

WORKING SMARTER NOT HARDER

HOW EXCELLENT JUDGES
MANAGE CASES



streamline
collaborate
convene

A circular diagram with three arrows connecting the words 'streamline', 'collaborate', and 'convene' in a clockwise cycle. The arrows are drawn in white chalk on the dark background.

// 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.)



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of the AMERICAN LEGAL SYSTEM



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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.

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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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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.

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EXECUTIVE SUMMARY

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

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

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

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

Reduce and streamline motions practice to the extent appropriate and possible. Rule quickly on motions. The judges emphasized that motions practice drives cost and delay in the civil pretrial process. Many judges aim to resolve motions, especially discovery disputes, informally. This obviates the need for written submissions and focuses on oral presentations. The judges

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

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

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

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

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

early
+ active
= efficiency



INTRODUCTION

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

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

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

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

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.

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](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](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 ACTL¹² 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

¹⁷ While this document has not been prepared or used by the judges interviewed, it includes topics mentioned by various interviewed judges.

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.)

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

prioritize
discovery

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*

advance
problem-
solve



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.

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 Slight’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 Slight, “and so I am never losing my focus on the trial date and making sure the parties are moving forward in a way that will have them prepared to go to trial if that is necessary.”

D. IN COLLABORATION WITH THE PARTIES, WORK BACKWARDS FROM THE TRIAL DATE TO SET MEANINGFUL AND FIRM DEADLINES FOR PRETRIAL EVENTS IN THE CASE, IN ORDER TO MAKE THE PRETRIAL PROCESS MORE EFFICIENT.

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

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

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

1. WORKING WITH THE PARTIES

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

Part of where I come from is that the lawyers know more about the case than the judge does. I do manage, and I manage actively, but it's also important not to micromanage because I don't know enough to do that for each case. So, largely what I do is set parameters—I get input from the lawyers and set deadlines.

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

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

— Judge Robert L. McGahey, Jr. (Colo. Dist. Ct.)

In issuing his ruling, Judge McCuskey holds himself to the same time standards to which litigants are held:

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

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

C. STREAMLINING MOTION PRACTICE SIGNIFICANTLY

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

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

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

25 See also Richard P. Holme, "No Written Discovery Motions" Technique Reduces Delays, Costs, and Judges' Workloads, 42 COLO. LAW. 65-68 (Mar. 2013) (highlighting this technique and the Colorado state and federal court judges who use it, including study participants Judge R. Brooke Jackson, Judge David Prince, and Judge Robert McGahey).

26 MCGAHEY, *supra* note 23, § II(2)(a).

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.)

“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 of 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.

streamline

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 provision³⁰ to streamline the motion practice. He analyzed all the motions, set out an order listing those that appeared to be frivolous and why, and invited parties either to withdraw any and all motions they wished or file an answer within 10 days. Before this safe-harbor period ended, the lawyers had withdrawn all the motions *in limine* he had listed in his order.

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 COLLEGIALLY 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.

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

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 Hangle, 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. Hangle
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. Hangle
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. Sights, 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.



!! A must-read for judges who are looking for strategies and tactics to gain control over their civil dockets. What better way to learn what works and what doesn't than to ask the folks who are in the trenches. !!

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



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

— Judge Marcus Z. Shar (Md. Cir. Ct.)



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