager to each case for the lifetime of the case. The case manager works closely with the judge and monitors case progress, calls attorneys if deadlines are not met, and manages all paperwork, notices, docketing, and any other matters for the case.

To ensure efficient practice by attorneys on the Criminal Justice Act (CJA) panel, the Western District of Washington appointed a task force made up of judges, court staff, and representatives from the U.S. Attorney's Office and CJA panel, which led to adoption of "Basic Technology Requirements" for CJA panel attorneys. The requirements state the minimum technology standards CJA attorneys must meet, including requirements regarding computer equipment and software.

To ensure that all issues are ready for immediate decision, the Western District of Washington requires that all attorney filings be joint.

ADA cases

Some judges in the Southern District of Florida hold an early half-day hearing in Americans with Disabilities Act (ADA) cases and issue an injunction while the defendant takes care of the problem (e.g., measuring the width of a door, which does not require experts). Cases generally settle promptly after this step.

ERISA cases

In the Central District of California, many district judges require joint briefs. The court also sets an early deadline for submission of the administrative record.

The District of Maine has an ERISA track with a very specific schedule. The magistrate judges' expertise in these cases helps to expedite them.

FLSA cases

A majority of the judges in the Southern District of Florida use a form order for Fair Labor Standards Act (FLSA) cases. The order sets an early deadline for a statement of the claim.

Prisoner cases

In Maine, the U.S. Attorney's Office is added to the docket for habeas cases to ensure that it automatically receives all notices. The court has an agreement with the Maine attorney general's office for more efficient filing of prisoner cases.

The Western District of Missouri has a memorandum of understanding with the department of corrections that prisoners may file habeas cases electronically, using equipment provided by the court.

The Northern District of Texas serves the state electronically in state habeas cases.

In the Eastern District of Wisconsin, the court is moving to electronic filing of all prisoner pleadings. Four prisons are included so far. The Wisconsin Department of Justice and one of the larger counties also have memorandums of understanding under which the department or county accept service electronically on behalf of defendants, rather than requiring personal service or paperwork for a waiver. Some judges also screen prisoner cases in chambers, rather than send them to pro se law clerks because they have found it is often faster to dictate a screening order as they review the case activity. The same can be done on motions for extensions, discovery, protective orders, and other matters that arise in these cases.

Social Security cases

To keep Social Security cases on track, the Central District of California uses tight deadlines, permits no discovery or summary judgment motions without leave of court, and requires mandatory settlement conferences. In their management of these cases, most of the magistrate judges also require joint briefing.

In the District of Maine, the magistrate judges handle all Social Security cases and have developed a high level of expertise. When the court needed a solution because disposition times were close to exceeding CJRA requirements, the magistrate judge convened a task force of the Social Security bar. To shorten disposition times, the bar

recommended an earlier deadline for remand motions and a decrease in the time permitted to attorneys to submit briefs. The magistrate judges also try to issue their reports and recommendations within 30 days of oral argument to enable the district judges to resolve appeals before the CJRA reporting deadlines.

In the Western District of Missouri, the magistrate judges are on the civil case-assignment wheel and decide many of the Social Security cases on consent.

To meet a goal of six months to disposition in Social Security cases, the Northern District of Texas sets tight and firm briefing deadlines and permits no oral argument.

When Social Security case filings increased rapidly and the court started falling behind, the Western District of Washington took several steps to speed up the cases. First, it borrowed law clerks from the senior judges, had a full-day education program for them, and assigned them exclusively Social Security cases. The court also requested and received a recalled magistrate judge. Third, a judge prepared statistics on the Social Security caseload, and the court then held a retreat to develop solutions. The court also created a bench/bar committee to obtain attorney input, which produced guidance on how judges could write more helpful opinions and altered the rules on length of briefs. Finally, the court held a full-day CLE workshop on Social Security cases for the bar. The court was able to catch up on the Social Security caseload in a year.

The Eastern District of Wisconsin focused on Social Security cases last year because a high reversal rate was causing significant cost and delay. After a meeting to discuss the problem with staff from the Social Security Administration, U.S. Attorneys' Office, and claimants' attorneys, a working group was formed that created a protocol for handling Social Security cases. The procedures include a form complaint, rules on service, and a briefing schedule. Most significantly in the court's view, the protocol also encourages claimants' attorneys to consult with the attorney for the government before filing the initial brief to explore whether a voluntary remand might be in order. A significant number of cases have been voluntarily remanded since the protocol became effective. The special procedures for Social Security cases are set out in a standing order listed under "Local Rules and Orders" on the court's website.

The Characteristics of Courts with Fast Civil Case Disposition Times

The information from our interviews with chief judges in the courts with fast civil case disposition times suggests they are fast for two primary reasons. First, the courts have sufficient judicial resources. Second, they are committed as a court to a core set of principles and practices—early judicial involvement in the case, setting deadlines and adhering to them, using magistrate judges to the fullest possible extent, effectively using staff law clerks, working as a team, actively using caseload reports to monitor

court-wide and personal performance, and watching for and solving problems. These principles and practices are put into effect in diverse ways across the districts and across judges within a district—only two of the seven districts have uniform time frames and case-management orders, and many practices, such as the specific methods for setting case schedules and the role of magistrate judges, vary from district to district and judge to judge—but each court has procedures for, and a culture that supports setting deadlines early and then monitoring and enforcing them. It is important to keep in mind, however, that this study is limited to review of disposition times and interviews in a small number of courts with only two—though very informed—respondents in each court. Additional understanding of disposition times in the trial courts would very likely be obtained through a more expansive study that includes quantitative measurement of the many practices and conditions that affect the management and disposition of civil and criminal cases

The Future of the Most Congested Courts Project

Perhaps one of the more interesting questions asked during the interviews was the question of benchmarks. As most of the chief judges and clerks understood, in an analysis based on averages there will always be courts that fall above and below the average. Should courts below the average forever be labeled "most congested," even as both these courts and the average are improving? One of the judges suggested that policy makers consider developing benchmarks, which would provide fixed, not relative, measures against which courts could measure their performance.

Several chief judges also asked whether it was appropriate or informative to compare their district against the national average rather than against, for example, an average based on districts of the same size or districts that had a similar number of vacant judgeships or a similar level of pro se filings. These chief judges suggested that the project consider developing additional analyses based on court size or other court characteristics, which is in fact a project goal.

The chief judges and clerks in the courts with delayed civil case disposition times also asked about the future of the Most Congested Courts Project. Regarding their own status, they were not concerned about the label, but about their very real need for assistance. They wanted to know whether the policy makers would stay involved with their courts and whether there would be any follow-up efforts. They understood that at a time of budget constraints they might not be given additional resources, but they were concerned about the fairness of current resource allocations. They spoke of their desire for any information or guidance that would help them do their job better and be more efficient.

The courts with faster civil disposition times also appreciated the opportunity for self-examination provided by the caseload analysis, and most had distributed them to

other members of the court. One chief judge said, "This is a really healthy thing to do. Whether we're doing well or poorly in a couple of years, call us so we can go through this review again." More generally, across all the districts, the chief judges and clerks found the caseload analyses very helpful and many had sent the tables and graphs to other members of the court to prompt further discussion and to spur additional efforts to move the civil caseload quickly.

The interviews underscored several key points regarding the Most Congested Courts Project: (1) the courts appreciated the opportunity to be heard; (2) the courts with delayed civil disposition times would appreciate help accessing more resources, whether those resources are information, judges, or legal staff; (3) all the courts would like to learn more about rules and procedures that expedite civil cases; and (4) the caseload analysis was very helpful to the courts and prompted self-examination and change.

The interviews also suggest at least the following actions:

1. Disseminate more information to the courts about best practices, including best practices involving judicial case management, the organization and use of staff law clerks, and the use of visiting judges to supplement judicial resources that are missing in the courts with delayed civil case disposition times.
2. Update the caseload analysis at least yearly, make it easily available to all district courts (as is already done and will be done on a continuing basis), and expand it to permit districts to compare themselves to other groupings, such as courts of their size or courts with similar caseloads.
3. Explore whether more visiting judges and staff law clerks can be provided to the courts.

One additional step could be a quantitative study that would take the understanding of case disposition time beyond the qualitative examination provided by the current study. Such a study would look at the effect on case disposition time of any practice or condition that can be readily measured—for example, judicial vacancies, the types (i.e., weightiness) of civil and criminal filings, the number of motions filed, the number of extensions granted, and the time between stages in a case. Such a study might help identify specific practices, beyond the general principles and approaches described by the present study, that support or impede expeditious civil case disposition time.

Attachment 1

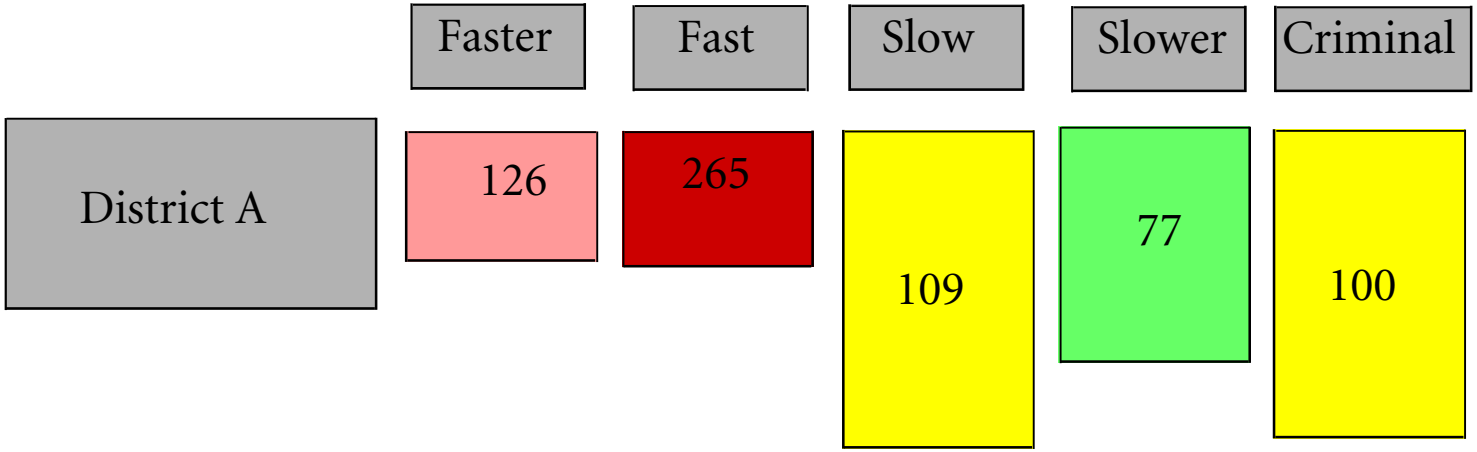
Example of Graphic and Tables Showing District Court Average Time to Disposition Compared to National Average Time to Disposition, by Civil Nature-of-Suit Code

Graphic and Tables Developed by

Margaret Williams
Senior Research Associate
Federal Judicial Center

District A: 2010–2012

Average Disposition Time for the District Relative to the Average Disposition Time Nationwide for Criminal Felony Cases and Civil Cases in Quartiles by Faster to Slower Groupings of Natures of Suit*



* Analysis and graphics developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

District A: 2010–2012
Faster Quartile Cases Ranked by Time*

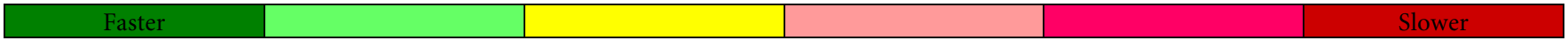
Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
BANKS AND BANKING	2.00	1	1	0.61	0.10
PRISONER - PRISON CONDITION	7.00	1	3	0.61	0.10
CONSUMER CREDIT	87.50	2	51	1.21	0.20
BANKRUPTCY APPEALS RULE 28 USC 158	132.92	13	66	7.88	1.31
CONTRACT FRANCHISE	196.00	1	68	0.61	0.10
TRADEMARK	198.33	6	72	3.64	0.61
PRISONER - CIVIL RIGHTS	235.38	29	83	17.58	2.93
CIVIL RIGHTS ADA OTHER	237.00	3	88	1.82	0.30
COPYRIGHT	299.11	9	98	5.45	0.91
NATURALIZATION APPLICATION	200.00	2	120	1.21	0.20
EMPLOYEE RETIREMENT INCOME SECURITY ACT	318.95	41	120	24.85	4.14
LABOR/MANAGEMENT RELATIONS ACT	291.20	5	122	3.03	0.50
MARINE CONTRACT ACTIONS	414.15	33	137	20.00	3.33
INTERSTATE COMMERCE	427.00	1	146	0.61	0.10
FORECLOSURE	294.60	5	159	3.03	0.50
RENT, LEASE, EJECTMENT	350.50	2	257	1.21	0.20
AIRLINE REGULATIONS	387.00	1	271	0.61	0.10
RECOVERY OF DEFAULTED STUDENT LOANS	568.00	10	399	6.06	1.01
TOTAL	258.15	165	126		

Faster — Slower

*Analysis and tables developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

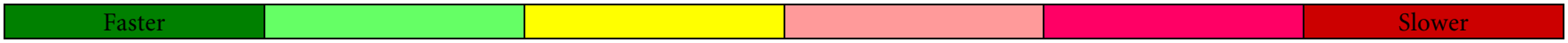
District A: 2010–2012
Fast Quartile Cases Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
PRISONER PETITIONS -VACATE SENTENCE	239.85	61	75	26.29	6.16
CIVIL RIGHTS ACCOMMODATIONS	308.00	4	94	1.72	0.40
CONSTITUTIONALITY OF STATE STATUTES	287.00	1	99	0.43	0.10
PRISONER PETITIONS - HABEAS CORPUS	414.89	70	124	30.17	7.06
OTHER PERSONAL PROPERTY DAMAGE	576.17	6	142	2.59	0.61
DRUG RELATED SEIZURE OF PROPERTY	468.76	21	150	9.05	2.12
ASSAULT, LIBEL, AND SLANDER	523.00	5	178	2.16	0.50
OTHER REAL PROPERTY ACTIONS	477.18	11	189	4.74	1.11
OTHER STATUTORY ACTIONS	691.20	49	227	21.12	4.94
FAIR LABOR STANDARDS ACT	1278.67	3	358	1.29	0.30
ASBESTOS PERSONAL INJURY - PROD. LIAB.	4116.00	1	1280	0.43	0.10
TOTAL	852.79	232	265		



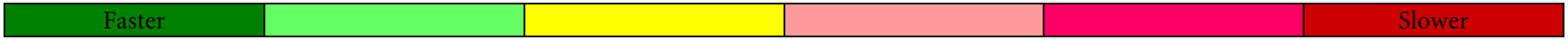
District A: 2010–2012
Slow Quartile Cases Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
OTHER FORFEITURE AND PENALTY SUITS	197.53	15	59	5.15	1.51
D.I.W.C./D.I.W.W.	258.93	40	71	13.75	4.04
CIVIL RIGHTS VOTING	195.50	6	77	2.06	0.61
CIVIL RIGHTS ADA EMPLOYMENT	277.60	5	78	1.72	0.50
S.S.I.D.	281.08	25	80	8.59	2.52
MILLER ACT	287.79	14	100	4.81	1.41
OTHER LABOR LITIGATION	342.38	8	101	2.75	0.81
MARINE PERSONAL INJURY	400.00	23	104	7.90	2.32
INSURANCE	372.77	53	113	18.21	5.35
MOTOR VEHICLE PERSONAL INJURY	417.96	23	116	7.90	2.32
OTHER FRAUD	432.25	4	118	1.37	0.40
OTHER CONTRACT ACTIONS	663.42	66	193	22.68	6.66
TAX SUITS	754.67	9	212	3.09	0.91
TOTAL	375.53	291	109		



District A: 2010–2012
Slower Quartile Cases Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
CIVIL (RICO)	9.33	3	2	0.99	0.30
SECURITIES, COMMODITIES, EXCHANGE	56.00	1	7	0.33	0.10
PERSONAL INJURY - PRODUCT LIABILITY	284.09	23	34	7.59	2.32
PATENT	153.00	1	40	0.33	0.10
OTHER PERSONAL INJURY	417.06	66	58	21.78	6.66
PROPERTY DAMAGE -PRODUCT LIABILTY	252.67	6	58	1.98	0.61
ENVIRONMENTAL MATTERS	328.79	29	63	9.57	2.93
AIRPLANE PERSONAL INJURY	296.75	4	64	1.32	0.40
OTHER CIVIL RIGHTS	235.45	88	64	29.04	8.88
OVERPAYMENTS UNDER THE MEDICARE ACT	303.00	2	81	0.66	0.20
LAND CONDEMNATION	618.50	2	92	0.66	0.20
FEDERAL EMPLOYERS' LIABILITY	425.00	1	94	0.33	0.10
CIVIL RIGHTS JOBS	403.33	21	103	6.93	2.12
TORTS TO LAND	673.25	4	151	1.32	0.40
MEDICAL MALPRACTICE	658.71	49	158	16.17	4.94
BANKRUPTCY WITHDRAWAL 28 USC 157	441.33	3	159	0.99	0.30
TOTAL	347.27	303	77		



Attachment 2

Explanation of the Civil Case Disposition Time Dashboard

Margaret Williams
Senior Research Associate
Federal Judicial Center

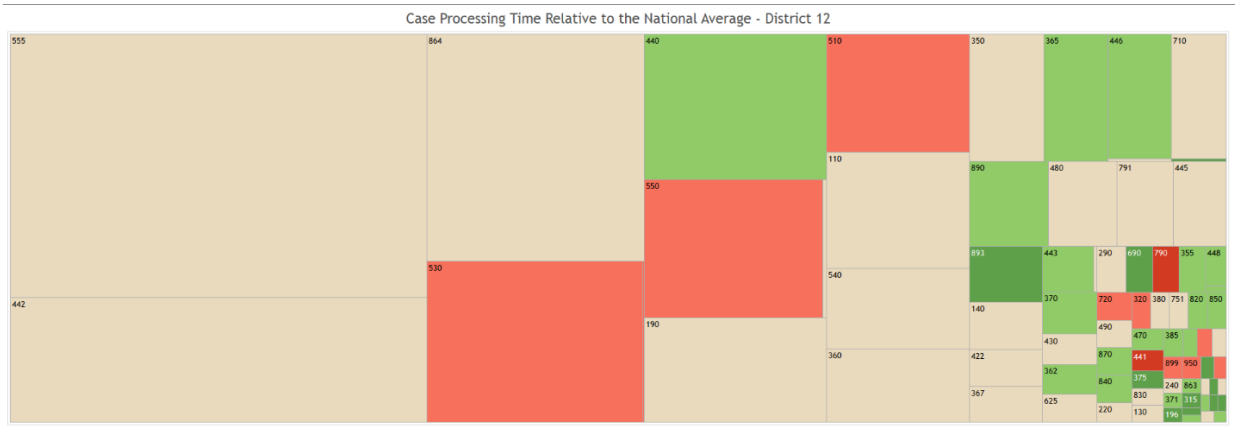
Civil Case Disposition Dashboard for U.S. District Courts

Courts often want to know how slowly or quickly they dispose of particular types of cases, relative to the national average. To that end, the Federal Judicial Center has compiled statistics on civil case terminations for each district and has placed the information in an electronic case termination dashboard. The dashboard allows a court to see its disposition time on each nature of suit, relative to the national average, and then drill down to the underlying case information. This drill down capability allows a court to see any problem areas where additional resources may be needed to help cases terminate more quickly. By looking at cases that terminated slowly in the past, courts can learn to better manage cases in the future.

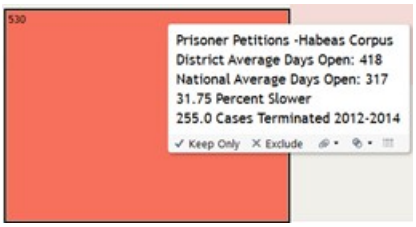
Understanding the Dashboard – Case Terminations

The basic idea behind a dashboard is to allow a court to see at a glance which nature of suit (NOS) codes it disposes of slowly and which NOS codes it disposes of quickly. This information is displayed in a treemap (see the example below for hypothetical District 12). The overall graphic represents the total terminated civil caseload in District 12 for calendar years 2012–2014. Each of the individual boxes is the proportion of the court's terminated civil caseload represented by each NOS code. Larger boxes mean the NOS code is a larger proportion of the civil caseload.

In treemaps, the color of the boxes is meaningful as well. Red boxes show NOS codes District 12 terminates slower than the national average: the dark red boxes are the slowest cases (more than 50% slower than the national average) and the light red boxes are slow but not as slow (16%–50% slower). Green boxes are the NOS codes the court terminates faster than the national average: again, the dark green boxes are the fastest cases (more than 50% faster), and the light green boxes are fast but not as fast (16%–50% faster). Boxes in beige show an NOS code disposed of in approximately the same time as the national average (within 15% of the national average).



As the user hovers over the boxes, a tooltip appears that provides the specific NOS description, the court's average case disposition time, the national average disposition time, the court's overall disposition score relative to the national average, and the number of cases the court terminated in this time period. In the example below, we can see that District 12 terminated NOS 530, Prisoner Petitions – Habeas Corpus, on average, in 418 days, which is 31.75% slower than the national average of 317 days. This NOS code is a relatively large proportion of the docket (it is the largest red box in the treemap above), with 255 cases terminated between 2012 and 2014.

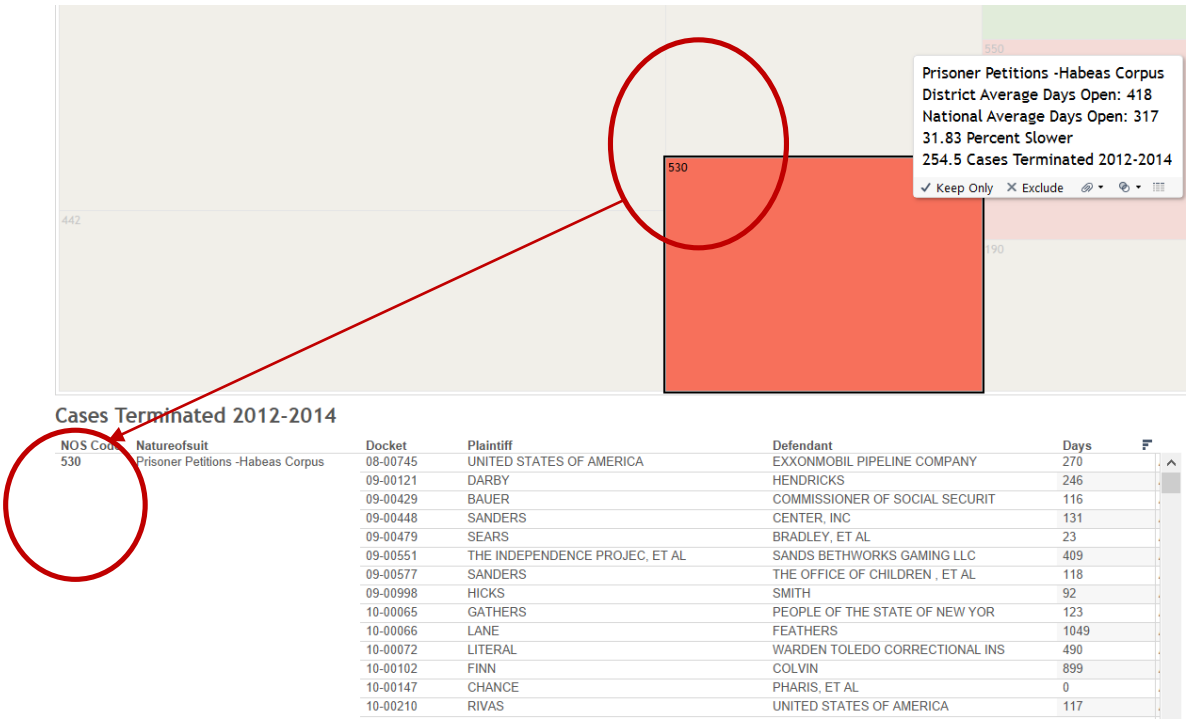


At the bottom of the dashboard, the user can see the cases used to calculate the district's average disposition times, organized by nature of suit and docket number (see below). Also listed are the plaintiffs and defendants for each case and the total number of days, from filing to termination, that the case was open.

Cases Terminated 2012-2014

NOS Code	Natureofsuit	Docket	Plaintiff	Defendant	Days
110	Insurance	05-00831	SMITH	SMITH	66
		08-00019	MAPP	GEORGIA DEPARTMENT OF C, ET AL	760
		09-00169	CULVER, ET AL	UNITED STATES OF AMERICA	94
		09-00375	HOLTCAMP	GLOBAL MEDICAL SAFETY DIVISION	822
		09-00574	NINO	MACY'S RETAIL HOLDINGS, INC.	383
		09-00713	BATISTE	LAWRENCE	380
		09-00780	ELLIS	JACKSON NATIONAL LIFE I, ET AL	324
		09-01055	BROOKS FARMS, INC.	AGRICOMMODITIES, INC., ET AL	564
		10-00222	JOHNSON	KEITH, ET AL	167
		10-00242	FRAZIER	HAYNES	748
		10-00502	GOMEZ	COLVIN	153
		10-00531	PERRY	FORT WAYNE CITY OF, IN, ET AL	70
		10-00611	BELL	MCCANN, ET AL	55
		10-00842	SHAKIR	DONAHOE, ET AL	64
		10-00858	SELLERS	SOCIAL SECURITY ADMINISTRATION	322
		10-00969	BAILEY	WALGREEN CO., ET AL	166

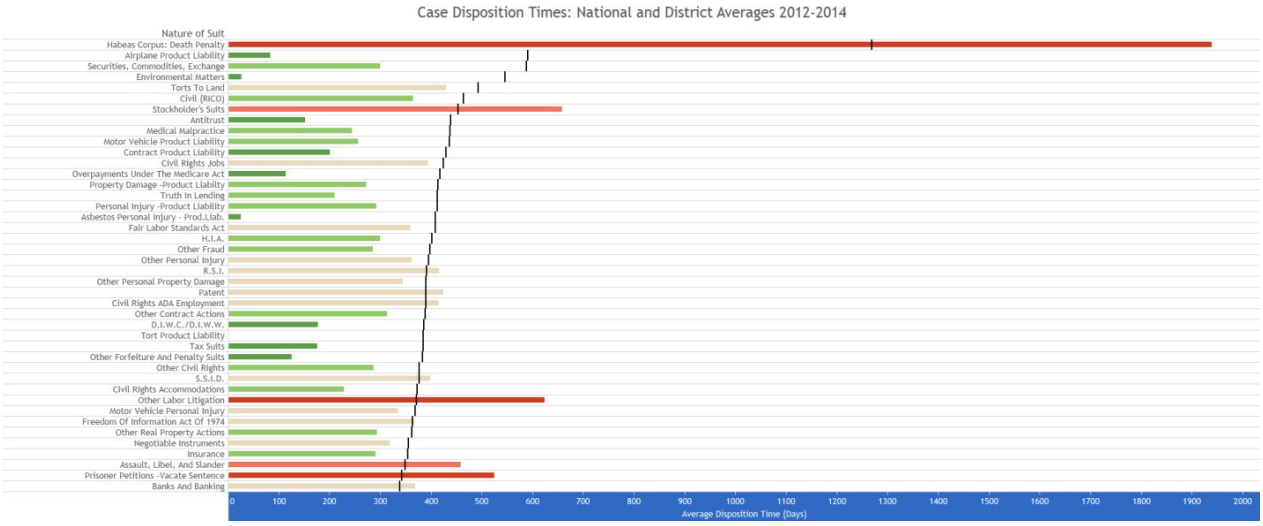
As the user clicks on each box in the treemap, the list of cases will filter to show only the cases within the selected nature of suit (see example on next page). To remove the filter, the user clicks on the selected box again and the screen reverts to the complete treemap.



If a court would like to know which cases were used to estimate their case disposition time for all NOS codes, they can download it directly from the software, or contact the FJC and we will provide it.

Understanding the Dashboard – National NOS Disposition Time

The second tab of the dashboard shows the average time to case disposition by NOS code, from the slowest to the fastest nationally, as well as a district's average time on each nature of suit. This tab presents the same basic information as the treemap (showing where a district is slower or faster than the national average) but in a different way. The bar is the district's average disposition time, and the black dash is the national average disposition time.



If a district is slower than the national average, the bar runs past the dash and is colored accordingly (dark red >50% slower, light red 16%–50% slower than the national average). If a district is faster than the national average, the bar stops before the black dash and is colored according to the time (dark green >50% faster, light green 16%–50% faster than the national average). District times within 15% of the national average are colored beige.

The sorting of the chart provides a different piece of information than the treemap: which cases take a long time, on average, for all districts to terminate and which ones are terminated, on average, much more quickly. While a court may know from experience that Habeas Corpus: Death Penalty cases are slow to terminate, seeing that they take, on average, twice as long nationwide as airplane product liability cases may be surprising. If courts are looking for a benchmark for case disposition time, the range of 400 and 500 days to termination is a good benchmark to keep in mind, as most civil case termination times fall into this range.

Whom to Contact

Users with questions about how to use the dashboard or what other avenues might be explored may contact Margie Williams, Senior Research Associate, at the Federal Judicial Center (mwilliams@fjc.gov, 202-502-4080).

Attachment 3

Example Email Sent to Chief Judge and Clerk of Court in "Most Congested" Districts in Preparation for Telephone Interview

From: Donna Stienstra/DCA/FJC/USCOURTS
To: Chief Judge _____
Cc: Clerk of Court_____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
Date: _____
Subject: Preparation for conference call

Dear Chief Judge _____:

As you know, Judge Arcara, Larry Baerman, Jane MacCracken, and I will be talking with you and [clerk's name] on_____about the caseload of your district. The conversation is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads.

Our conversation will be based on a set of tables you received several weeks ago. During the call we would like to talk with you about the types of cases that both (1) make up a substantial portion of your civil caseload and (2) are disposed of significantly more slowly than the national average for all district courts. The point of the discussion is to determine whether the court would want assistance in resolving the slower cases and what kind of assistance might be helpful.

We know your district's prisoner cases fit the description of large caseloads that are significantly slower than national averages in disposition time. For example, if you look at the table titled "Faster Quartile Cases", you can see that your district disposed of 633 prisoner civil rights cases in the years 2010-2012 and took, on average, 865 days to dispose of these cases - or 205% longer than the national average. Habeas corpus cases, which are in the table labeled "Fast Quartile Cases", are another example, with 551 cases taking, on average, 680 days to dispose of, or 104% longer than the national average.

Below I list several additional case types we might discuss with you. You can find the information about these case types in the tables you received (which I have enclosed again below, along with information about how to interpret the tables). These case types accounted for a substantial number of the cases disposed of by your court in 2010-2012 and took substantially longer to dispose of than these case types did nationwide.

Faster Quartile	Consumer Credit	895 cases, 213 days to disposition	23% longer than the national ave.
	Foreclosure	114 cases, 264 days to disposition	43% longer than the national ave.
	ERISA	132 cases, 575 days to disposition	117% longer than the national ave.
Fast Quartile	Other Stat. Actions	162 cases, 400 days to disposition	31% longer than the national ave.
	FSLA	47 cases, 1029 days to disposition	188% longer than the national ave.
Slow Quartile	Insurance	66 cases, 518 days to disposition	58% longer than the national ave.
	Oth. Contr. Actions	200 cases, 574 days to disposition	67% longer than the national ave.
	Motor Vehicle PI	84 cases, 625 days to disposition	74% longer than the national ave.
Slower Quartile	Civil Rights Jobs	387 cases, 694 days to disposition	77% longer than the national ave.
	Other Civil Right	393 cases, 715 days to disposition	94% longer than the national ave.

During our conversation on_____, we'll be interested in your thoughts about the longer-than-average disposition times for the case types listed above, particularly what might explain the longer disposition

times—for example, characteristics of the cases themselves, relevant features of the bench or bar, or other conditions in the district. And if there are other case types or other features of the district you would like to discuss, we welcome your thoughts on those as well.

In the meantime, if you have any questions, please don't hesitate to call me. We look forward to talking with you.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

Attachment: "Caseload Tables, [District Name], March 2013.pdf"

Attachment 4

Example Email Sent to Chief Judge and Clerk of Court in "Expedited" Districts in Preparation for Telephone Interview

From: Donna Stienstra/DCA/FJC/USCOURTS
To: Chief Judge _____
Cc: Clerk of Court_____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
Date: _____
Subject: Preparation for conference call

Dear Chief Judge _____:

I'm writing on behalf of Judge Richard Arcara, Larry Baerman, Jane MacCracken, and myself with regard to the conversation scheduled with you and {clerk of court name] next week. That conversation, which will focus on your district's civil caseload, is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads. Last fall we talked with seven district courts that terminate their civil caseloads more slowly than the national average. This fall we're talking with seven courts that terminate their caseloads more quickly than the national average.

The call with you and [clerk's name] is scheduled for_____at_____. The call-in number is 888-398-2342# and the access code is 3487491#.

Our conversation will be based on a set of tables you received with a letter from Judge Julie Robinson, CACM Committee chair, August 15, 2014 (attached below). As you know from the letter, the CACM Committee selected your court for an interview because you dispose of your civil caseload expeditiously compared to average disposition times nationally.

The purpose of the call is to understand how caseloads move and to identify any procedures, best practices, judicial or staff habits, etc. that could be adopted by other courts to expedite their civil caseloads. During the call we would like to talk with you about practices your court uses that foster expedited disposition times for civil cases. These practices might include judicial case management procedures, methods for tracking the caseload and identifying bottlenecks, pilot projects used to expedite specific types of cases, use of clerk's office and chambers staff, role of the magistrate judges, articulation of goals for the court, relevant features of the bench or bar, or any other conditions in the district.

In addition to the general discussion outlined above, we're interested in several specific questions:

1. We'd like to know whether your court has had slow disposition times for some types of civil cases and has overcome those slow disposition times. If so, what did the court do to bring disposition times under control?

2. Your court has disposition times near or better than the national average for some types of cases that are very slow in courts with backlogged civil caseloads—e.g., ERISA cases, consumer credit cases, prisoner civil rights cases, habeas petitions, Social Security cases, and employment civil rights cases. What does your court do to keep these case types moving quickly to disposition?

3. Given your court's expeditious processing of most of its caseload, the occasional very slow case type stands out. What is the nature of the court's "Civil rights ADA other" cases, for example, that makes them considerably slower than the national average in disposition time?

We look forward to talking with you and, later in the project, using your experience and best practices to assist other courts. Thank you for being willing to assist the Committee with this project.

If you have any questions before we talk next week, please don't hesitate to call me.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

See attached file: "Civil Caseload Analysis, [district name].pdf"