

redefining¹ case man·age·ment

1. **Redefine**

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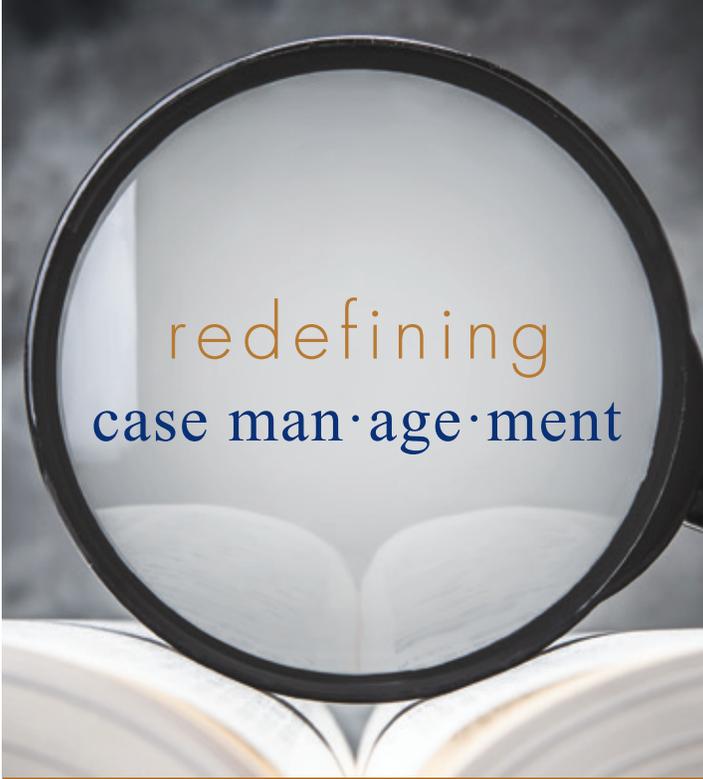
To reexamine or reevaluate especially with the view to change, transform



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A magnifying glass with a black frame is positioned over an open book. The lens of the magnifying glass is centered over the text 'redefining case management'. The book's pages are visible, and the background is a dark, textured surface.

redefining
case man·age·ment

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

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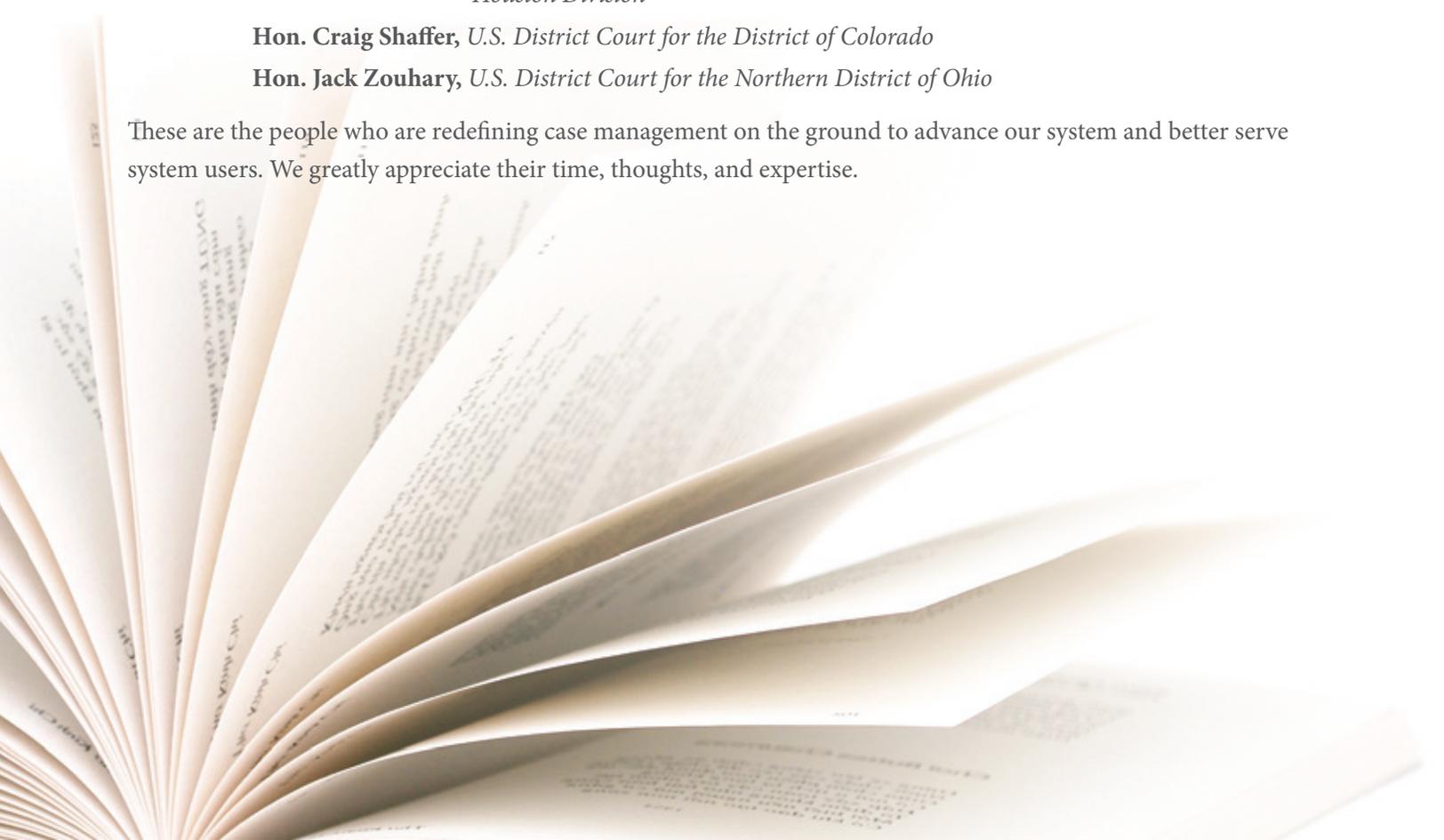
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These are the people who are redefining case management on the ground to advance our system and better serve system users. We greatly appreciate their time, thoughts, and expertise.



PREFACE

Case management is part of every civil justice reform proposal afoot in the nation. It is mentioned at every conference and in every set of recommendations. Attorneys want a judge in charge of their case, from beginning to end: a judge who is knowledgeable, accessible, and engaged.

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

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

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

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

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

Redefine

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INTRODUCTION

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

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

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

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- 1 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE, FINAL REPORT ON THE JOINT PROJECT OF THE ACTL TASK FORCE ON DISCOVERY AND IAALS (2009), available at http://iaals.du.edu/sites/default/files/documents/publications/actl-iaals_final_report_rev_8-4-10.pdf.
 - 2 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS, 21ST CENTURY CIVIL JUSTICE SYSTEM – A ROADMAP FOR REFORM: PILOT PROJECT RULES (2009), available at http://iaals.du.edu/sites/default/files/documents/publications/pilot_project_rules2009.pdf.
 - 3 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 21ST CENTURY CIVIL JUSTICE SYSTEM – A ROADMAP FOR REFORM: CIVIL CASEFLOW MANAGEMENT GUIDELINES 4 (2009), available at http://iaals.du.edu/sites/default/files/documents/publications/civil_caseflow_management_guidelines2009.pdf [hereinafter GUIDELINES].
 - 4 IAALS also released a third publication in the *A Roadmap for Reform* series, in collaboration with the National Center for State Courts, highlighting the importance of evaluating civil justice reform efforts. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & NAT’L CTR. FOR STATE COURTS, 21ST CENTURY CIVIL JUSTICE SYSTEM – A ROADMAP FOR REFORM: MEASURING INNOVATION (2010), available at http://iaals.du.edu/sites/default/files/documents/publications/measuring_innovation2010.pdf.
 - 5 CORINA D. GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT 37 (2014), available at http://iaals.du.edu/sites/default/files/documents/publications/momentum_for_change_capp_final_report.pdf; PAULA HANNAFORD-AGOR ET AL., NAT’L CTR. FOR STATE COURTS, NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES (2013), available at <https://www.ncsc.org/~media/Files/PDF/Topics/Civil%20Procedure/12022013-Civil-Justice-Initiative-New-Hampshire.ashx>; PAULA HANNAFORD-AGOR & SCOTT GRAVES, NAT’L CTR. FOR STATE COURTS, TEXAS: IMPACT OF THE EXPEDITED ACTIONS RULES ON THE TEXAS COUNTY COURTS AT LAW (2016), available at <http://www.txcourts.gov/media/1437615/texasimpactoftheexpeditedactionsrulespdf.pdf>; JORDAN SINGER, SUFFOLK SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT: FINAL REPORT ON THE 2012 ATTORNEY SURVEY (2012), available at http://iaals.du.edu/sites/default/files/documents/publications/final_bls_survey_report.pdf; PAULA HANNAFORD-AGOR & CYNTHIA G. LEE, NAT’L CTR. FOR STATE COURTS, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS (2015), available at <http://www.ncsc.org/~media/files/pdf/topics/civil%20procedure/utah%20rule%202026%20evaluation%20final%20report%282015%29.ashx>.

Civil rules reform and case management practices have come a long way since 2009 when IAALS and the ACTL Task Force first released the *Pilot Project Rules* and the IAALS *Civil Caseflow Management Guidelines*. Recognizing this and drawing on lessons learned since the partnership commenced work in 2007, IAALS and the ACTL Task Force issued an updated joint report in 2015, *Reforming Our Civil Justice System: A Report on Progress and Promise*, with a new set of proposed Principles to guide future innovation.⁶ To complement this piece and in recognition of the central role case management has come to play in civil justice reform, IAALS is now issuing an update to our *Civil Caseflow Management Guidelines*. Given the unique challenges across our state and federal systems, we recognize that the prior set of nine case management guidelines—focused largely on judicial case management—need updating in response to our complex and evolving legal system.

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

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

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

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

⁶ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE, *REFORMING OUR CIVIL JUSTICE SYSTEM: A REPORT ON PROGRESS AND PROMISE* (2015), available at http://iaals.du.edu/sites/default/files/documents/publications/report_on_progress_and_promise.pdf [hereinafter *PROGRESS AND PROMISE*].

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

Following the updated set of ten civil case management guidelines, we begin in Section II with a discussion of the origins of modern case management and the ways in which current practices are being affected by internal and external pressures facing court systems today. Here, we also briefly detail recent developments at the state and federal level that influence modern conversations on case management. In Section III, we set the framework for a renewed case management vision: court ownership of case management and user-centric case management processes. Building on this guiding vision, Section IV outlines various strategies for anchoring case management principles and practices in courts and courtrooms.

UPDATED CIVIL CASE MANAGEMENT GUIDELINES

GUIDELINE ONE: Case management should be tailored, or right-sized, to the specific circumstances of the case and the parties. Courts, including judges and court staff as a team, should manage civil cases so as to ensure that the overall volume and type of discovery and pretrial events are proportionate and appropriate to the specific circumstances of the case.

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

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

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

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

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

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

GUIDELINE EIGHT: Judges should rule promptly on all motions.

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

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

THE CONTINUOUS EVOLUTION OF CASE MANAGEMENT

Case management is recognized as an essential court function and a means through which courts can control civil litigation abuses, such as cost and delay.⁷ It has also come to be widely recognized as an essential piece of the puzzle—beyond rule changes—for achieving real and lasting reform of our civil justice system.⁸ While case management is not a new concept, it is also not a static concept. Case management practices—at the judge or court level—are constantly evolving alongside changes in the court landscape and in response to the changing needs of court users. Today’s case management discussions look noticeably different than their mid-20th Century counterparts. Understanding where we have been with case management is instrumental in redefining the future of case management.

The Origins of Modern Case Management

Concerns over delay drove early conversations about civil case management.⁹ With a primary focus on managing the pace of civil litigation, many of these efforts focused on court structure, judicial resources/workload, and rules of procedure because “assumptions implicit in discourse on court delay were that court resources and formal rules and procedures determined the pace of litigation and that solutions to the problem of delay must be applied in these areas.”¹⁰ Additionally, because the prevailing perspective at the time was that attorneys controlled the process prior to trial, not judges or the court, the time between trial readiness and trial was a common measure of delay, as opposed to the time between filing and trial.¹¹ Courts tended to center case management efforts on those components of the process that were largely under their control, and trial was the most time-consuming aspect of the process for judges at the time.¹²

Case management solutions in the 1970s, under the rubric of delay reduction, began to focus on how cases progress through the system from filing to disposition.¹³ “No Continuances” was one of the mantras of case management gurus. Also, at this time, court administrators were becoming an integral part of the state and local court landscape, with responsibility for monitoring and managing delay. Courts increasingly began to give attention to measuring times between *all* events in a civil case, not just the time between filing and trial or between trial readiness and trial. In addition to these quantitative measures, caseload management practices also began to

7 DAVID C. STEELMAN ET AL., NAT’L CTR. FOR STATE COURTS, CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM xi (2000), available at <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/1498>.

8 See REBECCA LOVE KOURLIS & BRITTANY K.T. KAUFFMAN, *Rule Reform, Case Management, and Culture Change: Making the Case for Real and Lasting Reform*, 24 KAN. J.L. & PUB. POL’Y 493 (2015), available at http://iaals.du.edu/sites/default/files/documents/publications/making_the_case_for_real_and_lasting_reform.pdf.

9 See STEELMAN ET AL., *supra* note 7 at xi-xvii; David C. Steelman, *What Have We Learned About Court Delay, “Local Legal Culture,” and Caseload Management Since the Late 1970s?*, 19 JUST. SYS. J. 145, 145 (“Few problems have been more difficult for court professionals than court congestion and delay. The assertion that ‘justice delayed is justice denied’ is one of the most frequently quoted themes in the discourse of American court management.”); THOMAS W. CHURCH, NAT’L CTR. FOR STATE COURTS, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978).

10 STEELMAN ET AL., *supra* note 7, at xiv; see also Steelman, *supra* note 9, at 152 (noting that “a 1968 review of remedies for court delay discussed the following techniques: a) pretrial conferences, trial readiness rules, and ‘blockbuster’ courts parts; b) referral procedures to remove cases from the trial system, such as auditors and compulsory arbitration; and c) removal of claims from the tort liability system by means such as no-fault basic insurance protection and administrative agency operation of an automobile accident victim compensation program like worker’s compensation.”).

11 Steelman, *supra* note 9, at 149.

12 *Id.*

13 STEELMAN ET AL., *supra* note 7, at xiv.

take on a qualitative component, as commentators highlighted the importance of ensuring that key events in the life of a case are not just timely but also meaningful:

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

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

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

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

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

14 *Id.* at 6.

15 *Id.* at xv (“[B]oth quantitative and qualitative data generated in this research strongly suggest that both speed and backlog are determined in large part by established expectations, practices, and informal rules of behavior of judges and attorneys. For want of a better term, we have called this cluster of related factors the ‘local legal culture’ These expectations and practices, together with court and attorney backlog, must be overcome in any successful attempt to increase the pace of litigation. Thus most structural and caseload variables fail to explain interjurisdictional differences in the pace of litigation.”); Steelman, *supra* note 9, at 150-51 (citing CHURCH, *supra* note 9).

16 See STEELMAN ET AL, *supra* note 7.

17 There is a split between commentators, including judges, as to whether the best practice is to set a firm trial date early in the life of a case or later in the pretrial process. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *WORKING SMARTER, NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES* 16 (2014), available at http://iaals.du.edu/sites/default/files/documents/publications/working_smarter_not_harder.pdf [hereinafter WORKING SMARTER].

18 *Id.*

Current Challenges & Opportunities for Courts

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

BUDGET & FUNDING CHALLENGES

Budget cuts have shaped much of the judicial experience over the last decade.¹⁹ While the recent recession substantially worsened state courts' financial situation, courts around the country had weathered significant cuts in funding even prior to 2008.²⁰ Deeper cuts after the market collapse forced state courts to take a variety of cost-saving measures—some as serious as layoffs or reduced hours of operation—and, not surprisingly, many such measures impacted courts' ability to manage cases and caseloads. Federal court budgets have arguably fared better than state court counterparts, but they have not been immune to cuts.²¹

The judiciary's experience during the recession is unique from that of other government sectors, on account of the nature of the court's duties and responsibilities. As Chief Justice Roberts of the United States Supreme Court has highlighted: "Unlike most Executive Branch agencies, the courts do not have discretionary programs they can eliminate or postpone in response to budget cuts. The courts must resolve all criminal, civil, and bankruptcy cases that fall within their jurisdiction, often under tight time constraints."²² Even as federal and state judicial budgets diminished, courts were required to handle the full caseload that came to them. In addition, court budgets are primarily personnel costs, which means cutting actual people rather than programs. Cutting personnel has the direct effect of undermining a court's ability to process cases in a just, speedy, and inexpensive manner. Alongside greater expectations by consumers in terms of service and technology, courts have been forced to do more with less.

19 Many courts, especially state courts, continue to struggle with intense budget pressures. In Kentucky, where courts have already seen their budget shrink by 49 percent since 2008, the Senate recently approved a nine percent spending cut. Kentucky Supreme Court Chief Justice John Minton warned, "We are on the edge of serious constitutional issues," and prior to the budget's passage, he indicated the proposed cuts could result in the laying off of 600 people and closure of state drug courts, among other impacts. John Cheves, *Chief Justice: Kentucky courts might have to fire 600 if budget cut*, LEXINGTON HERALD LEADER, Mar. 21, 2016, <http://www.kentucky.com/news/politics-government/article67349007.html>; John Cheves & Jack Brammer, *General Assembly gives final approval to state budget*, LEXINGTON HERALD LEADER, Apr. 15, 2016, <http://www.kentucky.com/news/politics-government/article72123697.html>. In Connecticut, at least four courthouses closed in 2016 as a result of a \$77M net reduction (a 13 percent cut) to the judiciary's budget. Chief court administrator Judge Patrick L. Carroll III warned that these closures "will be disruptive and will impact many people." Dave Collins, *4 courthouses to close because of budget cuts; cases to move*, WASH. TIMES, June 14, 2016, <http://www.washingtontimes.com/news/2016/jun/14/4-connecticut-courthouses-to-close-because-of-budg>.

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

21 Like state courts, the federal judiciary began cutting costs before the 2008 Recession hit. See Hon. John Roberts, 2013 Year-End Report on the Federal Judiciary (Dec. 31, 2013), available at <https://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf>.

22 *Id.* at 5.

RIISING CIVIL LITIGATION COSTS & THE IMPACT ON ACCESS

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

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

CHANGES TO COURT CASELOADS & FILINGS

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

23 Between 2007 and 2010, national surveys were administered to the following attorney organizations: American College of Trial Lawyers, American Bar Association Section of Litigation, and National Employment Lawyers Association. CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., EXCESS & ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE (2011), available at http://iaals.du.edu/sites/default/files/documents/publications/excess_access2011-2.pdf. The survey questionnaire was similar across these surveys and based on a survey IAALS and the ACTL Task Force on Discovery and Civil Justice first administered to College Fellows in 2007. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS, INTERIM REPORT (INCLUDING 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS) ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (2008), available at http://iaals.du.edu/sites/default/files/documents/publications/interim_report_final_for_web.pdf. The Federal Judicial Center also explored the issue of cost of litigation. THOMAS E. WILLGING & EMERY G. LEE III, FED. JUD. CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION (2010), available at <https://www.fjc.gov/sites/default/files/2012/CostCiv3.pdf>.

24 See CORINA D. GERETY & BRITTANY K.T. KAUFFMAN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SUMMARY OF EMPIRICAL RESEARCH ON THE CIVIL JUSTICE PROCESS: 2008–2013 41 (2014), available at http://iaals.du.edu/sites/default/files/documents/publications/summary_of_empirical_research_on_the_civil_justice_process_2008-2013.pdf. Additionally, one in three respondents to a Federal Judicial Center survey of attorneys reported that discovery costs increased likelihood of settlement in the case at issue. *Id.* at 34.

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

26 NAT’L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015), available at <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [hereinafter LANDSCAPE STUDY].

27 REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 11, 16 (2014), available at http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf.

28 RICHARD Y. SCHAUFFLER, NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS (2016), available at <http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC%202015.ashx>.

29 LANDSCAPE STUDY, *supra* note 26, at vi.

pre-trial settlement (often facilitated by court-annexed mediation) is the norm.³⁰ The “vanishing trial” phenomenon has been well documented, and evidence continues to point to an overwhelming decline in trial rates.³¹

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

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

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

SIGNIFICANT NUMBERS OF SELF-REPRESENTED LITIGANTS

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

30 Settlement rates vary by case type. A review of approximately 3,300 federal court tort, contract, employment discrimination, and constitutional torts found a single rate of approximately 67 percent, but the author cautioned that this aggregate rate may be misleading. Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUDIES 111, 132 (2009). The 2015 NCSC *Landscape of Civil Litigation* study found that settlement was the single most common outcome (62%) for the civil cases involved in the study. LANDSCAPE STUDY, *supra* note 26, at 7.

31 Examining federal caseload data between 1962 and 2002, Professor Galanter commented in 2004 that “[t]he drop in civil trials has not been constant over the 40-year period; it has been recent and steep.” Since the mid-1980s, the absolute number of trials in federal courts declined 60 percent; the portion of cases terminated by trial is also declining. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 3 J. EMPIRICAL LEGAL STUDIES 459, 461 (2004), available at <http://epstein.wustl.edu/research/courses/judpol.Galanter.pdf>. Additionally, in state courts from 1976 to 2002, the number of jury trials decreased by 32 percent and the number of bench trials decreased by seven percent. Marc Galanter & Angela M. Frozena, *A Grim without a Cat: The Continuing Decline & Displacement of Trials in American Courts*, 143 DAEDALUS 115, 116 (2014).

32 Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 750 (2010), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1485&context=dlj>.

33 *Id.* at 755.

34 LANDSCAPE STUDY, *supra* note 26, at 20-21.

35 See generally BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MOOR TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF THE LAW (2017).

36 *Id.* at iv.

37 *Id.*

38 *Id.* at 35.

*Justice Index*³⁹ found that “as many as two-thirds of the litigants appear without lawyers in matters as important as evictions, mortgage foreclosures, child custody and child support proceedings, and debt collection cases.”⁴⁰

As increasing numbers of self-represented litigants proceed through the system, established civil case management practices—many of which are still premised on the presence of attorneys on both sides—are being put to the test. Furthermore, justice system stakeholders are growing into new roles and undertaking new responsibilities in response to the changing face of court users. Finally, entire court systems are assuming a more active role in providing users with self-help resources and information, stepping into the vacuum created by litigants’ inability—or in some cases unwillingness—to obtain representation.⁴¹

ADVANCES IN TECHNOLOGY

Courts are increasingly leveraging technology to provide information and resources to assist litigants.⁴² Virtual self-help centers and robust websites enable courts to serve wide populations without substantially increasing court staff numbers. In some jurisdictions, online portals for court users are helping individuals appreciate the nature of their civil legal issue, as well as identifying options, potential outcomes, and available legal and non-legal resources.⁴³ These and other technology solutions are enabling courts to perform their key functions and serve users more efficiently and effectively.

In the area of pretrial discovery, the explosive rise in the use and amount of electronically stored information (“ESI”) is a primary driver of increasing litigation costs. In response, new technology is available to deal with the ESI explosion and control these costs, as information retrieval technologies and methodologies focused on electronic discovery become the norm rather than the exception. Technology also has the potential for impacting the litigation process in a much more profound way than merely lowering discovery costs. Courts have seen the impact of technology and are exploring ways in which the courts can utilize technology to provide greater access and more timely and cost-effective outcomes. Online dispute resolution is one example. This type of dispute resolution has gained acceptance in the private sector with companies such as eBay and PayPal, and our courts are jumping into the fray.⁴⁴

While there is a unique opportunity to improve the administration of justice through technology, technology is nevertheless one of the major challenges facing our court system today. Staying abreast of technology requires financial investment and agility—qualities that are rarely associated with our court system. As a result, there is an ever widening gap between “what people experience with technology in the courts and what they experience with technology in the private sector.”⁴⁵

39 THE JUSTICE INDEX, justiceindex.org (last visited January 22, 2018).

40 *Support for Self-Represented Litigants*, THE JUSTICE INDEX, justiceindex.org/2016-findings/self-represented-litigants (last visited January 22, 2018).

41 NATALIE ANNE KNOWLTON, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CASES WITHOUT COUNSEL: OUR RECOMMENDATIONS AFTER LISTENING TO THE LITIGANTS 5-7 (2016), available at http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_recommendations_report.pdf [hereinafter CASES WITHOUT COUNSEL RECOMMENDATIONS].

42 See REBECCA LOVE KOURLIS & RIYAZ SAMNANI, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., COURT COMPASS: MAPPING THE FUTURE OF USER ACCESS THROUGH TECHNOLOGY (2017), available at <http://iaals.du.edu/honoring-families/publications/court-compass-mapping-future-user-access-through-technology> (presenting a database/inventory of technology offerings in courts around the country).

43 Microsoft has partnered with the Legal Services Corporation and Pro Bono Net to develop a prototype access to justice portal. Microsoft, Microsoft partners with Legal Services Corporation and Pro Bono Net to create access to justice portal (Apr. 19, 2016), <https://blogs.microsoft.com/on-the-issues/2016/04/19/microsoft-partners-legal-services-corporation-pro-bono-net-create-access-justice-portal>.

44 JOINT TECHNOLOGY COMMITTEE RESOURCE BULLETIN, COURTS DISRUPTED VERSION 1.0 4 (2017).

45 *Id.* at 15.

Recent Advancements in Case Management

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

Driven by the pilot project activity, the changing landscape of civil litigation, and the potential benefits arising from nationwide coordination among state reform efforts, the Conference of Chief Justices (“CCJ”) adopted a resolution in 2013 creating a Civil Justice Improvements Committee (“CJI”) Committee.⁴⁶ The Committee was charged with:

- (1) developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and from other applicable research, and informed by implemented rule changes and stakeholder input; and
- (2) making recommendations as necessary in the area of case flow management for the purpose of improving the civil justice system in the state courts.⁴⁷

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

The Committee issued a final report, *A Call to Action: Achieving Civil Justice for All*, that empowered state courts with 13 recommendations for transforming state court systems to meet the needs of 21st Century litigants.⁴⁸ In July 2016, the CCJ and the Conference of State Court Administrators endorsed these recommendations.

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

The picture of civil caseloads that emerges from the *Landscape* study is very different than one might imagine from listening to current criticism about the American civil justice system. High-value tort and commercial contract disputes are the predominant focus of contemporary debates, but collectively they comprised only a small portion of the *Landscape* caseload.⁴⁹

Additionally, as briefly discussed in the previous section, the *Landscape* assessment also revealed that self-representation rates have changed dramatically.⁵⁰ Compared to a 1992 NCSC study, plaintiffs’ representation rates declined only slightly (from 99% to 96%), but attorney representation for defendants decreased by more than half (97% to 46%).⁵¹ The NCSC notes that “[t]he *Landscape* data are insufficiently detailed to draw firm conclusions about the impact of attorney representation in any given case, but it is clear that it does affect case dispositions.”⁵²

46 CONFERENCE OF CHIEF JUSTICES, RESOLUTION 5 TO ESTABLISH A COMMITTEE CHARGED WITH DEVELOPING GUIDELINES AND BEST PRACTICES FOR CIVIL LITIGATION (2013).

47 *Id.*

48 NAT’L CTR. FOR STATE COURTS, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, RECOMMENDATIONS TO THE CONFERENCE OF CHIEF JUSTICES BY THE CIVIL JUSTICE IMPROVEMENTS COMMITTEE (2016) [hereinafter CALL TO ACTION].

49 *Id.* at iii.

50 CALL TO ACTION, *supra* note 48, at 9; *see also supra* Sec. II.B.

51 LANDSCAPE STUDY, *supra* note 26, at 31-32.

52 *Id.* at 33.

In light of these various changes to the landscape of civil litigation, the overarching theme of the CCJ recommendations was that courts—meaning judges, court managers, indeed the whole judicial branch—must take responsibility for managing civil cases from the time of filing to disposition.⁵³ The report recognizes the “party-take-the-lead culture can encourage delay strategies by attorneys, whose own interests and the interests of their clients may favor delay rather than efficiency.”⁵⁴ According to the Committee’s recommendations:

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

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

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

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

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

53 CALL TO ACTION, *supra* note 48, at 16.

54 *Id.*

55 *Id.*

56 Memo from Hon. David G. Campbell to Hon. Jeffrey Sutton re: Proposed Amendments to the Federal Rules of Civil Procedure, Rules Appendix B-11 to B-13 (June 14, 2014).

57 PROGRESS AND PROMISE, *supra* note 6, at 5.

58 GUIDELINES, *supra* note 3.

59 WORKING SMARTER, *supra* note 17.

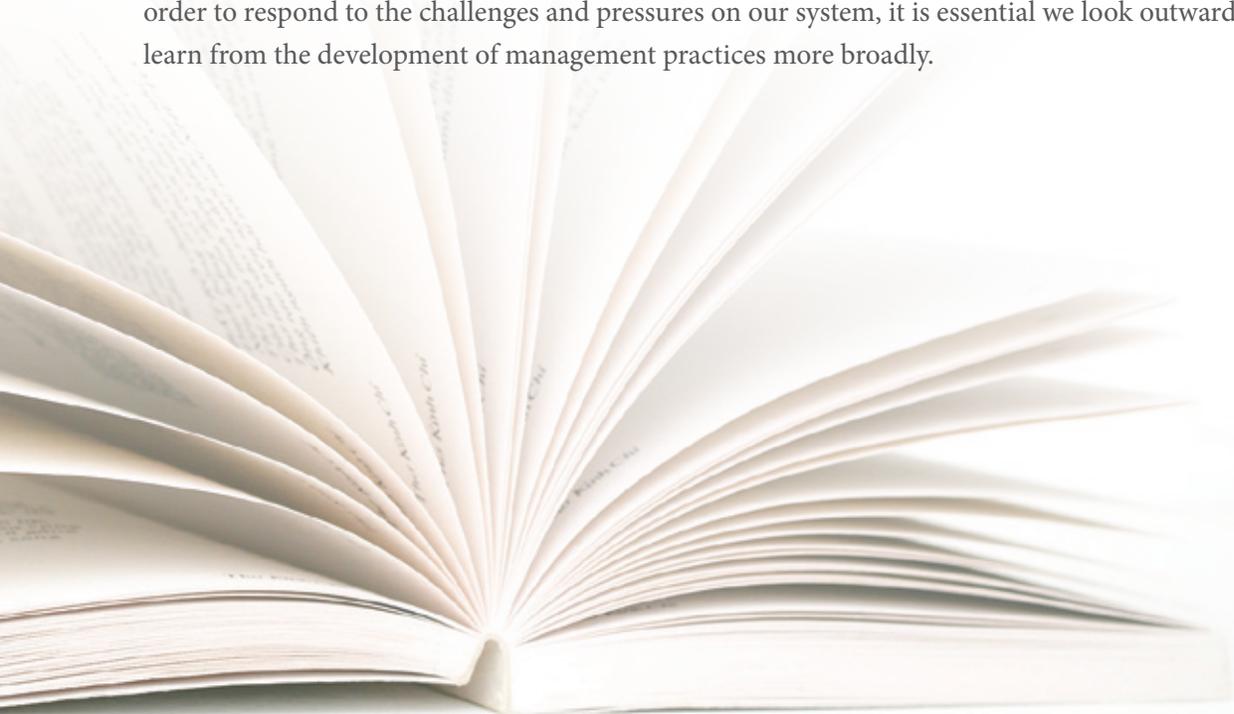
60 STEELMAN ET AL., *supra* note 7, at xi.

A RENEWED CASE MANAGEMENT VISION FOR 21ST CENTURY JUSTICE

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

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

This section and the following benefits from the first-hand perspectives of respected stakeholders and experts in court and case management who helped IAALS with this update.⁶¹ Informal conversations with these experts illuminate the relevance and application of evolving notions of civil case management and the strategies for cementing case management in court practice.⁶² Further, in identifying, distilling, and researching the strategies that emerged from these experts, we also considered case management from fields outside the legal industry. In order to respond to the challenges and pressures on our system, it is essential we look outward to understand and learn from the development of management practices more broadly.



61 The list of expert participants can be found in the acknowledgements section.

62 Over the course of several months in Fall 2016, IAALS conducted informal telephonic interviews with participating stakeholders.

Rethinking the Paradigm: Court Ownership of Case Management

The CJI Committee’s paramount recommendation for civil justice reform was that “[c]ourts must take responsibility for managing civil cases from time of filing to disposition,” and the Committee defined “courts” broadly to include the whole judicial branch: judges, magistrates, judicial clerks, court clerks, court staff, court administrators, and other non-judicial personnel.⁶³ Ensuring that every case has a plan and proceeds according to that plan is first and foremost the court’s responsibility; following through on this obligation, according to the CJI Committee recommendations, is key to facilitating access to justice, thereby enhancing the rule of law. Technology solutions can support this goal, presenting new opportunities for managing the docket in ways that are responsive to the needs of the users.

Certainly, there are strong advocates for this holistic approach to managing cases, but there remain many around the country—judges and attorneys alike—who believe that attorneys are in the best position to control the pace and flow of their own cases. Those who hold this view believe that attorneys know their case best and that judges should defer to the attorneys, particularly when there is agreement. Knowing the case well, particularly from an advocacy perspective, does not necessarily equate to being in the best position to manage it toward a “just, speedy, and inexpensive” resolution. Attorneys are definitionally advocates for their clients’ points of view. They have a duty as officers of the court, but their perspective is colored by what is best for their client—not for the system as a whole. Only the judge and court staff have an undivided responsibility to the system and to procedural fairness for all. The increasing recognition of the numbers of self-represented litigants have illuminated tensions between this traditional approach and the need for the courts to take a more active and engaged role in case management, especially in state courts where there is attorney representation on both sides in just 24 percent of cases.⁶⁴ Even where both sides are represented, “the party-take-the-lead culture can encourage delay strategies by attorneys, whose own interests and the interests of their clients may favor delay rather than efficiency.”⁶⁵ Think: a tennis match where the referee only shows up when summoned—the players will certainly handle themselves differently, as will the referee, who will not have a sense of the whole match and the behavior of the players overall. The court plays a critical role in balancing power as well, particularly in asymmetric litigation.

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

64 LANDSCAPE STUDY, *supra* note 26, at iv.

65 CALL TO ACTION, *supra* note 48, at 16.

Court

\ 'kōrt \ *Noun*

Broadly defined to include the whole judicial branch: judges, magistrates, judicial clerks, court clerks, court staff, court administrators, and other non-judicial personnel

User-Centric

\ 'yü-zər 'sen-trik \
Noun

Framing the delivery of service around the needs, wants, and limitations of the user

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

Managing to the Overarching Goal: User-Centric Processes

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

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

CONSISTENCY WITHIN & ACROSS CASES

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

66 See, e.g., Margaret Hagan & Miso Kim, Design for Dignity and Procedural Justice, *Advances in Intelligent Systems and Computing, Proceedings of the Applied Human Factors and Ergonomics International Conference (2017)*, available at <https://ssrn.com/abstract=2994354>; Video: *Person Centered Case Management – Changing the Way our Systems See Cases*, CTC SALT LAKE CITY 2017 (Sept. 12, 2017), <http://www.ctc2017.org/Schedule/Streaming-Schedule.aspx> (recounting Utah’s efforts to reengineer a case-centric, client-server content management system into a person-centric, web-based content management system. “This changed our thinking a little bit about how we look at cases. Instead of cases and case management, it became more about people and the overall experience with the courts, which led us to a person-centered case management system. . . . When we started thinking about things this way, we were able to identify additional opportunities for innovation and we realized if we could program our case management system to identify relationships between cases, it changed at the core our system so that we can improve our processes.”).

throughout the process. It is equally important for represented clients to hear from the judge what is expected of them. Case management is the key to: establishing these expectations, creating a structure through which the court can convey them to users, and holding the court accountable for consistently enforcing them.

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

It also bears mentioning: as system stakeholders look to technology solutions to “increase efficiency, effectiveness, and clarity,”⁶⁷ consistency and predictability are essential. “The only way to take advantage of technology is to create a systematic approach that is consistent across a court,” according to Judge Jennifer Bailey.⁶⁸ “You can’t have every judge doing everything differently and expect technology to be helpful.”⁶⁹

PROPORTIONALITY

The days of trans-substantive processes are quickly waning in courts around the country as there is growing recognition that the one-size-fits-all approach has contributed to the current cost and delay in our system. In response, proportionality has developed as a consistent theme across civil justice reform efforts.⁷⁰ At the state level, the Conference of Chief Justices recognized that “uniform rules that apply to all civil cases are not optimally designed for most civil cases,” often providing “too much process for the vast majority of cases.”⁷¹

At the federal level, recent amendments to the Federal Rules of Civil Procedure require that discovery be proportional to the needs of the case.⁷² Applying proportionality to the pretrial process more broadly, the joint IAALS/ACTL Task Force concluded that the concept of a just resolution includes “procedures proportionate to the nature, scope, and magnitude of the case that will produce a reasonably prompt, reasonably efficient, and reasonably affordable resolution.”⁷³

While the growing paradigm of court-owned civil case management requires that every case have a plan for resolution that is comprehensive enough to get it from beginning to end within a reasonable time, not all cases

67 BRITTANY K.T. KAUFFMAN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CHANGE THE CULTURE, CHANGE THE SYSTEM: TOP 10 CULTURAL SHIFTS NEEDED TO CREATE THE COURTS OF TOMORROW 18 (2015), available at http://iaals.du.edu/sites/default/files/documents/publications/top_10_cultural_shifts_needed_to_create_the_courts_of_tomorrow.pdf [hereinafter CHANGE THE CULTURE].

68 Telephone Conversation with Jennifer Bailey, Administrative Judge, Eleventh Judicial Circuit of Florida (Jan. 4, 2017).

69 *Id.*

70 See generally CALL TO ACTION, *supra* note 48, at Appendix D.

71 CALL TO ACTION, *supra* note 48, at 12.

72 The incorporation of proportionality into the scope of discovery was among the more controversial of the recent rules amendments. BRITTANY K.T. KAUFFMAN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CREATING THE JUST, SPEEDY, AND INEXPENSIVE COURTS OF TOMORROW: IDEAS FOR IMPACT FROM IAALS’ FOURTH CIVIL JUSTICE REFORM SUMMIT 7 (2016), available at http://iaals.du.edu/sites/default/files/documents/publications/ideas_for_impact_post-summit_report.pdf.

73 PROGRESS AND PROMISE, *supra* note 6, at 3.

require all available processes and procedures. A right-sized approach involves assessing the case, the parties, and the issues at the time of filing and matching the court's resources to what is needed to most efficiently and effectively resolve the issues presented.⁷⁴

PROCEDURAL FAIRNESS

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

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

PUBLIC TRUST & CONFIDENCE

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

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

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

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

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

75 See generally Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction, A White Paper of the American Judges Association*, 44 COURT REV. 4 (2007), available at <http://aja.ncsc.dni.us/publications/courtrv/cr44-1/CR44-1-2BurkeLeben.pdf>.

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

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

78 CALL TO ACTION, *supra* note 48, at 3.

79 CHANGE THE CULTURE, *supra* note 67, at 16.

Many outside the court context and legal industry recognize the value (and often necessity) of efficient case management. Health care workers, social workers, mental health providers, and related professionals embrace case management⁸⁰ as a means through which to balance workload, manage workflow, and facilitate customer/client care. Here and throughout this publication, we look to case management practices and principles in these non-legal contexts to highlight commonalities across industries as well as emerging themes that track the broad vision of case management—and the strategies for anchoring case management—that we present here.

Client-Centric Focus

In the health care and human services contexts, care coordination includes engagement and collaboration with the client directly, touching on another key principle that appears across descriptions of case management in these fields: case management is an inherently client-centric practice. Case Management Society of America (“CMSA”)⁸¹ President Mary McLaughlin-Davis notes: “We can find sufficient evidence in the literature that delivering patient-centered care is central to all our work with our patients, our clients, our beneficiaries, and (or) our members.”⁸² According to Patrice Sminkey, former-CEO of the multidisciplinary Commission for Case Manager Certification® (“CCMC”)⁸³: “We do not work with cases. Actually, we have never worked with cases. We work with people.”⁸⁴

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

80 Within the health care and human services context, some industries or professional organizations use different nomenclature to denote the practice of case management. For example, care management, care coordination, service coordination, transitional care, or patient navigation may be used interchangeably to describe high-level case management or may be used distinctly to denote discrete practices. See NAT’L ASS’N SOC. WORKERS, *NASW STANDARDS FOR SOCIAL WORK CASE MANAGEMENT 10* (2013), available at <https://www.socialworkers.org/LinkClick.aspx?fileticket=acrzqmEfhlo%3D&portalid=0> [hereinafter *NASW STANDARDS*].

81 The Case Management Society of America is an international, non-profit organizations founded in 1990 dedicated to the support and development of the profession of case management. *About CMSA: Our History*, CASE MGMT. SOC’Y OF AM., <http://www.cmsa.org/about-cmsa> (last visited January 22, 2018).

82 Mary McLaughlin-Davis, *Patient-Centered Care*, CASE MGMT. SOC’Y OF AM. (Aug. 16, 2016), <http://www.cmsatoday.com/2016/08/16/patient-centered-care>.

83 The Commission for Case Manager Certification® is a nationally accredited organization that certifies case managers in multidisciplinary health care and human services settings. *COMM’N FOR CASE MANAGER CERTIFICATION*, <https://ccmcertification.org> (last visited January 22, 2018).

84 Comm’n for Case Manager Certification, *Theory into practice: Transitional Care Model’s success demonstrates that evidence alone isn’t enough*, *ISSUE BRIEF 5* (Jan. 2015) (emphasis in original).

culturally-relevant care.” CMSA notes⁸⁵ that if a conflict arises between the client, the health care team, and (or) the payer, “the needs of the client must be the number one priority.”⁸⁶

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

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

85 CASE MGMT. SOC’Y OF AM., STANDARDS OF PRACTICE FOR CASE MANAGEMENT 5 (2016) (emphasis added) [hereinafter CMSA 2016 STANDARDS].

86 *Id.* at 17.

87 CASE MGMT. SOC’Y OF AM., STANDARDS OF PRACTICE FOR CASE MANAGEMENT 9 (2002).

88 CMSA 2016 STANDARDS, *supra* note 85, at 10 (emphasis removed).

89 NASW STANDARDS, *supra* note 80, at 17.

90 *Id.* at 38.

STRATEGIES FOR ANCHORING A HOLISTIC CASE MANAGEMENT VISION

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

Case Management Is a Team Sport

One of the CJI Committee’s 13 recommendations concerns the development of civil case management teams which consist of a “responsible judge supported by appropriately trained staff.”⁹¹ This recommendation “proposes a radically different staffing model for civil case processing that delegates substantial responsibility for routine case management to specially trained professional staff supported by effective case technology.”⁹² Examining caseflow and business practices can help courts delegate routine case management decisions and certain aspects of case processing to appropriate non-judicial or quasi-judicial personnel, or automated processes.

In addition to facilitating the progression of a case from filing to disposition, establishing and deploying effective case management teams frees up valuable judge time for tasks that require their unique authority, expertise, and discretion. “The most valuable thing in the court—the scarcest resource—is judge time,” says Alan Carlson, former Court Executive Officer of the Superior Court of Orange County, California, “so whatever you can do to relieve the judge and make best use of the judge’s time is what the support staff ought to be focused on.”⁹³ Equally important, this frees up resources for additional support from team

91 CALL TO ACTION, *supra* note 48, at 27.

92 NAT’L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: A GUIDE TO BUILDING CIVIL CASE MANAGEMENT TEAMS 1 (2017), available at [https://www.ncsc.org/~media/Microsites/Files/Civil-Justice/CJI-Guide-Teams.ashx](https://www.ncsc.org/~/media/Microsites/Files/Civil-Justice/CJI-Guide-Teams.ashx).

93 Telephone Conversation with Alan Carlson, CEO, Orange County Superior Court of California (Jan. 10, 2017).

Civil Case Management Team

\ 'si-vəl 'kās
'ma-nij-mənt 'tēm \

Noun

1. A team consisting of a responsible judge supported by appropriately trained staff
2. A radically different staffing model for civil case processing that delegates substantial responsibility for routine case management to specially trained professional staff supported by effective case technology

members who can focus on case management tasks that are critical but not uniquely judicial. Case management teams can ensure that cases of all types get prompt attention right-sized to the needs of the case.

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

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

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

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

94 CHANGE THE CULTURE, *supra* note 67, at 17.

95 CALL TO ACTION, *supra* note 48, at 27.

96 *Id.* at 29; CASES WITHOUT COUNSEL RECOMMENDATIONS, *supra* note 41, at 5-7.

97 CALL TO ACTION, *supra* note 48, at 29.

98 *Id.* at 27-28.

99 *Id.* at 27.

100 Telephone Conversation with Jack Zouhary, U.S. District Judge, U.S. District Court for the Northern District of Ohio (Jan. 13, 2017).

Collaborative & Coordinated Process

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

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

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

101 *Definition and Philosophy of Case Management*, COMM’N FOR CASE MANAGER CERTIFICATION, <https://ccmcertification.org/about-ccmc/about-case-management/definition-and-philosophy-case-management> (last visited January 22, 2018).

102 The Case Management Society of America is an international, non-profit organizations founded in 1990 dedicated to the support and development of the profession of case management. *About CMSA: Our History*, CASE MGMT. SOC’Y OF AM., <http://www.cmsa.org/about-cmsa> (last visited January 22, 2018).

103 CMSA 2016 STANDARDS, *supra* note 85, at 11.

104 Pamela Mitchell et al., *Core Principles & Values of Effective Team-Based Health Care*, DISCUSSION PAPER, INST. OF MED. 3 (2012), available at <https://www.nationalahec.org/pdfs/VSRT-Team-Based-Care-Principles-Values.pdf>; see also Health2 Resources, Comm’n for Case Manager Certification, *CareCoordination: Case managers “connect the dots” in new delivery models*, 1 ISSUE BRIEF 2 (2010) (“The case manager has a key role to play in coordinating a spectrum of care through patient transitions and care settings The case manager offers a link and oversight on the complexity across settings and providers, the technology, and the increased need for accurate communication.”).

105 Mitchell et al., *supra* note 100, at 3.

106 NASW STANDARDS, *supra* note 76, at 18.

107 *Id.* at 13.

Systematization

\,sis-tə-mə-tə-'zā-shən\

Noun

1. To arrange in or according to a system; reduce to a system; make systematic
2. The way to imbed case management firmly and deeply into a court system

Systematization Is Essential

One of the key takeaways from the changing landscape of litigation is that there is a wide variety of cases in our courts, and a one-size-fits-all approach is not an efficient or effective way of approaching case management.

That said, many judges have struggled to tailor the process to the needs of each case, particularly in jurisdictions where the size of the docket makes individual case management conferences in every single case unmanageable. This is where systematization can play an important role to move traditional case management into the 21st Century.

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

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

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

108 *Id.* at 18.

109 *Id.* at 19.

how to get these simple cases to run themselves,” says Minnesota state court judge Jerome Abrams.¹¹⁰ “And you have to make sure . . . that when they are running themselves, the rules are robust enough and supervision is in place well enough to make sure things go well.”¹¹¹

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

This vision of systematization is directly responsive to the pressures facing our courts today. For many courts and judges, early, active, bespoke¹¹³ judicial case management of every case on the docket is not feasible. Many judges have not embraced case management because such an approach is simply not possible given their caseload and limited staff and technology support. To the extent business practices can be put in place, and then carried out where appropriate by staff and technology, time can be freed for tailored case management where needed.

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

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

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

111 *Id.*

112 CALL TO ACTION, *supra* note 48, at 12.

113 On the role of bespoke, or made to order, legal services, see RICHARD SUSKIND, TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE (2013).

114 *Id.* at 30.

115 Telephone Conversation with Kevin Burke, Judge, Minnesota Judicial Branch (Jan. 11, 2017).

Strategic Case Management

\ strə- 'tē-jik 'kās
'ma-nij-mənt \ *Noun*

The process of identifying specific goals for a case, designing strategies to achieve these goals, and then implementing them, based on considerations of resources and the legal framework of the case

Judges Remain Primary Drivers Through Strategic Case Management

Decades of expert commentary and research have illuminated some common themes that guide effective judicial management of a civil case from filing to resolution. Many of these principles were included in the 2009 *Civil Caseflow Management Guidelines* and the 2014 *Working Smarter, Not Harder* themes for pretrial management of civil cases.

Engagement: Direct, in-person engagement with attorneys/parties is far better than a passive, mechanical approach. According to Federal Judicial Center Director Jeremy Fogel, “[t]he case is a living, breathing thing, and judges should be an active presence.”¹¹⁶ An engaged judge is also more effective at appropriately tailoring processes to the needs of the case and parties.¹¹⁷

Encourage communication and cooperation: The key to effective case management is getting parties to communicate with one another, and an active judicial manager can facilitate communication and cooperation between the parties. Included in this role is the ability to assess parties’ personalities and relationship with one another¹¹⁸—case dynamics that are often instructive in determining an appropriate path to resolution.

Simplify the issues: Whether by critically reviewing the pleadings and other case files or through active case management conferences with the parties, a judge has a unique opportunity to facilitate the early identification and simplification of issues.¹¹⁹ Early engagement and communication with the parties is particularly important in achieving this goal, since parties are far more familiar with the issues at the outset of the case than the judge.

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

116 Telephone Conversation with Jeremy Fogel, Director, Federal Judicial Center (Jan. 4, 2017).

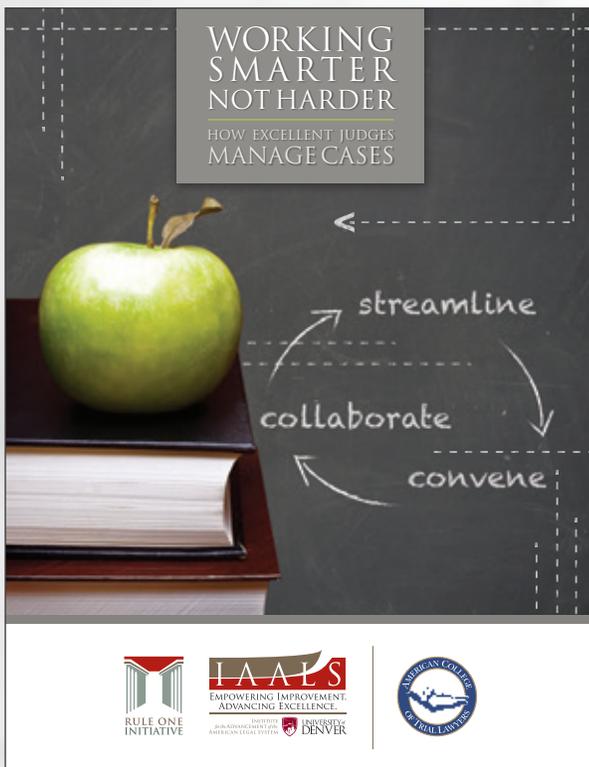
117 CHANGE THE CULTURE, *supra* note 67, at 15.

118 The impetus for collaboration and cooperation is high when lawyers are repeat adversaries, either because they practice in a smaller communities or because the parties have an ongoing relationship with one another.

119 CHANGE THE CULTURE, *supra* note 67, at 10-11.

WORKING SMARTER NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES

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



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

Utilize court staff and technology to right-size management of the cases. Cases with clear issues and fewer parties need a streamlined process with clear deadlines and communication to the parties. More complex cases will need more active judicial management from the judge through a case management conference and continued monitoring.

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

Case management conferences are essential in complex cases at the state and federal level. Additional status conferences throughout the life of these types of cases will keep them on track and ensure problems are addressed early so as to reduce cost and delay.

- **Reduce and streamline motions practice to the extent appropriate and possible. Rule quickly on motions.**
- **Create a culture of collegiality and professionalism by being explicit and up front with lawyers about the court’s expectations, and then holding the participants to them.**

Where parties are self-represented, communication of court expectations are even more important, as are clear schedules and meaningful and intentional court interactions.
- **Explore settlement with the parties at an early stage and periodically throughout the pretrial process, where such conversations might benefit the parties and move the case toward resolution.**

Enforce rules and expectations: Expectations, rules, and deadlines lose meaning if they are not routinely and consistently enforced. If parties and attorneys question whether events will occur as scheduled or suspect that certain behaviors will be overlooked, at best, inefficiencies will result and, at worst, trust in the system will deteriorate.

While there is widespread consensus around the efficacy of these principles and techniques, there are still countless courtrooms in which these are not common practice. Some of the resistance to case management has come from judges who find this a less-than-desirable aspect of their position—a more ministerial and less judicial function. Case management, however, “is not a rote, mechanistic process. It is complex and sophisticated, calling upon experience, understanding of the issues and of the interrelationship of the parties in order to craft the best possible path to resolution for that case.”¹²⁰

Indeed, there is a part of civil case management that remains a core judicial function and that cannot be delegated or systematized. You might view this in terms of “strategic management”—a concept originating from seminal business management literature and industry leaders like Peter Drucker. According to Drucker, “management is not just passive, adaptive behavior; it means taking action to make the desired results come to pass.”¹²¹ Judges may have balked at this concept thinking that they had no desired results in the case—other than the application of the law. But, to the contrary, the desired result is a just, speedy, and efficient process that satisfies procedural fairness. To achieve that result, the judge has to be engaged. Applied to the justice system context, this is the process of identifying specific goals for a case, designing strategies to achieve these goals, and then implementing the strategies based on considerations of resources and the legal framework of the case. This is as core to the judicial function as ruling on the law. Judges routinely make high-level strategic decisions that drive all other aspects of case management and resolution: thinking through the process in light of the issues in a case, determining what discovery is proportional, deciding whether discovery should be phased, talking with the parties about what dispositive motions to file, etc.¹²² Judges (and because of their unique and special skill, judges alone) must be engaged in this aspect of the case strategy. Judges can think ahead several steps in the process—and plan accordingly. This type of high level strategy is at the heart of the value that high-level lawyers bring to their clients, and this strategy should be equally valued in our judges. This is particularly true for complex cases. Furthermore, the team approach to management, discussed above, “will free the judge to focus on tasks that require the unique expertise of a judicial officer, such as issuing decisions on dispositive motions and conducting evidentiary hearings, including bench and jury trials.”¹²³

120 KAUFFMAN, *supra* note 68, at 13.

121 Pankaj Ghemawat, *Competition and Business Strategy in Historical Perspective*, 76 BUS. HISTORY REV. 37, 39 (2002), available at <http://coin.wne.uw.edu.pl/pmodzelewski/Competition%20and%20business%20strategy%20in%20historical%20perspective.pdf>.

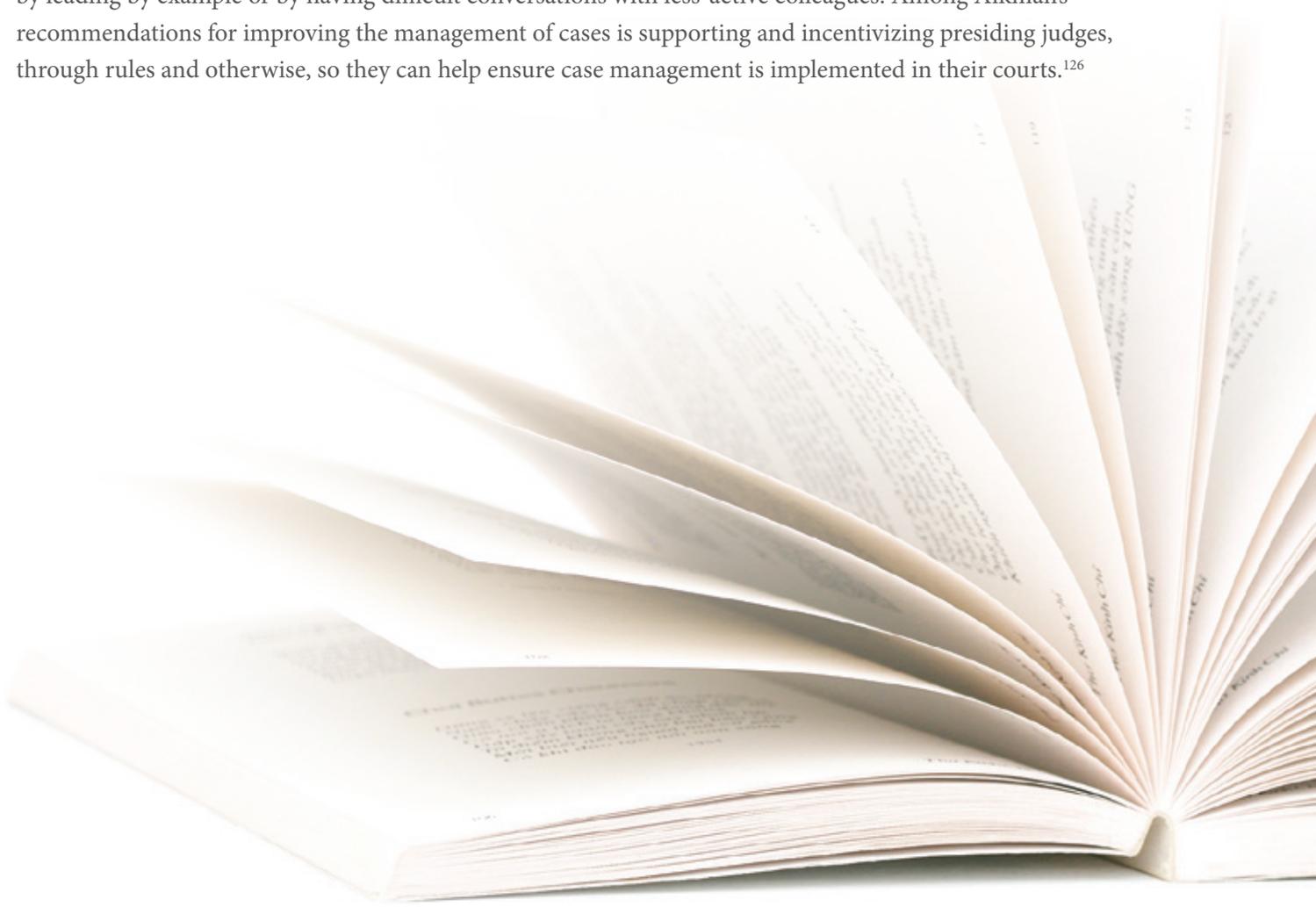
122 See generally Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 KANSAS L. REV. 101 (2013).

123 CALL TO ACTION, *supra* note 48, at 12.

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

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

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



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

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

126 Alexander B. Aikman, *An Essay on Restoring Caseflow Management to ‘The Heart of Court Management’*, 30 COURT MANAGER 6, 18 (2015).

Expansive Case Manager Skill Set

Much of the knowledge and skills that case managers in the health care and social work industries must possess are technical, specialized, and industry specific—for example, understanding of funding sources, healthcare delivery and financing systems, contractual health insurance or risk arrangements, clinical standards, human behavior dynamics, etc. As the health care industry’s understanding of patient care evolves, however, soft skills are becoming increasingly important in the case management field.¹²⁷ The CMSA 2002 Standards lists primary case management functions that include many interpersonal, demeanor-based skills and concepts: positive relationship-building, effective written and verbal communication, attention to cultural competency, and ability to plan and organize effectively.¹²⁸ These soft skills are equally critical for judges in their role as strategic case managers.

Data Is Essential to Effective Case Management

UNDERSTANDING & MANAGING TO A COURT’S LANDSCAPE

The National Center for State Courts’ multijurisdictional *Landscape* study was instrumental in the CJI Committee’s work, providing an empirical and meaningful basis for understanding the problems about which the Committee could then shape its recommendations.¹²⁹ Data collection is similarly important for individual courts, because only when the court fully understands the landscape of its civil docket and cases can it successfully manage to that landscape.¹³⁰ A well-functioning, institutionalized case management system must be built from a comprehensive understanding of the jurisdiction’s caseload makeup. “Experience and research,” according to the CJI Committee, “tell us that one cannot manage what is unknown. Smart data collection is central to the effective administration of justice and can significantly improve decision making.”¹³¹

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

128 CMSA 2016 STANDARDS, *supra* note 85, at 8.

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

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

131 *Id.* at 31.

This type of monitoring and measuring of actual performance is an essential aspect of case management.

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

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

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

USING DATA TO SUPPORT TRANSPARENCY & ACCOUNTABILITY

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

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

132 STEELMAN ET AL., *supra* note 7 at 83.

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

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

135 See 28 U.S.C. §476(a) (2006). Although the reporting requirements were initially set to sunset after seven years, Congress made them permanent in 1997. Act of Oct. 6, 1997, Pub. L. No. 105-53, §2, 111 Stat. 1173, 1173 (codified at 28 U.S.C. §471 note).

136 Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 675-76 (2010).

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

CASE MANAGEMENT IN NON-LEGAL CONTEXTS

Informed by Evidence & Research

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

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

137 Lex Machina Inc., a data analytics company, is one example. Lex Machina mines and analyzes publicly available data, such as data from the federal PACER (Public Access to Court Electronic Records) system, to enable lawyers to develop data-driven litigation strategies. See generally <https://lexmachina.com>.

138 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *TRANSPARENT COURTHOUSE REVISITED: AN UPDATED BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION* 11 (2016), available at http://iaals.du.edu/sites/default/files/documents/publications/transparent_courthouse_revisited.pdf.

139 Telephone Conversation with Jerome Abrams, Judge, Minnesota Judicial Branch (Jan. 5, 2017).

140 *Id.*

141 The CMSA Standards of Practice for Case Management suggest this principle can be demonstrated in practice in a variety of ways. CMSA 2016 STANDARDS, *supra* note 85, at 30. (“Incorporation of current and relevant research findings into one’s practice, including policies, procedures, care protocols or guidelines, and workflow processes, and as applicable to the care setting. Efficient retrieval and appraisal of research evidence that is pertinent to one’s practice and client population served Participation in research activities which support quantification and definition of valid and reliable outcomes, especially those that demonstrate the value of case management services and their impact on the individual client and population health. Identification and evaluation of best practices and innovative case management interventions. Leveraging opportunities in the employment setting to conduct innovative performance improvement projects and formally report on their results.”).

142 Comm’n for Case Manager Certification, *Measuring Care Coordination: Validated tools for an evolving environment*, 5 ISSUE BRIEF 5 (2014).

143 NASW STANDARDS, *supra* note 76, at 42.

CONCLUSION

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

New strategies are helping courts integrate and anchor case management. A team approach, systematization in tandem with high-level strategic management, and the use of data could be transformative. It bears mentioning that anchoring case management within and across courtrooms does not mean implementing rigid processes and systems. The world is evolving at a fast pace, and the needs of litigants and the court will necessarily evolve in tandem. Courts must be prepared, and this means that court systems must be flexible and designed for continuous improvement. Courts must consider staffing, technology, and the use of data in this design. Attorneys and other legal service providers must rethink their own role in case management if they are to be true partners in achieving a “just, speedy, and inexpensive” system for those who turn to and rely on the courts for dispute resolution. Strategies that may have been effective a few years ago—or even those that are effective today—may not work in coming years. As Dan Becker points out, courts can no longer “force the realities of today’s work into yesterday’s practices and procedures.”¹⁴⁴

144 Telephone Conversation with Dan Becker, former State Court Administrator, Utah (Jan. 4, 2017).



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