Rethinking Case Management and the Process of Civil Justice Reform

Summary and Papers Presented at a UCLA-RAND Center for Law and Public Policy Conference

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About These Conference Proceedings

The American civil justice system is a sprawling affair that attempts, with some success, to resolve millions of disputes each year, applying reasonably consistent rules through sometimes efficient procedures. Although the "system" is highly decentralized across states, and in many states even varies significantly at the county level, civil justice methods across these jurisdictions have evolved substantially in broadly parallel ways over the past century, so that most court procedures are fairly recognizable from one part of the nation to the next. There are important institutions that share information, ideas, and innovations across the civil justice system, such as the Conference of Chief Justices, the National Center for State Courts, and the Federal Rules Committee. Still, it is uncommon to observe a court system undertake a deliberate experiment in civil justice reform, carefully evaluate the effects of the experiment, and then systematically spread the word about how well it worked. Despite the wide acknowledgment that the American civil justice system has room for improvement in both its fairness and its efficiency, there is not really a culture of experimentation and incremental reform. Yet the case for reform is strong. The World Justice Project ranks the United States 108th out of 128 countries in "access and affordability" of civil justice. The cost of litigation to the participating parties appears to have risen manyfold over the past two generations, and the number of parties who cannot afford representation at all, and find themselves pro se defendants, has jumped since the turn of the century.

Around 30 prominent judges, scholars, and other observers of the civil justice system gathered in Santa Monica, California, in November 2021 for the "Rethinking Civil Case Management" conference to discuss how and whether the American civil justice system might develop a stronger culture of experimentation and reform. The focus was on *case management*—how judges can institute methods and procedures to shape and channel litigation—but more-general issues of civil justice reform regularly surfaced. This publication summarizes the discussions and presents four pieces of scholarship—examples of answers to the "how" question—presented during the conference. The participants brought diverse views to the conference, but at the end of the day, there was a palpable consensus that a stronger culture of experimentation and reform was a worthwhile and attainable goal. The key to such efforts, it was generally agreed, is close collaboration between teams of judges and scholars to identify worthy innovations to study, to develop good data sources (that can, preferably, be widely shared), to use methodologies that are in some way experimental rather than just observational, and to "evangelize" results. Strong working relationships between judges and scholars make it more likely that judges will seriously pursue the goals of particular reforms and that scholars will correctly understand and interpret the data they are gathering.

The material in this publication explains and expands on these basic themes.

Part A summarizes the five plenary panels held at the conference, and Part B presents four papers circulated before the conference. Appendix A contains contact information for the participants, Appendix B contains the conference agenda, and Appendix C contains brief biographies of participants. The conclusions and momentum from this conference have already produced important new initiatives, and we expect to publish follow-up reports and proceedings.

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PART A
Conference Proceedings

The chapters in this part contain summaries of the conference's five panels, including some audience discussion and recommendations for future study.

Chapter 1. Panel: Toward a Unified Theory of Case Management

Moderator:	Judge Carolyn B. Kuhl, Complex Civil Litigation Program, Superior Court of the State of California, County of Los Angeles; Board of Advisors, RAND Institute for Civil Justice
Presenters:	Judge William F. Highberger, Complex Civil Litigation Program, Superior Court of the State of California, County of Los Angeles
	Justice Thomas A. Balmer, Oregon Supreme Court; former Chair, Civil Justice Improvements Committee, Conference of Chief Justices
	Judge Robert M. Dow, Jr., Northern District of Illinois; Chair, Federal Rules Advisory Committee on Civil Rules
	Stephen C. Yeazell, David G. Price and Dallas P. Price Distinguished Professor of Law Emeritus, UCLA School of Law

Judge Kuhl: There are colleagues here who have been involved in thinking about civil case management for a very long time and well know the history of prior work in this area. We have in the room some who are involved in civil case management every day in our work, and we have some here today who are relatively new to the area, especially those who are thinking about case management from the standpoint of self-represented litigants. It is truly a privilege to be with each of you. With this depth of wisdom and experience in one room, we hope that, in the course of the day, we will be able to chart a course for future work in this area.

Judge Highberger: Judge Kuhl and I have, for many years, discussed and thought about a way to approach the subject of case management systematically. A paper laying out our thoughts in some detail is included in Part B of these proceedings (Chapter 6), and a longer paper that fleshes out our thinking is available from us on request. We don't think we have figured out a master plan for approaching these issues; rather, our goal is to encourage discussion about the concept of case management and what "thinking systematically" about case management should mean. In these remarks, I will touch on a few key ideas that underlie our approach.

While we were working on our paper, the medical and pharma communities were working to develop a reasonably safe and effective COVID vaccine—an effort that was phenomenally successful and changed the course of the pandemic. We know, of course, that successful drug development depends on getting favorable results in controlled clinical trials that test a trial vaccine against a placebo. More generally in the medical field, doctors are constantly trying to improve patient outcomes with improved therapies. Once the efficiency and safety are proved, doctors and hospitals tend to respond by updating their practices to the best standards.

By comparison, how do our legal and judicial communities evaluate the utility of the current practices used in our civil dockets? And how often do we test new therapies?

Some judges do no case management whatsoever. Some judges set deadlines but don't do much of anything else. Other judges intervene but only when facing what they consider a squeaky-wheel problem. Conversely, some judges before the administrators consciously try to be more proactive in case management, at least for certain case types. Judicial education tends to focus on training judges to follow controlling precedent, with occasional, anecdotal references to good judicial preferences. But it is extremely rare for anyone in our system to seek rigorous empirical evidence that one approach to case management works better than another.

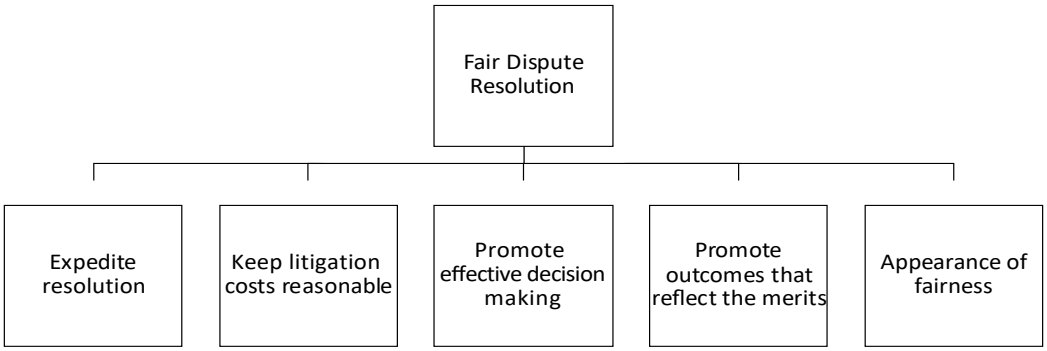
The National Center for State Courts (NCSC) has played a helpful role in gathering and publishing information about how various courts approach specific challenges (e.g., Hannaford-Agor, 2021). But on the whole, case management and the broader issue of civil justice reform is characterized by neglect. There is no common meeting point for the federal and state court systems to compare practices and outcomes. Legal scholars make occasional forays—but rarely systematic ones. Across legal scholarship, it is more common to find skepticism about the utility of case management than any examples of how to do it better.

Our gathering today includes many judges and scholars—both groups who are indispensable, in my judgment, to the effective development and testing of case management ideas and reforms. An important third group is not here today—court administrators. It's important to bear in mind that some of the best civil case management is not done by judges but by administrators and their staffs. They have valuable insights into the workings of the courts, and they also generally have control over the data on what happens in the courts, and that is an essential ingredient for meaningful progress.

Some critics of proactive case management describe it as judicial lawlessness. We actually have some common ground with those critics, because we think that proper proactive civil issues must be tethered to some clearly stated neutral principles so that we know why we're doing what we're doing. If there aren't clear guiding goals for the exercise, then it is probably quite true that proactive management can easily descend into something ad hoc that can dangerously (whether intentionally or not) favor one side over the other.

How, then, can we characterize the goals of case management? Consider the following chart (Figure 1.1).

Figure 1.1. Goals of Case Management



To reiterate, these general goals, like everything else in our paper, is intended to generate thought and discussion. Another possible source of inspiration on the goals of civil litigation comes from Rule 1 of the Federal Rules of Civil Procedure (FRCP): the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." There's more than a passing similarity between our goals and FRCP Rule 1—but note that Rule 1 uses the word *determination*, which implies an actual judicial disposition of each case. As we know, the overwhelming majority of civil cases are ultimately resolved by the parties, through compromise and settlement. Note, too, that our fourth goal (promote outcomes that reflect the merits) and fifth goal (appearance of fairness) do not have an exact counterpart in the language of the Federal Rules. Our point is that, while *just* refers to reaching a lawful, appropriate outcome, *fairness* goes to process and perception. Even a just outcome will probably not be perceived as fair unless the parties feel that they had an opportunity to be heard.

I will conclude with a few comments about seven strategies we identify that can help attain the give goals described above:

1. Differential case management is important because, as case complexity increases, effective guidance should rely less on objective case characteristics and more on judicial evaluation of individual cases. California's rules have, since 1991, expressly called upon the courts to triage cases into specific types that have tailored processes adapted to the needs of that case type.
2. Active judicial management underlies all the others.
3. Give priority to case activity that reduces uncertainty as to core issues of fact and law, since that will generally help parties to resolve their disputes consensually.
4. Give priority to case activity that focuses on substantive merits, rather than procedural wrangling.
5. Set process and completion deadlines in a manner that furthers the case management goals.
6. Be transparent about one's purposes and goals with parties and counsel.
7. Develop uniform case management practices across and within a legal community, particularly for cases of low and medium complexity. Even in complex cases, it is helpful

for judges to use similar, familiar tools for case management, since lawyers can respond more effectively when they understand judicial expectations for their performance.

Justice Balmer: I have long been interested in civil justice reform, and one particularly notable effort in which I was involved is the 2015 report from the National Center for State Courts, the *Landscape of Civil Litigation in State Courts* (Hannaford-Agor, Graves, and Miller, 2015). The project had two components: first, gathering enough data to give us a strong portrait of state civil litigation, and, second, identifying ideas and innovations that could help judges run their civil dockets in ways better tailored to the wide range of cases, from small repeat cases to large, complex ones, with the goals of achieving fair results more quickly and at less expense.

Before our project, there had been no substantial overview of the landscape of civil litigation since 1992, and that earlier report provided helpful points of comparison (Smith et al., 1995). Our survey gathered data on some 900,000 state court cases from ten urban counties, including single-tier general jurisdiction courts and others with a two-tier structure of a limited jurisdiction (small claims) court and a general jurisdiction court (see Table 1.1). Our sample represented around 5 percent of the total number of civil cases in the country that were filed between July 1, 2012, and June 30, 2013. Setting aside family and juvenile matters, contract lawsuits dominated the dockets, accounting for 64 percent of the cases, including large volumes of debt collection cases, foreclosures, and landlord-tenant disputes. Only 1 percent of cases dealt with property disputes, and 7 percent arose from tort claims. Another 16 percent of the sampled cases were "small claims" disputes—with many of these also involving debt collection, and 12 percent fell into other categories. Notably, torts made up 27 percent of the cases in the 1992 study (Smith et al., 1995), so that category appears to have shrunk substantially, perhaps because many lawyers have concluded that small-injury tort cases are not economically viable on a contingent-fee basis (Hannaford-Agor, Graves, and Miller, 2015).

Table 1.1. Some Findings from *The Landscape of Civil Litigation* (2015)

Case Type	Share of Civil Cases	Median Judgment Amount	Proportion of Litigants Represented by Counsel		
			Plaintiff	Defendant	Both
Contract	64%	$2,272	95%	22%	20%
Small claims	16%	$3,000	76%	15%	15%
Tort	7%	$6,000	96%	67%	63%
Real property	1%	$12,789	95%	43%	39%
All other civil	12%	$2,002	78%	37%	24%

SOURCE: Hannaford-Agor, Graves, and Miller, 2015.

Put differently, about 80 percent of the civil cases filed in state courts are essentially contract claims, and many of those involve very small amounts of money. In our database, the median judgment for contract claims was $2,272; for small claims, the median was $3,000; and for unclassified civil cases, the median was $2,002. Judgments were a little higher in tort cases ($6,000) and real property cases ($12,789), but recall that torts and property composed only 8 percent of the total. There are, of course, cases that lead to injunctions or declaratory judgments, with no monetary damages being sought, and even the modest damages at stake in debt collection or landlord-tenant cases are often consequential to the parties. Nonetheless, a general takeaway from this data is that the money involved in most of these cases is so small that there is little incentive for a lawyer to take them on, unless there is an opportunity to seek (and recover) an attorney fee, if the claim is successful.

Unsurprisingly, then, the 2015 report also found that most defendants are not represented by an attorney. Even excluding cases in "small claims" courts, only about one-third of the defendants in the sample of cases had representation. In 75 percent of all the civil cases, at least one party was not represented.

Consequently, our traditional idea that litigation involves a party represented by a competent, reasonable lawyer, suing another party represented by a competent, reasonable lawyer, using the tools and civil rules designed for attorneys—with a judge available when needed to resolve issues between the two sides—no longer holds. A very large share of cases involve pro se defendants, and a not insubstantial number involve a pro se plaintiff as well. Moreover, the vast number of these smaller cases means that judges have little time to spend on each one.

These findings, and others that are discussed in our paper, led us to conclude that case management reforms are vital both for reasons of fairness and reasons of efficiency. Let me summarize several of our key recommendations:

1. The court system must take responsibility for case management from the time a case is filed until the time of resolution. Our current system tends to assume that lawyers will manage cases, but this does not work if at least one party is not represented in a large majority of cases. The fact is that the court system is supported by public funds, and the order and legal rules generated by cases are for the public benefit. Note, too, that when I say that the *court system* must manage cases, that is not limited to judges. Judges need the help of staff and of technology. We need systems that can handle cases fairly and efficiently and keep them moving toward resolution.
2. At the outset of each civil case, courts should allocate appropriate resources to the needs of that case. We proposed three principal pathways. The first path is for cases that can be "streamlined," either because, like the typical debt collection case, they involve small amounts of money and limited factual or legal disputes or because, even though a large amount of money is involved, the case turns on a simple legal or factual question. The second path is for "complex" cases that present multiple legal and factual issues, involve many parties, or are otherwise likely to require close court supervision. Cases that fit neither the first or second category should be routed into a "general" category. As I say, the court system should assign cases to a pathway soon after filing, but the system should

retain the flexibility to reassign, for example, cases that appeared straightforward when filed (and were therefore assigned to the "streamlined" path) but that prove to be unexpectedly complex as the case progresses.

3. The court system should have more or less automatic procedures to keep cases moving. For example, in Oregon, after a complaint is filed and the initial digital "file" is created, if the case management system does not detect the filing by the plaintiff of the return of service indicating service of the complaint on the defendant within a specific number of days, the system automatically generates a notice to the plaintiff saying, "if you don't get that complaint served, it's going to get dismissed without prejudice."

In summary, we need to understand and respond to the composition and structure of modern caseloads. State courts must develop better ways of managing the high-volume repeat cases with relatively low amounts at stake, but that nonetheless can have important consequences for the large number of people who are currently unrepresented and have little idea of how to navigate the system. We must likewise develop better ways of managing complex business cases, mass torts, and multiparty disputes in ways that ensure the fair resolution of those cases on a timely basis.

Judge Dow: I am a late convert to active case management. When I first joined the bench 14 years ago, I had come from a civil appellate practice, and I was instinctively reluctant to tell trial lawyers how to run "their" cases. But after six or eight months of learning about the cases before me, and the rather dysfunctional state they were often in, I paid a visit to the judge I had clerked for many years before, Judge Flaum, told him about some of my cases, and asked, "What do you think I'm doing wrong?" And he said, "You're not doing anything wrong, but you could do it better. So let me tell you how this works. You have a lot of discretion. You have more discretion than you ever imagined. But you don't need to impose order; you can make suggestions. You can make clear to the lawyers that you are available to help them solve problems. Usually, they can work things out, but being there to resolve impasses, and suggesting paths to follow, can keep matters on course."

This is how I learned the concept of the *hidden hand*. By bringing the lawyers together, identifying areas of impasse, suggesting ways forward, being available to them—this sort of gentle but consistent case management has a large effect.

I think the Federal Rules of Civil Procedure do a pretty good job of providing the tools for the sort of case management advanced by Carolyn Kuhl and Bill Highberger (Chapter 6). We have seen that they are flexible—when the pandemic came around, the Rules provided sufficient tools to make emergency adjustments.

There seems to be a growing consensus—or at least an emerging consensus—that early and active case management is essential if we are to achieve the goals of Rule One. I am a big fan of Rule One, and I always look to the goals it articulates when lawyers come to me perplexed and uncertain how to move forward, especially in the smaller cases that Justice Balmer highlighted. Applying Rule One encourages the parties to give information to the judge earlier in the case. In

my experience, mandated early disclosure is a good idea. In cases where there is no great mystery to be uncovered, I approach counsel and encourage them to simply lay down all their cards. At the same time, one must recognize that this does not work in every case.

In similar fashion, it is desirable to have multidistrict litigation (rules that provide flexibility but that are not overly prescriptive), since cases vary and a uniform formula can hamstring judges; we want, rather, to empower judges to use discretion. In general, we should be cognizant of the danger of too many prescribed rules. Many of my younger colleagues favor more across-the-board rules, but we must consider, is a given change going to make the judge's role easier or harder? Every judge can, after all, put in his or her own standing order and find ways to streamline the judge's own cases.

A better route than tighter regulation of the courtroom is to develop, and carefully evaluate, pilot projects. Experiment, and carefully learn from the experiments about what works well and what does not. If we assemble a series of proven models of case management, develop some rules of thumb for when particular approaches work well, and give judges the discretion to adapt these practices to particular cases—that seems to me a path toward progress.

Professor Yeazell: I have long been a skeptic about the salutary potential of case management, but I am intrigued by my colleagues' remarks and by the material developed for this conference. Bill and Carolyn's paper makes an important contribution—rather than making a generalized appeal to judges to "just manage something," they are disaggregating case management into very specific pathways tailored to particular case types. The report of the Conference of Chief Justices is excellent (Conference of Chief Justices Civil Justice Improvements Committee, 2016) and provides grounding for thoughtful innovations. And the papers we'll hear in the second session are showing valuable ways to objectively evaluate whether particular innovations work in practice.

All of which is to say that I may be on the path to conversion—but I still would like to offer some cautionary notes about the case management enterprise.

First, there is a significant methodological challenge in assessing any case management innovation. If judges can freely opt in or opt out of a case management technique, it is hard to know whether the results we observe are attributable to the technique or simply to good judging. Mandating that judges use a specific technique, as Judge Dow has pointed out, comes with its own problems. Assuming that some judges would be willing to apply a given innovation and others will not, this can exacerbate the challenge of getting good, statistically significant results.

A second major challenge is figuring out how case management can properly consider parties who lack representation and therefore have no idea how to engage the procedural system. As our third panel will likely point out, this is a large and growing problem and a direct challenge to the fairness and legitimacy of the court system. Some of the ideas advanced by the Conference of Chief Justices, such as using technology in innovative ways and adding staff to supplement the work of judges, are excellent ideas worthy of experimentation.

A third challenge, well expressed by Carolyn and Bill, concerns the task of establishing meaningful goals that can be empirically measured. *Time to resolution* may be easy to measure, but if many parties are not represented, how do we know that quick resolutions are just? Similarly, *cost of resolution* is a useful goal, but I wonder how one measures costs when half your litigants are unrepresented? It is important—but not at all easy—to find and measure *quality of justice* goals. Suppose we would like to measure the parties' degree of satisfaction from the litigation experience. We should be interested in whether there was a genuine adversary hearing and whether there was some kind of adjudicated outcome. These are important dimensions of quality.

I think none of these challenges should detract from recognizing that this may be a very important step forward in thinking about how our court systems can do better and advance the national interest.

Discussion

Goals of Case Management

The panel discussed the goals of case management, and, notably, the judges on the panel noted two recurring challenges for judges. The first is the problem of the unrepresented or *poorly represented* party. Here, *case management* often takes the form, and has the goal, of providing judicial input that keeps that party more or less on course in the litigation. The challenge for the judge is staying on the *judicial* side of the line and not becoming a de facto attorney for the unrepresented litigant. It is helpful if the rules allow a judge to encourage a client to modify pleadings, when appropriate, or to suggest key areas for discovery. The second is the problem of the attorney who seeks to run up costs, either for personal gain or because the attorney thinks that, by making the litigation costly, the other party will be forced to settle or withdraw. As we all know, the "rules" generally indulge this sort of strategy. The judge can respond to such cases by pushing the case forward, providing clear guidance on the boundaries of discovery, encouraging the parties to make the key elements of their case at an early stage in the litigation, and getting to the merits sooner. A clear articulation of the goals of case management helps guide the judge and to explain the management philosophy to the parties.

There are challenges, however, in articulating case management goals. For one thing, multiple goals will, inevitably, sometimes conflict with one another. For instance, *promoting outcomes that reflect the merits* may mean, in many cases, that the judge has to pull back; an active judge runs the risk of riding over parts of a case that may need to be developed to uncover the merits. It may be important for us to understand the typologies of cases in more detail, so that we can tailor forms of management that do not, in particular case types, suppress one goal in the interest of pursuing another.

Should Pro Se Cases Be in a Class by Themselves?

In Panel 3, we will be delving specifically into the challenges posed by the prevalence and growth of pro se litigants. The panel and audience made several germane points. First, pro se cases are themselves very heterogeneous, so it is probably not workable or desirable to create a separate track just for those cases. It may be more helpful to think of the *pro se variety* as an overlay on each of the other case categories, requiring some special judicial sensibilities. It's also clearly important and necessary that we develop special tools to help pro se litigants. One judge noted, for example, that his court has developed software that takes a user through a series of simple questions and can thereby produce the necessary court forms to file a request for a restraining order. Another piece of software helps users file a petition in small claims court and can advise the user that, for example, the date of the debt is sufficiently long ago that the claim is barred by the statute of limitations. We can do more along these lines, and we can also develop subsystems with trained paralegals and other paraprofessionals who can help people navigate the system.

The Effects of Scale

One panelist noted that the need for case management varies in surprising but systematic ways. In systems in which a relatively small number of lawyers regularly come up against one another, they tend to cooperate; they work out informal methods of resolving or expediting litigation, and they are low maintenance from the judicial point of view. In systems in which this is not the case, skillful case management becomes more necessary.

Are Systems of Case Management Even Possible?

One participant noted that we have been down this road before. The Civil Justice Reform Act of 1990 sought to impose systems of case management and to evaluate them. The general experience and finding was that uniform systems did not work. Some courts were mandated to use a specific set of case management tools; others were not. When scholars compared the two groups of courts, they found so much heterogeneity of practice within each group that the differences were not meaningful. The upshot was that judges were deciding for themselves—and not according to any assignment—when a particular case management tool was useful or not. Judges used their independence to simply pursue, on an ad hoc basis, whatever practices they felt were best for their courtrooms.

Although other participants agreed that all of this is true, they suggested that the new wave of case management reform and evaluation is different in fundamental ways from the 1990s reform effort and that those differences are making the newer efforts more successful. Panel 2 will illustrate some of those differences in approach, and Panel 4 will specifically compare some of the 1990s experience with newer strategies.

Chapter 2. Panel: Experiments in Measuring the Effectiveness of Case Management Techniques

Moderator:	James M. Anderson, Director, RAND Institute for Civil Justice
Presenters:	Richard H. Sander, Dukeminier Distinguished Professor of Law, UCLA School of Law
	Eric Helland, William F. Podlich Professor of Economics and George R. Roberts Fellow, Claremont McKenna College; Senior Economist, RAND Corporation
	Dr. Emery G. Lee III, Senior Researcher, Federal Judicial Center
	Judge David G. Campbell, District of Arizona; former Chair, U.S. Committee on Rules of Practice and Procedure
	Judge Jennifer D. Bailey, Administrative Judge, Circuit Civil Division, Miami-Dade, Florida

Mr. Anderson: The RAND Institute for Civil Justice has a long history of studying ways to make the civil justice system work better. I want to thank the judges and practitioners who are here today. Your participation makes for better research because it is so easy to subtly misunderstand a piece of data related to civil litigation. A central goal of this conference is to show how data can be used to study how the rules governing civil litigation translate into the actual practice of law in our courts. How can we integrate scholarly methods with the experience and insight of judges and lawyers to improve case management? This panel will provide some concrete examples of this integration in practice. Eric Helland and Rick Sander have been working with Judge Kuhl to create systematic databases on the dockets of Los Angeles civil courts and using that data to test the effects of recent innovations in California civil procedure. Emery Lee will discuss early results from the Federal Judicial Center's evaluation of a pilot program in mandated early discovery, occurring in two federal districts. Then Judges Campbell and Bailey will discuss the potential utility of these methods, and others like them, in their own court systems.

Professor Sander: Let me start by noting that I hope we can reach two distinct audiences with empirical research on the courts. The first audience is the judiciary—we want to build partnerships between scholars and judges, with scholars learning in depth how courts actually operate, and judges developing confidence that careful scholarship can shed light on the concrete effects of particular changes in procedure. A second audience is legal academia. Law professors, and therefore legal education, tend to be fairly disengaged from the actual operations of our court systems and more preoccupied with theory than practice. By generating insightful scholarship on how contemporary court systems actually function, we can engage and excite our colleagues about the everyday realities of litigation, and therefore perhaps build their interest in similar types of research. We can imagine a virtuous cycle, where a better academic understanding of

courts builds more interest among a wider swath of judges in implementing experiments in procedural reform, thus producing better data and more issues to study.

Eric and I will be discussing research our teams have undertaken on a particular part of litigation activity in the Los Angeles County court system. We were able to obtain docket data on nearly the entire universe of what are called *major civil* cases in Los Angeles that were filed between July 2012 and October 2018. Let me start by situating those cases in the overall composition of Los Angeles litigation.

Los Angeles has about 10 million residents. The Los Angeles Superior Court system is a unified court system that oversees all state and local law. In the 2015–2016 fiscal year, parties filed roughly 1.6 million cases in the various Superior Courts. Of these, about 75 percent were "criminal" cases, including around 1 million traffic citations, a couple hundred thousand misdemeanors and other infractions, and some 40,000 cases charging defendants with felonies. Of the 25 percent of cases that were "civil," about half dealt with family, probate, or juvenile issues. That leaves about 240,000 filings in 2015–2016; of these, 170,000 involved relatively small amounts, either going to small-claims court or constituting "minor civil" actions. Another 25,000 were civil petitions (for example, name changes). This leaves 45,000 "major civil" actions—civil suits involving claims for at least $25,000. These are the cases for which Eric and I have docket data and which we focus upon in our analysis (see Table 2.1).

Table 2.1. Differing Lenses for Gauging the Distribution of Civil Litigation

Case Type	Distribution, 2015 *Landscape of Civil Litigation in State Courts*	Distribution, Major Civil in Los Angeles	
		By Filed Cases	Weighted by Case Events
Auto	9%	27%	13%
Other personal injury		17%	16%
Other tort		6%	16%
Employment	79%	14%	13%
Other contract		23%	22%
Property	1%	9%	16%
All other	11%	4%	4%

SOURCES: Hannaford-Agor, Graves and Miller, 2015; authors' research.
NOTE: *Landscape of Civil Litigation in State Courts* distribution excludes small-claims cases, thus producing slightly different numbers from those reported in Table 1.1.

I go through these numbers for two reasons. First, it is important to keep in mind that when researchers discuss civil justice systems, the data they present often refers to very dissimilar universes of cases, which can give us very different, seemingly incompatible notions of what is happening. Second, in examining particular issues, different types of civil litigation become relevant. The issue of unrepresented litigants is a pervasive problem in minor civil litigation; in

major civil cases, it is relatively uncommon. If we are concerned about the cost of civil litigation, then major civil cases are where expensive litigation is concentrated. Although major civil cases compose only a small fraction of all civil cases, they undoubtedly account for a predominant share of the cost of litigation as measured by attorney fees.

Of course, the distribution of cost is dominated by a relative handful of cases even within the universe of major civil cases. As I mentioned, we were able to obtain complete docket data for all these cases for a six-year period—roughly a quarter million cases in all. This enabled us to count the number of events in each case, with an event being any occasion that would add documents to the court docket, such as a motion, an answer, a judicial order, and so on. As one might expect, the distribution of case complexity across major civil cases is very skewed; the 10 percent of cases with the most events account for 45 percent of all the events. To put it differently, cases in the most complex 5 percent of cases have, on average, more than 20 times as many events as cases in the least complex half of cases.

When we talk about the landscape of civil litigation, it is important for us to be clear on what type of litigation we're discussing, because that will largely determine the answer we get. For example, the 2015 Conference of Chief Justices report on civil litigation tells us that torts made up about 9 percent of all the civil cases gathered in their sample of cases (Hannaford-Agor, Graves and Miller, 2015). But among the Los Angeles major civil cases, torts constitute 49 percent of the total—which implies that they are much more heavily represented among cases that involve some substantial claim and thus they take up a large share of judicial resources and legal costs. Property cases—presumably excluding routine suits by landlords against residential tenants—account for only 1 percent of the civil cases in the 2015 survey but for 9 percent of the major civil cases in Los Angeles, and 16 percent of the events in those cases. Consequently, finding ways to simplify property litigation can have a significant impact upon court efficiency.

With the docket data we obtained, we sought to study a 2015 California statute that required civil parties that intended to file a demurrer (what California calls a *motion to dismiss*) to *meet and confer* with opposing counsel before filing. The legislature instituted this requirement for a trial period, so it was important to determine whether it had any effect. *The paper discussing our analysis of the data is included in these conference proceedings, so I will not repeat those in detail here* (see Chapter 7). We had two bottom lines: First, demurrers did fall sharply—by over 30 percent—when the meet-and-confer requirement went into effect, and, second, the effect varied a lot depending on the substantive subject of the lawsuit, with employment and property cases seeing much larger declines in demurrers than tort cases. We plan to dig further into these cases and interview a sample of lawyers in the cases to better understand the effects. Certainly our view thus far is that this was a surprisingly effective change in procedure.

Some aspects of our methodology are worth emphasizing. As I mentioned, we obtained raw docket data on the entire universe of major civil cases filed in Los Angeles Superior Court over a six-year period—about a quarter million cases. We also took a random sample of 625 major civil cases filed in 2015 and studied the dockets and often the filed papers to understand and code the

cases by hand. The hand coding provided an important check on our use of the electronic data; it enabled us to make sure that assumptions we made about the meanings of particular docket practices actually corresponded to the realities of those cases. At the same time, however, we were impressed by the robustness of the electronic data. So long as we were interpreting the electronic data correctly, it was more reliable than the hand-coded data (because less subject to error) and, because of its comprehensiveness, it was significantly more versatile in enabling us to look at connections within the data.

An even more important component of our work was the integration of judicial and scholarly expertise. Judge Richard Fruin had conducted his own independent analyses of how the meet and confer influenced cases in his own courtroom, and he readily shared his data and his interpretations and helped us generate hypotheses to test. Judge Carolyn Kuhl has deep knowledge of civil courts in Los Angeles not only from her experience presiding over complex litigation but from her years as a presiding judge. Carolyn guided us on how to interpret court dockets, to understand court procedures, and to avoid minefields in our analysis. The judge-scholar collaborative model was integral to every phase of the project.

Professor Helland: As Professor Sander mentioned, papers describing our research are included in the conference materials, so I am not going to recount the paper itself in any detail. But I do want to highlight some general lessons from the research that are very applicable to our larger enterprise of studying civil case management practices.

Our paper (Chapter 7) examines the effect of informal discovery conferences (IDCs) upon motions filed to compel discovery. We can't know, a priori, what effect these will have. If the IDC persuades one of the parties that the judge will be sympathetic to aggressive discovery, then it may lead to more motions. If the IDC fosters discussion and compromise, and if the parties and the judge all have a better sense of how the others view the case, it may lead to fewer motions. And if the IDC is a mere formality, with everyone just going through the motions, it may have no effect at all.

Consider two different sorts of challenges involved in trying to understand the effect of IDCs. One challenge is that if new rules are adopted that require or encourage judges to use IDCs but the judges are unenthusiastic about the tool, the reform may have little practical effect. This was a recurring finding in research about IDCs conducted in the 1990s. What we would like to know, then, is whether IDCs help much when judges actually use them purposefully.

A second challenge is to address what social scientists refer to as *endogeneity*. If one examined 100 civil cases at random, and measured in each case whether there was an IDC and how many discovery motions were filed, one would almost certainly find a positive correlation—cases with an IDC have more discovery motions, on average, than cases with no IDC. But this is because big, complex cases are more likely to have an IDC at some point than a simple case is, and of course complex cases also have more discovery than simple cases do. So how do we isolate the effect of the IDC, independent of case complexity?

With the detailed docket data we obtained, on the entire universe of Los Angeles major civil cases over a six-year period, we think we came up with good solutions to both problems. In the Los Angeles Superior Court, judges are only required to use IDCs in a couple of specific types of litigation, such as personal-injury tort claims. Outside those case types, some judges use IDCs routinely, and about one-third never use them. So, we can compare heavy IDC users with nonusers.

We can solve the endogeneity problem by capitalizing on the practice of randomly assigning cases to judges. Here again, the Los Angeles Superior Court has certain judges who sit on certain "specialty" courts, but there are about 50 judges who sit at the central courthouse and receive a random set of cases drawn from a wide spectrum of major civil general-jurisdiction litigation.

Our methodology produced very striking results: The effect of an IDC was a 70 percent reduction in the number of discovery motions. Of the discovery motions that were made in cases that had an IDC, fewer require a hearing, and a higher share were granted. The effects are fairly symmetrical, whether it is the defendant or the plaintiff who is bringing the motion. The IDC cases, not surprisingly, also appear to reach resolution more quickly. In other words, this relatively simple step has a fairly dramatic effect.

This is thus a good example where a strong empirical finding can provide a way to have conversations with judges about the use and potential effects of a simple process change. And we think it also highlights a good way to disentangle cause and effect in case dynamics.

Dr. Lee: First, a disclaimer: My comments today reflect my views and not those of the Federal Judicial Center or its board; nor do my comments reflect the views of any other person or entity within the judicial branch. The Federal Judicial Center has also been evaluating an attempt to make the discovery process more efficient, and our effort provides an interesting comparison with Eric's work. In 2016, the Judicial Conference Committee on Rules of Practice and Procedure approved the launch of temporary discovery reform efforts in volunteer federal districts. In the spring of 2017, the Mandatory Initial Discovery Pilot, or MIDP, went into effect in the District of Arizona and the District of Northern Illinois. Under MIDP, the parties to civil litigation are required to make good-faith efforts to disclose all material that sheds light on claims, counterclaims, and defenses raised by the plaintiff's original complaint and the defendant's answer and other responsive pleadings. The usual rule is that parties only disclose documents that support their position in the litigation.

The theory of MIDP is that by requiring parties early on to disclose both positive and negative documents and electronic materials relevant to the initial claims, this will speed resolution of the case—both by making the merits of the case clearer at an earlier stage and by rendering unnecessary some of the iterative battles over discovery that often generate much of the cost involved in civil litigation.

The pilots ran for three years, covering cases filed through the spring of 2020—that is, into the early months of the pandemic. Not surprisingly, a significant number of these cases are still

open in the fall of 2021, so we do not yet have comprehensive information on the eventual duration and composition of these cases. What I have today is survey data gathered from litigators whose cases were subject to MIDP and which have closed. By the time these proceedings are published, the final report will be posted at www.fjc.gov (see Chapter 9).

Surveys often get a bad rap, and many surveys are not particularly informative. It is, of course, important to get substantial response rates and to take account of how the pool of respondents may be different from the entire pool under study. It is vital not to ask leading questions. A great and often unappreciated virtue of surveys is that, if properly done, they can provide real insight into the actual experiences of the respondents. For example, an excellent study of Rule 26, conducted some years ago, used surveys to ask what actually happened in meet-and-confer sessions between attorneys; that was crucial to our understanding of the operation of the rule (Lee, 2012).

We have sought feedback on MIDP from thousands of attorneys involved in closed pilot-project cases. Over a third of the attorneys in each district have responded, generating over 4,000 completed surveys. The responses form very similar patterns in Arizona and in the Northern District of Illinois:

- Most respondents agree that MIDP has led to earlier disclosures of information, the key goal of the MIDP.
- Substantial numbers say that MIDP reduced discovery motions, discovery costs, and the overall costs of litigation; not surprisingly, plaintiff attorneys are more likely than defendant attorneys to express these views. However, roughly half of the attorneys do not agree that such economies were achieved in their cases.
- We have seen little evidence of "satellite" litigation—that is, motions practice generated by the additional discovery of MIDP—and few signs of implementation difficulties.

Sometime in 2022, we hope to be able to analyze whether pilot cases were resolved more quickly than comparable cases, although the coronavirus pandemic is an obvious complication. It may be possible to say more about the type of cases in which economies were achieved and whether those economies were comparable to the large drops in discovery motions that Professor Helland reports for Los Angeles.

In conclusion, I agree with what seems to be an emerging theme in this conference: that as we foster this type of research, we need to work closely with judges and court staff and to think carefully about what sort of analyses will produce information most useful to judges in determining their own paths toward reform and improved case management.

Judge Campbell: I worked for 14 years on the Rules Committee to try to bring about improvements to the federal rules. Our committee would deliberate, develop changes that seemed to us sensible, good ideas, and put them out for public comment. Almost invariably, 80 percent of the criticism we would encounter was some variation of this: Where is the empirical

data that this will work? That, for me, is why I believe this is a valuable conference and why some of the methods we are discussing point towards a good way forward.

That said, any systematic effort to reform and improve civil justice should be cognizant of what one is up against. First, while many judges like the abstract idea of reform, it is very hard to persuade judges to actually adopt reforms that require them to change their usual way of doing things. It's really hard to get judges to change their behavior. Some years ago, when we developed a pilot project on mandatory mutual exchange of discovery, we personally approached the chief judges in 40 federal districts to consider this, and 40 chief judges turned us down. They were not eager to undertake experiments.

A second, related fact of life is that "changing rules" does not automatically change behavior. In 2015, we took out of Rule 26 the incorrect standard for when discovery is permissible, but judges continue to regularly cite the incorrect, pre-2015 view of when discovery should be allowed. I would submit that formal rules and published procedures tend to be less important than local legal culture. A valuable 1978 study by Thomas Church compared 21 state courts of general jurisdiction and tried to determine what distinguished the more efficient courts from less efficient ones. He found that efficiency did not depend on resources, or on the size of the system involved; instead, it depended on the local legal culture—that is to say, the established expectations, practices, and informal rules of behavior of judges and attorneys.

How, then, does one change a local legal culture? Strong court leadership is part of the answer. And having good experimental data on the effects of particular reforms is undoubtedly helpful and important. We have 50 state court laboratories doing different things, and we undoubtedly could learn a lot about what improves civil litigation practices. But neither of these constitute complete answers; we need to be aware of the challenge and explore additional ways to change culture.

Let me now turn to some observations about particular reform efforts. Professor Sander's finding about the meet-and-confer requirement, and its effect in reducing motions to dismiss, resonates with my own experience. I have noticed that when judges convene a premotion conference for motions to dismiss, that, too, causes a decline in those motions. It might be worthwhile to do a companion study of this practice.

Dr. Lee's work on mutual disclosure also strikes me as encouraging. Even if these practices reduce costs in only one-third of cases, that alone is ample reason to pursue them.

In reference to Professor Helland's study, I'll note that the Arizona state courts have been innovative in devising ways to expedite discovery procedures. The current rules require that, if you have a discovery dispute, you have to promptly file a three-page statement laying out what the dispute is, and get on a call with the judge about the dispute. After the conference with the lawyers, the judge will then make a ruling or allow briefing on a motion to resolve the issue. Here again, it seems that a companion study would be helpful and appropriate in extending the Los Angeles findings.

In advance of our next panel, on the problem of unrepresented litigants, let me note that Arizona has been creative here as well. Arizona, like some other jurisdictions, has considered a requirement that all licensed lawyers provide a certain number of hours each year of pro bono representation. However, it calculated that if this mechanism was used to meet the needs of the vast and rising number of pro se litigants, every lawyer would need to do 900 hours pro bono per year—something that, of course, is not going to happen. Accordingly, Arizona has developed paraprofessional programs to license nonlawyers providing representation in four areas: family law, limited civil cases, limited criminal cases that do not involve the possibility of jail time, and hearings before administrative agencies. Utah has undertaken a similar effort. Here, too, we have a promising way forward that merits careful study.

Judge Bailey: I oversee the civil courts in Miami-Dade County, which is comparable in size to Maricopa County, Arizona. Both jurisdictions are big enough to generate a large volume of cases but are small enough so that, under the right conditions, we can institute reforms and have some nimbleness in responding to crises.

One of those crises occurred in late 2008. The mortgage crisis, the collapse of Lehman Brothers, and the deepening recession generated a big surge in filed foreclosure cases. Our courtrooms were overwhelmed, with caseloads rising from 2,500 per judge to over 6,000 cases per judge, and we noticed that 70 percent of the scheduled hearings in foreclosure were wasted because the requisite paperwork was not in order. So, the judges and court-supervised case managers implemented a "red flag" system to identify before hearings whether the case was actually ready to move forward. It worked, greatly accelerating our ability to resolve cases and work through our backlog. The NCSC found a 32 percent increase in cases closed within 18 months, even as caseloads were growing.

That's a simple example, but one can draw some powerful conclusions from it. First, case management, if done well, works. Second, desperation inspires action. Never let a crisis go to waste. Third, if you want judges to be team players in implementing reform, show them data that make the case for the change and build systems that help them case manage. Fourth, good data is much more meaningful, and more persuasive, if capable researchers are helping to generate and interpret the data.

In 2016, we undertook a simple experiment, building a system that we thought would help judges manage their caseloads. We recruited a group of four judges to participate in the pilot project. We had 5,500 cases assigned to the case management protocol and 21,000 cases in the control group. We created a system of tracking and enforcing the deadlines in the civil rules: to serve, to respond, etc. In addition, a case management plan was entered in every case, differing by case type and pathway. The pilot asked to set, in every case, a case management conference to occur from four to six months after the case was filed. The plan laid out a road map for the case, and the conference provided enforcement, including nonbinding agreements by the parties on their alterations to the plans for the case. We did not monitor compliance, and we did not have

sophisticated technology to track the cases—we relied mostly on Excel spreadsheets. Nonetheless, the effects were dramatic. In the experimental group, we had an 86 percent increase in case closure within 18 months and a 32 percent increase in cases that closed within 12 months. Simply setting deadlines and having a deadline for a conversation among the parties and the judge had dramatic effects.

In other words, there's not much doubt that using case management techniques can produce significant improvements over the status quo. There's also not much doubt as to why it hasn't spread more widely: inertia, a need for better technology support and management systems, and the lack of a network of skilled, committed scholars. The "inertia" point goes to what Judge Balmer described as court culture. A typical judge looks to his left, and looks to his right, and does what his fellow judges are doing. One needs momentum for reform and the support to carry it out. To develop the support infrastructure, one often needs an assist from the state legislature. Legislators don't like to increase the number of judges, but they will increase support staff—and thus enable efficiency reforms—if a good empirical case is made.

The Florida court system offers a great opportunity for valuable studies on specific reforms. Starting in 2021, civil courts are under a mandate to implement a variety of case management reforms from a menu. What reforms are pursued will vary from one court system to another, so it will be possible to analyze these as a series of new experiments. We hope we can interest some scholars in working with us.

What is true for case management generally is particularly true for lawyerless parties.

Many of those cases stall out because the unrepresented person doesn't know what he or she is supposed to do next. Improving technology can create software that helps to guide them on next steps—understanding the process, finding and correctly filing forms. Case management hearings and prehearing checks to make sure that the parties are on top of the appropriate paperwork are of course also going to be helpful here. The growing number of lawyerless parties is a problem, but it is also an opportunity—much like a hurricane or a pandemic, it is creating a crisis that needs to be addressed, which is an opportunity for change and reform and a chance to study what changes work and which ones do not. Parties generally come to court when a bad thing has happened to them. We owe everyone a resolution within the law in a reasonable period of time.

Let me offer a few words about research. Collaboration between scholars and judges is critical. To understand the meaning of data on court dockets, for example, scholars need judges as guides. Judges can not only explain the procedural context in which court data is entered but can provide guidance on which types of data are more reliable and which types are prone to error. This not only helps scholars make meaningful uses and interpretations of often uneven data—it also builds confidence among the judges that the scholars will draw valid inferences and conclusions. It also matters to judges how data is used. We are more interested in using data to understand how the system works, and how to make it better, than to make invidious comparisons across judges. Elected state court judges are, of course, particularly sensitive, but

even federal judges tend to share this concern. Anonymizing the identities of judges in a research project is, frankly, a valuable way of building confidence in the judge-scholar collaboration. Scholars, in turn, can help judges and court administrators identify and develop better methods of identifying the information most helpful to research and evaluation and thus foster improved data gathering, data entry, and system management.

Discussion

Improving Data Access

Audience members asked about concrete steps the courts could take to facilitate the scholar-judge cycle of experimentation and evaluation. Members of the panel made several suggestions. First, don't put documents behind a paywall—or, if you do, design a paywall that can allow reasonable access for research purposes (as compared with commercial purposes). The PACER (Public Access to Court Electronic Records) paywall, for example, is unhelpful. Second, it would be helpful if state courts could work toward the development of national open-data standards, involving both agreed-upon standards of access to court dockets and documents and common definitions of some key data elements so that one can accurately make comparisons across jurisdictions, which currently is very difficult and often misleading. The National Center for State Courts has established the National Open Data Standards (NODS) to begin the process of adopting consistent data standards across the states. But even with greater transparency and standardization, it is important to remember that scholars need to collaborate with judges to decipher data. Researchers going it alone will be walking through minefields of potentially fatal misinterpretations of data—it is not going to end well.

Process Improvement Model

A comment from another participant suggested that courts should adopt a process improvement model. This is a concept used by consultants and by business managers when they identify an opportunity for change, implement the change on a small scale, and then use data to analyze the results of the change to determine whether it made a difference.

Chapter 3. Panel: Litigants Without Representation

Moderator:	David Marcus, Vice-Dean for Curricular and Academic Affairs, UCLA Law School
Presenters:	Melanie Zaber, Economist and Codirector, Middle-Class Pathways Center, RAND Corporation
	Judge Consuelo B. Marshall, Central District of California; Board of Advisors, RAND Institute for Civil Justice
	Rebecca Sandefur, Professor of Sociology and Law, University of Illinois at Urbana-Champaign; Faculty Fellow, American Bar Foundation
	James J. Sandman, President Emeritus, Legal Services Corporation
	Justice Constandinos Himonas, Justice, Utah Supreme Court

Professor Marcus: Over 100 million Americans have some interaction with the justice system each year. These interactions range from life-changing events like foreclosure, bankruptcy, and criminal charges to simple traffic tickets. In extreme cases, these justice problems can lead to homelessness or imprisonment, but even in more minor cases, individuals can face difficulty in paying fines or other financial penalties. While representation by an attorney is constitutionally required for criminal cases under the Sixth Amendment, no such requirement exists for civil cases. According to the Legal Services Corporation, "86% of the civil legal problems reported by low-income Americans received inadequate or no legal help" (Legal Services Corporation, 2017). The problem is particularly acute in debt collection cases, which have doubled from 12 percent to 24 percent of the civil docket of most state courts (Pew Charitable Trusts, 2020, p. 8). The problem for self-represented (pro se) litigants is that they are expected to use rules of pleading and discovery designed by and for lawyers. This panel is examining evidence on litigation outcomes for self-represented litigants in bankruptcy and divorce cases. The panel then also addresses whether streamlined case management approaches can even the playing field for self-represented litigants in cases that ordinarily present straightforward, repetitive issues of fact and law, such as debt collection and eviction cases.

Dr. Zaber: The U.S. court system is currently being overwhelmed with litigants who represent themselves. Currently, in civil cases, three out of five people are self-represented. In this talk, I will focus on bankruptcy and my ongoing research on how to help self-represented litigants navigate the bankruptcy legal system. My research has focused on bankruptcy cases in the California Central District of the federal courts. This district has the second highest total caseload of pro se bankruptcy filers in the U.S., with only the Washington, D.C., district having a higher rate of pro se filing. My focus is also on Chapter 7 bankruptcy, which, unlike Chapter 13 bankruptcy, does not require a repayment plan.

As shown in previous studies, bankruptcy filings generally track unemployment, with higher bankruptcy filings in periods of higher unemployment. This relationship breaks down in 2005 when the U.S. passed the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). This legislation revised the United States Bankruptcy Code, and its changes made it harder to file for bankruptcy, making filing both more complex and more expensive. Simultaneously, courts increased filing fees, and lawyers increased fees for assisting with bankruptcy. These changes led to a sharp drop-off in filings, and the decrease in filings was largely independent of the filer's income.

Lawyers are important in the success of a bankruptcy filing. I find that of those who are represented by a lawyer, 95 percent are able to discharge their debts. By contrast, for pro se litigants in bankruptcy, only 63 percent are able to get their debts discharged. One potential reason for this difference is that pro se litigants have incomplete bankruptcy filings. In response to these differences, the Central District of California introduced eSR (Electronic Self-Representation) in September 2014. This system allows pro se litigants to file an incomplete petition but warns them that it is incomplete and lets them know what they might need later. The change has caused an across-the-board decrease in overall case duration, from 125 days to 122 days. While this may not seem like not a big effect, an average of a three-day reduction is large because only about 6 percent of self-represented cases used eSR. This finding means that the impact on the subset of cases that used eSR must have been significant to shift by three days even with the small share of litigants using the systems. The eSR system potentially has spillover effects by freeing up court personnel and provides benefits to all participants within the court system.

The results suggest that eSR, and potentially similar innovations, may assist pro se litigants in bankruptcy courts. I now turn to another area of law with high rates of pro se litigants and with similarly high stakes for the litigants, divorce cases.

My second study examines the impact of lawyers in divorce. The Legal Services Corporation (LSC) provides legal assistance to those who are low-income. Specifically, the LSC provides free legal aid in civil cases, such as divorce, to individuals with an income below 125 percent of the federal poverty level. For low-income individuals seeking a divorce, this assistance is potentially important, as divorce is exceptionally expensive. The filing fees for a divorce case are approximately $300, but attorney fees are often $1,000 or more, although mediation is usually less expensive. Not surprisingly, for low-income individuals who don't have the resources to get divorced, the existence of legal aid can encourage them to file for divorce even if they consider it financially impossible with their own resources. My study leverages the LSC income-eligibility standard and, more specifically, variation in what specific local-area income threshold guarantees LSC services. I use data from the LSC grantee activity report, which contains the aggregate usage of LSC lawyers in divorce cases. I then link this with the American Community Survey's (ACS's) individual-level data. The ACS data contains information on whether an individual survey respondent was recently divorced. Thus, the ACS allows me to look at a

representative sample of the U.S. population and the impact of access to attorneys on the likelihood of divorce.

I find that areas in which the local LSC has set a higher income threshold and, therefore, have higher local LSC grantee activity are associated with an additional 2.5–3.5 divorcees per 1,000 eligible persons. This impact is also statistically significant at conventional levels. The impact translates into a 7–8 percent increase in the divorce rate within the local population when we move from the lowest to highest levels of LSC grant activity. Overall, this is a relatively large effect considering that not all people who are eligible for LSC services want a divorce.

The implications of both of these studies is that access to a lawyer has implications for the ability of many people to access the legal system. While this may seem unsurprising, the divorce study suggests that for low-income women, not being able to afford divorce discourages them from divorce. It is not a difficult leap to suggest that leads to lower-income individuals being stuck in negative material situations. The bankruptcy study suggests the importance of interventions for pro se litigants. By using eSR, the court was able to improve not only the ease of filing pro se but also the bankruptcy petition's quality. There are also spillover effects to eSR: The system simplifies court processes and frees up court personnel.

Judge Marshall: Many courthouses, including the Central District of California, have walk-in clinics, where self-represented litigants can file papers and talk to someone about the litigation procedures. These clinics are an important part of the infrastructure needed to deal with pro se litigation, and the Central District of California's clinic system has been fairly successful. It's also worth noting that the Central District is a big district. It has three different courthouses, and there's a pro se clinic in each location. Every pro se litigant is encouraged to go to the clinic, and the court security officers will give brochures to anyone who may want to consult the clinics. The clinics see a wide variety of cases. Recently the breakdown was 26 percent civil rights, 23 percent Social Security, 11 percent employment, and 10 percent Americans with Disabilities Act defense cases, but we're also seeing an increase in self-represented litigants in copyright and infringement cases (movies, TV rights, etc.). Litigants are seeking all types of advice from prefiling advice, motions for summary judgment, service of process, discovery matters, etc. Moreover, many of these pro se plaintiffs could afford to hire lawyers but choose not to.

The clinics were opened in 2009. At first, the court reached out to large law firms to see if they would take on pro bono cases, mostly inmates suing someone within the institution. The clinics were a way for newer lawyers in the firm to get trial experience in cases the pro bono lawyers felt could not be resolved by summary judgment. The pro bono service wasn't entirely a donation on the part of firms. Some of the law firms actually prevailed in cases on behalf of the plaintiffs and received attorney's fees. In fact, one case even went to U.S. Supreme Court, and the firm representing the client returned the fee to fund pro se clinics. Donations like that continue to fund clinics today in addition to the money provided by the attorney admission funds. That funding has allowed an expansion of the clinics. The attorney admission fees represent a

reasonably large amount of money, and judges couldn't agree on how it should be spent. Using it to fund the clinics was a good way to benefit both the bench and bar.

One important aspect of understanding the problem of unrepresented litigants is understanding the impact of the pandemic on pro se plaintiffs and, in particular, what happened to pro se clinics during the pandemic. During the pandemic in the Central District of California, Judge Ty ensured that the pro se clinics were still available remotely via video conferencing and telephone. In addition, the court quickly utilized outside spaces to return to in-person assistance. Nevertheless, the experience of disrupting the pro se clinics highlighted many of the issues with pro se litigation. Progress needs to be made in a number of areas, such as forms not being so complicated or available online, to make the work of the pro se clinics less critical. There is also a real benefit from examining what other courts did to help pro se litigants during the pandemic. The move to more remote access and the different strategies employed present an opportunity to learn from each other and to improve court systems for dealing with unrepresented litigants.

Professor Sandefur: One way to think of the problem of unrepresented litigants is to think of an iceberg. Although imposing when viewed above the water, some 90 percent of the typical iceberg is actually below the surface. Studying unrepresented litigants by examining court filings is a lot like studying icebergs by looking at the portion above the surface of the water. If the iceberg represents all the civil justice problems facing America, the top sliver is what you actually see in court. Similar to icebergs, about 11 percent of people's civil justice issues are what courts see. In case management, we need to think very broadly when considering ordinary people who are pro se litigants. Examining only the experience of those who actually end up in court risks missing the problem of those who are discouraged from filing or pursuing their claim; these problems are not even within the courthouse.

To be clear, sometimes an individual is better off without a lawyer, and sometimes they are not, but in all cases, lawyers will manage the process, and the system is designed for them. This fact means that one goal of case management should be to try to simplify the process. One common suggestion is to have forms that simplify filing—for example, by allowing people to check off which aspects of litigation apply to their case.

Consider a domestic violence case. People on both sides of a domestic violence case often appear unrepresented. Since getting an initial temporary order of protection is often vital in these cases, the court needs to start the process quickly. For example, in the local court in the Bronx, getting an order typically took a day or more, but the court decided to devote resources to shorten the process to 90 minutes by putting everyone in one room immediately.

Process simplification can also allow courts to deal more easily with changing circumstances. Consider the example that faced the Washington, D.C., family courts. The D.C. family court was hearing harassment cases in which the harassment was going on over Facebook. The question was how to serve the harasser. One obvious solution was to serve him over Facebook, but this

was outside the normal procedures of the D.C. family court. The lesson is that the courts need to change their old perceptions of service to adapt to new technologies.

Finally, consider what the court can do to help people respond and show up to debt collection cases. First, we can explain the debt collection process to people in plain language. Courts that have provided simple-to-understand documents have found that debtors file answers in collection procedures at twice the rate they did before, and they default about half as often. Think about what this means. Those individuals do better when they show up to court and their cases are decided on merits. The metaphor is that if you want people to exercise, turn off the elevators instead of trying to tell every single person that they should exercise more. Put differently, instead of trying to convince individuals to show up for debt collection cases and go through a process designed for lawyers, redesign work processes to make the results come about. That is the promise of technology—an accessible system individuals can use without the assistance of lawyers.

President Emeritus Sandman: I want to stress the urgency of the problem of self-represented litigants. Courts need to develop differentiated case management for unrepresented litigants, and this is especially true for high-volume, high-stakes cases like evictions and protection orders in abuse cases.

Why is there not more pressure to address the situation? One possibility is that people do not understand the magnitude of the problem. It's likely that most lawyers have no idea that there are so many pro se litigants. Part of that disconnect arises from the way we train lawyers. Every case in a law school casebook was litigated with lawyers on both sides. Yet no one tells law students that those cases are not typical of the civil legal system today. In some categories of cases, like evictions, the numbers of pro se parties are staggeringly high. In Washington, D.C., 88 percent of eviction cases find the tenant not represented by a lawyer. In contrast, more than 90 percent of landlords are represented in those same cases. A similar story emerges in cases involving protection orders, debt collection, child custody, and child support. The legal system is not working for these unrepresented litigants, hence the urgency of reforms.

The large number of unrepresented litigants is a relatively recent phenomenon. In 1976, in one of the earliest studies of the phenomenon, a *Yale Law Journal* analysis of divorce cases in Connecticut found that in just 2 percent of cases, at least one party didn't have a lawyer ("The Unauthorized Practice of Law and Pro Se Divorce," 1976). The number of self-represented litigants increased dramatically in the last quarter of the 20th century. But the system never adapted to accommodate this change. The rules for adjudicating a dispute in court are archaic and designed by lawyers for lawyers. The archaic design is really a rule of law issue. It is fundamentally unfair to compel people who can't afford a lawyer to play by the rules of a system created for people who can. We need to redesign court processes so that they work for the unrepresented.

There are, of course, limitations to what case management by itself can do to provide meaningful access to unrepresented litigants. While strong case management is absolutely essential to improving access, it is not sufficient. Courts need to look at the overall litigation process. Modification might require amendments to rules of civil procedure, as well as statutory changes. Courts should examine all processes across the life of a case, from filing to final disposition, and evaluate each step in the process from the perspective of an unrepresented litigant. Is the step necessary? Can it be made easier? Is it explained clearly?

Such an evaluation will require data on court processes to help evaluate what will work and what won't work. There is currently a lack of data in law generally, particularly on litigation processes. Ideally, we would use randomized control trials (RTCs), like those Jim Greiner and the Access to Justice Lab are currently conducting at Harvard, to see what works and what doesn't work. Even without RTCs, we need to have more people engaging in research that provides meaningful guidance through scientific data collection and analysis.

Finally, we need to involve real-life users, particularly self-represented litigants, in the design of solutions, not just lawyers purporting to speak for them. That requires outreach. Far too often, reform efforts have depended on lawyers to drive system change and come up with ideas to simplify the process. Yet if you ask lawyers to simplify a legal process, they'll usually start with the status quo and tweak it. Such tweaks are not sufficient. Courts need to be proponents of user-centered design, where the user is the pro se filer. Courts need to hear from self-represented litigants directly about what will work for them rather than taking the patronizing approach of having lawyers determine what they need.

Justice Himonas: In part, I think we are asking the wrong question: instead of talking about helping the growing class of unrepresented litigants, ask why do we have such a burgeoning class of unrepresented litigants in the first place? And how do we prevent "unrepresentedness" from continuing to spiral? Those questions are important because, although case management offers a potential, partial solution, it won't solve the problem completely. In fact, case management will likely only mend the edges of the problem. We must think broadly about the problem of unrepresented litigants and, I suspect, implement a variety of strategies to take care of the problem as just digital platforms or judging, or any single idea will be insufficient.

To give some context, in adult courts in Utah's largest judicial district, in 93 percent of all civil cases, one or more parties were unrepresented through the entirety of the civil litigation process. That lack of representation isn't just problematic for the individuals; it's an overwhelming problem for state courts. Case management strategies like digital platforms and streamlining court procedures through digital processes can simplify the process and make the legal process easier; for example, litigants can be pinged on their phones for hearing dates, pay online, and file online. But having said that, changing rules doesn't necessarily change behavior. That requires a change in court culture and, certainly, more resources for the court.

Chapter 4. Panel: What Outcomes Can We Measure?

Moderator:	Eric Helland, William F. Podlich Professor of Economics and George R. Roberts Fellow, Claremont McKenna College; Senior Economist, RAND Corporation
Presenters:	Nicholas M. Pace, Senior Social Scientist, RAND Corporation
	Justice Joshua P. Groban, California Supreme Court
	Judge Yvonne Gonzalez Rogers, Northern District of California Richard H. Sander, Dukeminier Distinguished Professor of Law, UCLA School of Law
	Jonah B. Gelbach, Visiting Professor of Law, New York University; Professor of Law, UC Berkeley School of Law
	Renee Danser, Associate Director, Access to Justice Lab, Harvard Law School

Professor Helland: In many ways, RAND's study of the 1990 Civil Justice Reform Act is the foundational evaluation of case management. Mr. Pace, as one of the original study's authors, can you describe some of the issues faced in that study and how that study might inform future studies of case management reforms?

Mr. Pace: There was a growing concern in the 1980s that the civil justice system was taking too long to resolve cases, at great expense to the parties. The junior senator from Delaware at the time, Joe Biden, championed the idea of a working conference that would bring together stakeholders as well as academics and judges and come up with a set of recommendations for procedural reform of the federal courts. The Brookings Institution hosted Biden's Civil Justice Reform Task Force, the RAND Institute for Civil Justice served as technical advisor, and a report outlining a set of recommendations regarding cost and delay was published in 1990 (Dunworth and Pace, 1990). Within a year of the publication of the Brookings Institution report, its recommendations found their way into the Civil Justice Reform Act of 1990, or CJRA, as it is known to its friends.

The act operated on three levels. First, it provided a road map for all federal district courts to confer with local stakeholders and come up with plans by December 1993 that would address costs and delays. Second, it required, for the first time, federal district courts to publish information about case backlog and to report it at the individual-judge level. And third, it created a massive experiment in case management where strategies could be implemented and assessed for effectiveness. The act required that a research entity, which turned out to be RAND, would have unprecedented access to information about federal civil case processing. The act also created a pilot program in which ten federal district courts were to be selected and required to adopt certain case management techniques, such as differential case management, early judicial management of cases, monitoring and control of complex cases, encouragement of cost-effective discovery, requiring litigants to make good-faith efforts to resolve discovery disputes before

filing a motion, and referral of appropriate cases to alternative dispute resolution. The act also directed these ten courts to consider additional techniques, such as requiring the parties to come up with a joint discovery and case management plan, requiring attorney and client signatures on requests for postponements or extensions, and requiring the in-person or telephonic presence of a party representative with authority to bind that litigant to the results of any settlement conference. These techniques don't seem particularly groundbreaking in 2021, but at the time, the attitude among many judges was that this sort of hands-on management was an unnecessary intrusion into the affairs of private parties.

What made this exciting from a research standpoint was that an additional ten districts that didn't have these mandates as formal requirements would be picked as comparison sites. In accordance with Rule 1 of the Federal Rules of Civil Procedure, cases in the 20 courts were compared for relative differences in speed, expense, and justice, the last being measured by participants' reported satisfaction with the process and their perceptions of overall fairness. All in all, the study examined 10,000 cases with unfettered access to the courts' case management system. The RAND team obtained surveys from judges in most of those cases, from 9,000 lawyers and from about 5,000 litigants. The research team also interviewed judges and court administrators to understand the pre- and postpilot practices in those courts.

All in all, the study concluded that as a *package* of management tools, CJRA, as implemented in the pilot districts, had little effect on time to disposition, on attorney work hours (the proxy used for litigant costs), on time spent by judges on individual cases, and on participant satisfaction and perception of fairness. One thing that did work was the requirement that courts disclose the names of each judge's cases that did not terminate within three years of filing. The moment that information began to be published, the percentage of cases that were at least three years old began to drop, ultimately by 25 percent (Kakalik et al., 1996).

The problem wasn't that the individual techniques weren't useful. For example, early case management of any kind reduced overall time to disposition, though at the cost of increasing attorney work hours. Shortening the time to discovery cutoffs also reduced time and, in this case, *reduced* litigant legal costs. The same was true for having litigants accompany their attorneys to settlement conferences and setting firm trial dates. But as a pilot program, CJRA didn't work the magic that was intended in those initial years.

One reason studies of pilot court programs such as these are difficult subjects for research is that we have an independent judiciary in which judges do what they think is best for the cases they manage and do what they think is in the best interests of justice. As a result, no matter what the rules say, or what highly granulated procedures were set forth in detailed cost and delay reduction plans, judges are going to do what they want, which isn't always optimal from a researcher's perspective.

This is why studying pilot programs can be so difficult. We often get asked to assess the impact of newly adopted pilots as early as possible to figure out whether the novel techniques or whatever should go system-wide. But pilot court programs have bugs to work out after adoption;

they rely on judges to apply the new rules in cases that the judges may not think are appropriate for that approach, and they can imply that what a judge was doing before the change was wrong in some way. Nobody likes that implication. When we asked the judges in the pilot districts if they were doing anything different in the post-CJRA cases compared to the pre-ones, 85 percent of the time, the answer was no. This is not to say that CJRA didn't have a long-term effect on civil case processing. It certainly heightened awareness among the judiciary about cost and delay concerns and introduced many judges to the idea of early case management and having the courts set the pace of litigation rather than the litigants, that have become mainstream today. But the rollout of pilot programs is a slow one, and changing long-standing judicial practices turns out, ironically enough, to take a long time to accomplish, and if you try to study these programs before they become mature enough for a quality examination, you might not be able to answer the really important questions.

Justice Groban: It is interesting that the three-year requirement was effective because lawyers and judges found a workaround for even that, involving filing courtesy copies of briefs so as not to start the three-year clock.

An audience member: There were no judges on the Civil Justice Reform Task Force committee. This was because, at the time, the perception was that the judges were the main source of the problem, and in order to produce an effort to change judges' behavior, judges should not have a seat at the table. This strategy was a huge error. It contributed to the negative feeling among the judiciary about the effort as well as excluded important experience and perceptions from the conversation, causing significant injury to the ultimate outcome.

Judge Gonzalez Rogers: I like pilots and will apply them without waiting for the bureaucracy to tell me it's a good idea. In the Northern District of California, there is a group of judges who do pilots on a more grassroots basis. Pilots produce something tangible. It's clear that there is no one answer, and we must think about these things as a mosaic and hope that by the end, we will have done something forward-thinking and progressive that is efficient and creates justice with a capital *J*.

I encourage researchers to find judges willing to work with them but also to think about how the studies can help the judges. The "help" aspect is important because judges are tired and have a ton of cases, especially at the state court level, where judges have relatively little staff support. When researchers ask, "Why can't judges help us?" Often, it's because they have so little time. I encourage the development of projects where researchers are part of the intake and collecting as opposed to asking courts and judges to do it. Pilots will be improved by studies that foster a symbiotic relationship.

Professor Gelbach echoed the sentiment that studies should attempt to make use of data that is already available or being collected. It's useful to think about pilots in terms of maximizing the value of the information that comes out. For example, random assignment of judges within districts that are doing the same pilot but with half of the cases being held out from the pilot provides a method of evaluation. Even though there is unlikely to be full compliance among judges, in the sense that some judges assigned to the pilot won't implement the proposed reform and some judges not assigned to the pilot might implement the reform of their own volition, empirical researchers have techniques to address such noncompliance. There are a lot of potential gains to be had from researchers and judges seeing each other as collaborators.

The Limits of Natural Experiments

The moderator asked Professor Gelbach about the limitations of so-called "natural experiments," case management experiments that arise because some judges simply try a technique without prompting by the researcher, for measuring the impact of different case management policies.

Professor Gelbach: One issue is that assignment to treatment, in this context having a specific case management technique used in a specific case, is not necessarily random in the way a clinical trial is random. In the litigation context, one issue is that the facts that generate the variation that looks like it would be useful for measuring the effect of different case management practices are often going to correlate with other things about a judge. For example, some judges are generally more focused on getting cases through, and, on average, it might be the case that those judges are more likely to adopt observable changes in policy. A second issue arises because settlement is up to the parties and sometimes results from judicial pressure. Economists would call these situations *endogenous*—a result of the considered strategic behavioral choices of the people making the decisions and whose behavior we're trying to understand. Consequently, we can't just look at what happens under different policy regimes and assume a causal relationship. It may be that we have different kinds of litigants and different kinds of cases and that they settle for reasons that are difficult to observe. Researchers can almost never observe the terms of a settlement. There is a limit to what can be observed.

Randomized Control Trials as the Gold Standard of Policy Evaluation

Increasingly, social scientists are turning to randomized control trials (RCTs) to deal with the endogeneity described by Professor Gelbach. Professor Helland asked Renee Danser, the associate director of the Access to Justice (A2J) Lab at Harvard Law School, to address at some point in her remarks how A2J gets courts to participate in RCTs.

Ms. Danser: Our work attempts to gain more support from courts to go beyond just case outcomes and ask how what we're doing as a justice system affects individuals and communities beyond that case. We try connecting results to community and socioeconomic effects, such as housing stability, employment stability, general health, and well-being. We're all interested in knowing if the justice system is having a longer reach than we expected. One other thing, which was mentioned earlier, is not just being an independent researcher but beginning a partnership. We design research studies with partners rather than designing a study and then asking the partner to come along with the researcher's mode of thinking. Another barrier is that the legal community has a misunderstanding of the ethical permissibility of randomized control studies. The misunderstanding is that we can't treat people differently because what we are doing is what is best for the person. And if we aren't giving people in the control group what is best for them, then we aren't being neutral as a justice system. But we can't fall back on neutrality when we don't actually know whether what we're doing is helping or harming. The goal is to figure out what works and what doesn't.

There is also the fact of scarcity: that there is more need than there is subsidized help that we can provide. As a legal services and justice community, we are bad at reaching out and informing the community about the services we provide and inviting them to take them up. We know that we can't serve them all, so we fear that if we invite them, they will come. So, randomized control studies are not ethically impermissible for the reason that not everyone will be treated the same—because we are *already* turning people away.

Another technique that is working at certain labs is working with a multidisciplinary team, including not just researchers but lawyers and those with an appreciation of the justice system. It's incredibly important to create systems of trust, and this conference is a great example where a team of not-completely-alike people can come together to develop research and make it actionable beyond just the results.

Professor Helland: Scarcity is possibly an easier conversation with judges than other stakeholders in the legal system because judges know that we must ration. But what sounds more challenging is convincing judges who are certain that what they are doing works that they should put that certainty to the test in an RCT. Often judges have policies in their courtroom that they are certain are superior to the policies used in other courts, and they become a sort of evangelist for it. What an RCT is asking them to do is to not give their preferred treatment. My understanding is that, years ago, this was an issue in medical trials as well. Doctors had preferred treatments they were very confident in, and not using them on the control group felt like shirking a professional responsibility. How do we have that conversation with a judge?

Ms. Danser: One point of disagreement: the legal space has not fully recognized the scarcity. That is an *easier* conversation but not necessarily an easy conversation. But to the question: When a judge or legal services provider believes what they are doing is the best, sometimes that

is actually the selling point for doing the evaluation. And don't forget that the control group might not get *nothing*; often the control group just gets the status quo, but the status quo doesn't need to be no services at all. That said, if a judge thinks that a technique is the best treatment, then we should want to know that so we can tell everyone else. That's how we've structured that conversation, but it really is a long-game process—lots of 30-minute discussions over lots of time to build trust. Consensus building is important to equalize the room.

Making Case Management Evaluations Win-Win for Judges

For RCT, pilot programs, and natural experiments, judicial cooperation is, if not vital, then extremely helpful. Professor Helland asked Justice Groban of the California Supreme Court how researchers could make such cooperation valuable for judges, given judges' workload and existing demands.

Justice Groban: Judges are people too. When somebody from the outside comes in, we are probably going to have the same questions that anyone else is going to have about a study or some potential change. That is: I'm open to doing better at my job, especially if it will save time, just don't cause me pain or upset or embarrass me. The "embarrass me" concern may be more of a factor for judges than for people in other professions, and researchers probably need to be acutely aware of how understandably concerned judges can be about being in the public eye. Something that seems innocuous to the researcher may not to the judge.

Take, for example, a study about the efficacy of discovery meets and confers. A judge may be wondering if this will result in a finding that "I don't do my job as well as others may." Is the next finding going to be that I mistreat low-dollar litigants or pro-per litigants or treat them differently than others? So, thinking about buy-in is the same for an individual judge as it is for any corporation. Bain & Co. wouldn't do a study of how Amazon could deliver more packages more quickly without buy-in from Amazon. Think of the courts in a similar way.

It would be helpful to develop a set of formal or informal protocols to manage expectations when researchers come to the court. Judges like looking at a term sheet: agreement about buy-in from judges early on, hearing what the needs of the court are, up-front conversation about anonymity, especially with respect to the names of individuals judges and justice, and creating a climate where judges can serve not only as vehicles to tell researchers what would be helpful but can also serve as translators throughout the process. The nomenclature and procedures vary so greatly between courts, divisions, judges, etc., so having someone on your team to help translate can be helpful. Judges are generally open to change but need to be convinced that it is worth their while and won't cause them upset or embarrassment.

Professor Gelbach: If one thing comes out of this event, I hope it is a set of principles for researcher and judiciary collaboration. The point of anonymity, which might seem a bit troubling, is an understandable position and acceptable price to pay for the public to get

information about how different case management techniques function. That's a great example where a statement of principles or best practices with the imprimatur of judges who are committed to the public service entailed in this kind of research but also looking out for the interest of their courts.

But also, researchers can do other research projects. We aren't interested in these kinds of questions because it's the only thing we can do with our time. We're interested because there is real public value to it. That's an important thing that I hope judges around the country can understand—many of us researchers are trying to help with this public service. By way of example, while doing some research work with a U.S. District Court on jury selection, I found the judges on the committee were committed to the study, while other judges on the court were really not very interested in it. On a related matter, the Administrative Office of the U.S. Courts gave what seemed to me enormous pushback on the idea that there would be public awareness of the degree to which juries are not representative of the census data for that area. There is room for a lot of collaboration, but while it may be different for state courts, Article III is life tenure, and one way to use that security is to invest in the judicial system.

Justice Groban: The example of jury selection is a good one, but it is fraught because one way to describe that research is as important empirical research in the public interest that every jurist would want to know. But a different way to phrase it is: "You want to come in and tell me that my court is violating people's constitutional rights every day?" That's a discomforting proposition on a number of different levels.

Professor Gelbach: If I imagine that I'm a judge, and I am presented with research that showed that, as a result of processes that I didn't design and through no fault of my own, I am violating constitutional rights, and if researchers are showing me the problem and offering ideas about how to fix it, I would regard that as really important.

Justice Groban: Yes, I agree, but even so, this is going to make some judges nervous, and that has to be thought through. And finally, you are assuming that the jurist who may just be meeting you for the first time will trust that the research is going to be done the right way and is going to be accurate, but you may not have established that level of trust, especially so early in the process.

Judge Gonzalez Rogers: It's complicated and takes time to revamp a system if that's what you want to do. Just because you're at a particular level doesn't mean you're violating someone's constitutional rights, even though you *could* be at a level that makes it even better.

Sometimes judges just aren't good at every single thing that judges need to do. There are rules-based experiments that could be designed to fix a particular problem that then engage the judge at a later point. For example, there's a court with a general order that deals with all

Americans with Disabilities Act cases, stating certain specific rules about filings and deadlines, so the judges don't get to them until the end. That's a rule-based program that is case management, but that doesn't depend on the judge to implement or not.

Professor Yeazell: Here's a very, very practical solution: If one is working with a state judge, who are all one way or another subject to electoral checks at some point, a researcher may be very cognizant of when that retention election is coming up. If it's next year, that's one thing. But if it's 11 years off, maybe you're not so worried.

An audience member asked how many studies that are collecting information on courts need to be reviewed by an institutional review board (IRB), the administrative body established by colleges, universities, and research institutes to protect human subjects.

Ms. Danser: For RCTs, it is every single one since they all involve human subjects, although that would depend on whether you are varying the treatment assigned to different subjects.

Professor Gelbach: For other empirical studies, that would depend on whether the researcher is using court data that already exist or not. If you are simply using publicly available information, I wouldn't think that should require IRB's approval, although if a researcher is uncertain, they should consult their IRB. Typically, it will tell you if you need IRB approval.

Professor Helland: I agree with Professor Gelbach. If it's publicly available data—that is, if anyone could find the information online—it's unlikely to require IRB approval but always good to check.

Professor Gelbach: It's a great point that judges don't know the researchers who walk through their door and, in that situation, may not feel comfortable working with them. One solution would be some sort of consortium or clearinghouse where researchers could get a certification indicating the researchers know what they're doing—a kind of intermediation between researchers and the bench. We should certainly be looking for collaborative ways to bridge that gap.

An audience member pointed out that pilots are very important for two reasons: First, there are unintended consequences. When a judge does one thing over here, another thing may be happening over there. Second, sometimes judges are just wrong or just make mistakes. Often, a judge will work up a lengthy and elaborate process and then become married to that process and be hesitant to accept that there may be problems with it. When designing a pilot, start with deciding the questions to answer to collect the right data points, and then also have an implementation plan if it works. Fantastic projects have language on the shelf; there are 40 years

of case management studies all pointing in the same direction, the vast majority of which have not been implemented.

Judge Gonzalez Rogers: What's the communication plan? For example, if we have something great, there should be a mechanism to present it at all the circuit conferences.

Professor Helland: Judge Rogers, can you give us advice on how to effectively utilize these circuit conferences?

Judge Gonzalez Rogers: The conferences are where judges brainstorm and connect with other leaders. For example, Judge Kuhl is a key person to seek out if you're interested in case management. There are leaders that judges look to. Judges also respond to the bar. When I couldn't get my colleagues to adopt a technique, I took it to the bar and convinced *them* to make a presentation at the conference to tell the judges how good it was. When the bar said, "We like this. It works. Here are the judges who have done it," then other judges accepted it.

Judge Highberger: What about the fact that much research is done using only publicly available data? Wouldn't researchers like better data—i.e., access behind the federal paywall? Judges can't be friendly with researchers because they like them and then restrict access to other organizations just because they don't know them. How can we deal with that?

An audience member pointed out that key stakeholders are also missing from the conversation if the discussion is restricted to judges and researchers.

Professor Gelbach: In response to the data-access question: Many agencies have restricted-use models for data distribution that could be used to address these concerns.

Ms. Danser: We are definitively missing important voices when we restrict the conversation to judges and researchers, including community voices. What do they think is valuable research, and what about the justice system is important to them?

Professor Sander: If we compare controlled experiments with web-scraping work, there is a big difference in cost. To what extent is low-cost research like web scraping a reasonable substitute? What is the cost-benefit trade-off for the different methodologies, both from a research quality point of view as well as a judicial persuasiveness point of view?

Professor Helland: What a pilot study can do is identify what is going to go wrong. It won't answer how to separate who participates from the effect of the policy, since participation is at the discretion of the judges who sign up for the pilot. Pilot studies are really good at seeing whether

something works. In contrast, work like the LA Superior Courts project is limited to trying to overcome problems with nonrandom assignment, and you're limited to things that have already been done. Randomized control studies get around those problems. The hierarchy of these methodologies is also the hierarchy of comfort: A judge will really have to be comfortable with a researcher to let them give random treatment to the people coming into their courtroom. If it's a pilot study and the judge is opting in, there is a level of comfort, but the judge gets to look at it first and decide they are comfortable. So, the comfort doesn't have to be that high for pilot studies. It's a little higher when you want to look at what a judge has already done, but then you're limited to past action. For randomized control studies, you better have a relationship to build that trust.

Chapter 5. Panel: Paths Forward

Moderators:	Judge Carolyn B. Kuhl, Superior Court of the State of California for the County of Los Angeles
	Jamie Morikawa, Associate Director, RAND Institute for Civil Justice
Presenters:	Chief Justice Nathan L. Hecht, Supreme Court of Texas; Immediate Past President, Conference of Chief Justices
	Judge David Levi (retired), President, American Law Institute; Director, Bolch Judicial Institute
	Deborah R. Hensler, Judge John W. Ford Professor of Dispute Resolution, Stanford University
	Richard L. Marcus, Distinguished Professor of Law and Horace O. Coil Chair in Litigation, UC College of the Law, San Francisco; Associate Reporter, Federal Rules Advisory Committee on Civil Rules
	Mary C. McQueen, President, National Center for State Courts

Judge Kuhl and Ms. Morikawa: We suggested to each of the five panelists that they consider the following questions:

1. Given the wide variations in approaches to case management, can a uniform and systematic approach lead to a more effective approach to case management overall?
2. How can we motivate judges to change their current approaches to case management?
3. How can courts be encouraged to adopt these approaches?
4. Can local rules effect changes in case management?
5. Would it be useful to have a toolkit to address these issues?

However, given the diverse and well-informed perspectives of the panelists, we gave them total freedom to comment on the substance of the previous panels and to express their views of case management in practice and how empirical work can contribute to its improvement.

Chief Justice Hecht: This is a historic time, and it is urgent that we act.

Since its overhaul in the 1930s, the American justice system has changed very little. The reform in the 1930s did not embrace management of cases and disputes. Case management has since developed, but it has tended to focus more on complex cases. In 2019, some 30,000 state courts in the United States decided somewhere around 82 million cases. A small fraction of those would benefit from the kind of case management designed for complex cases—like initial disclosure, discovery and status conferences, discovery, summary judgment, and trial preparation. Yet all would benefit from management of cases by type—e.g., evictions, debt collection, small claims, and many family matters. Nevertheless, the civil justice system has proved to be quite static and resistant to change.

COVID-19 changed that dynamic and, in an instant, created a unique opportunity for case management. When courts were forced to close and shut their doors to the public, they were given no choice other than to adapt for their survival. Over the course of the pandemic, judges

and courts have repeatedly proven themselves not only more willing than previously thought but also more able to change the ways things are done.

When the pandemic first struck in March of 2020, judges were suddenly asked to learn how to conduct trials and hearings over Zoom. With very little training and only a few days' notice, the courts were able to adapt. This shift was welcomed by judges not only because it was a necessity but because it was evident that remote video court access resulted in increased participation, reduced time frames for case development and allowed increased access to legal services. It was a marked shift and has opened the door for a sea change in the management of a large volume of cases. The time for change is now precisely because judges and courts are already undergoing material changes and have been forced to see firsthand the value of new court processes.

Now that we have "got it" with respect to the need for change, what do we do with that realization? We need to act to make the promise of justice more real. We need to make improvements that people can use. To give an example, legal aid lawyers can sit in remotely for eviction hearings.

One of the questions posed for this panel is how judges can be motivated to change their current approaches to case management. New and better avenues to produce just outcomes will be embraced by judges because judges most value the pursuit of justice. Other motivators are not quite as high for members of the judiciary—for example, judges do not get paid more if they use effective case management techniques in their courts. Rather, the emphasis needs to be firmly on how case management improves the system overall and strengthens the justice system.

The goal of improving the public perception of courts goes hand in hand with producing just outcomes. Recent events have many branches of government, including the judiciary, taking sharp criticisms. People need to know that the system is here for them. Changes are needed to create a system that gives people confidence they can find justice in the courts when they don't have anywhere else to turn.

Judge Levi: Understanding the role of case management in the federal courts requires a focus on the Federal Rules of Civil Procedure and on the federal judges who implement the rules.

What do the rules want? They want to preserve judicial discretion where a procedural matter is not covered by the rules. They want transsubstantivity—the rules apply regardless of the substantive nature of the cause of action being litigated. They want local court rules that are not inconsistent with the Federal Rules—a civil litigator should be able to go into any federal court in the country and expect uniform procedures.

No rule contemplates pilot programs for introducing case management ideas. One such rule was proposed in the past but failed to gain traction because of the general approach of the rules to preserve the discretion of individual federal judges. This means that judges have broad discretion to experiment with case management and to create their own pilot programs so long as

their approach is not inconsistent with the rules. Thus, the Federal Rules' current framework is conducive to exploring new case management approaches for handling civil cases.

What do federal judges want? They want to get their work done to the best of their ability. They want to avoid being embarrassed by being on the "six-month list" (a list of judges who have undecided motions pending for more than six months). They want to get their criminal cases done. And, inevitably, there is not enough time.

In order to get more case management efforts adopted by federal courts, we need to understand these judicial motivations. As Chief Justice Hecht stated, a sense of justice is a strong motivation for judges. However, getting the work done and wrapping up matters is also a strong motivator. After all, judges are people too, and being a judge is a tough job. In the federal system, where judges are responsible for both civil and criminal cases, they must work incredibly hard to juggle moving all matters forward. Pushback on implementing new case management strategies is often the result of a lack of time on the judge's part rather than a dislike of case management. A judge's head might be so far underwater that he or she doesn't have the bandwidth to try anything new.

One way of breaking through to overwhelmed judges is with hard data. Data is important. There is a natural fit of academics with the courts in doing empirical research. Some of the empirical findings presented at this conference are research of the sort judges can find persuasive. These types of empirical projects simply did not exist 20 years ago. Empirical data always has been an underlying driver of the rules, and it used to be standard practice that the Federal Rules of Civil Procedure would not be revised by the committee unless there was strong empirical evidence to back up a revision. In recent years, data advancement has been so great that it only makes sense to continue that tradition. Empirical studies can be disseminated to federal judges in the context of circuit conferences and midwinter sessions when federal court judges get together.

Data about the courts is being used by litigants in ways that judges themselves do not know about. Litigants probably know more about ruling tendencies than judges do themselves. For example, modern private analytics can calculate how many days a judge typically takes to rule on a certain type of motion, something that an individual judge would not track. If we show judges the ever-expanding importance of data and emphasize that data can show us a path forward to help judges do their work, judges likely will be receptive to adopting new case management techniques. All courts have at least one area that can be improved. The focus needs to be on court systems as a whole.

I suggest several areas for possible future empirical work federal courts:

- *Problem-solving courts.* There are problem-solving courts in New York and Philadelphia where the judges are highly involved with different supervised release measures.
- *"Rocket docket."* The rocket docket is a case management process used by judges to quickly push a case through to trial. It hasn't been studied, likely because of the judges' strong sense of autonomy. Judges have a firm opinion of the effectiveness of their own

case management, and perhaps proponents of the rocket docket would not be moved by the results of any study. But it is very surprising that no one has looked at "rocket docket" case management empirically.

- *Simplified procedures for noncomplex cases where low dollar amounts are in controversy.* A pilot study could be organized.
- *Use of forms specific to substantive case types or particular procedures.* The Federal Rules of Civil Procedure no longer propose standard forms. (They were abandoned because the forms seemed idiosyncratic and difficult to manage.) However, the absence of nationwide approved forms creates an opportunity to experiment with model forms and to measure how well they work. The Administrative Office or one of the circuits could step in and develop model forms for straightforward substantive case types or for processes like discovery. Judges and lawyers would be receptive to high-quality forms that further efficiency.

Efficiency is often the most important measure in an empirical study of how cases are processed. However, efficiency should not be the only goal. Public perception of the justice system must be considered. How judges handle their cases has personal and societal aspects. It is important for judges to be in touch with the people. As the courts have become more congested, the proportion of the population coming to know a judge has waned. This hurts the public perception of the judiciary and decreases its effectiveness. We should look for opportunities for people to see the judge.

Professor Hensler: We need to ask the fundamental question: What problem are we trying to solve and for whom? As a veteran in the judicial case management space, I suggest we need to avoid prior pitfalls and zero in on the "new" dimensions of case management identified during the conference. It is important to recognize distinctions between types of cases and to identify categories where attention to case management reform ideas should be placed.

Data indicates that the bulk of case management occurs in multiparty litigation. In the mass tort area, the problem is coordination because of the large number of parties. Logistically, it would be impossible for these cases to move forward if no one took charge. The natural person to assume the coordination function is the judge presiding over the case. While these cases obviously need case management, its use in this domain has still proved controversial.

It is less clear that we need case management in other case types. In disputes involving a small number of parties, research shows that a disproportionately small number of cases take up the most time. That is, they last the longest, have the most discovery disputes, and cost the most. However, these measures are also correlated with the stakes of a case. The investment of more time and resources in these cases by the parties and their lawyers is the result of a rational and strategic decision. In other words, the lawyers in these cases don't need case management because they are highly sophisticated. In the modern era, general counsels of firms have their own in-house analytics teams allowing them to make highly informed decisions about the conduct of litigation.

On the opposite end of the spectrum from mass tort litigation are cases with unrepresented litigants. Here, the competency of the parties is of high concern because they have limited access to the court and its processes. However, case management is of limited utility to these parties because they need more help than case management can provide. They need actual representation provided through programs such as Legal Aid. Full-fledged provision of legal services likely never will occur in this country. By contrast, the Netherlands has found a way to provide legal services to those without representation. Looser regulation of legal services would be more effective than case management for these case types because unrepresented parties would have better access to the level of help they need. Other advancements in programs like online dispute resolution and IT assistance also would help.

This leaves us with the category of cases in the middle—average disputes with average lawyers. Surprisingly, and somewhat concerningly, lawyers and parties in this middle category of cases need case management directives from the court. It's hard to tell what exactly is going on with these lawyers and why they require court assistance to move their cases along. The explanation likely has something to do with the financial motives of lawyers, and a better understanding of that issue probably is necessary to paint a comprehensive picture. Future empirical research and development of case management techniques should recognize this category of cases as amenable to and in need of case management.

In summary, we should move away from using the diffuse term *case management*, and look instead at individual case management techniques.

Professor Marcus: I feel that I come to this conference as the proverbial "wet blanket." I question the overall utility of case management techniques and their long-term impact in light of the wide variety of cases our courts (particularly the state courts) must address. In recent history, procedural rule changes have been more about mending the edges than complete overhauls.

The range of types of litigation and differences among docket types must be considered when thinking about how case management will play out on a large scale. Each court is quite idiosyncratic and deals with disparate issues, depending on its jurisdictional and geographic makeup. For example, state courts must address the needs of unrepresented litigants. One potential solution currently employed by federal courts is the pro se assistance clerk who attempts to assist these types of litigants.

Disparate treatment of cases for purposes of case management is not inconsistent with the transsubstantive Federal Rules of Civil Procedure. The rules leave discretion for judicial management of case flow. In the UK, there are litigation tracks for cases based on the amount in controversy.

The larger question is: How do we get judges to engage in case management when and where we think it's a good idea? Motivating judges requires gradual culture change. Case management isn't a switch you can flip. The process of culture change starts with the individual judge.

Because each judge is a powerful and autonomous figure, they can't be forced into adopting a change in case management practice. The hardline approach of "turning off the elevators and forcing judges to take the stairs" is likely to be largely ineffective for this reason.

Nevertheless, empirical work can promote culture change, although it is a blunt instrument. It is important to keep in mind that when procedural rules were first being developed, there was a complete absence of any empirical data. Ostensibly, any data-driven rule proposed sits on firmer footing than its predecessor. Empirical research "back in the day" was a far cry from data and analyses employed for the papers at this conference. Historically, empirical research was more along the lines of reading court reports.

Roscoe Pound advocated being realistic about what can be achieved through rule changes. Empirical work and case management are unlikely to achieve perfection. When things are changed, one cannot expect complete satisfaction. For example, while a federal rule change would be unable to completely solve the unrepresented litigant issue, that does not mean the change is a failure. Rather, we should look for reforms that can be viewed as a marked improvement over the current model.

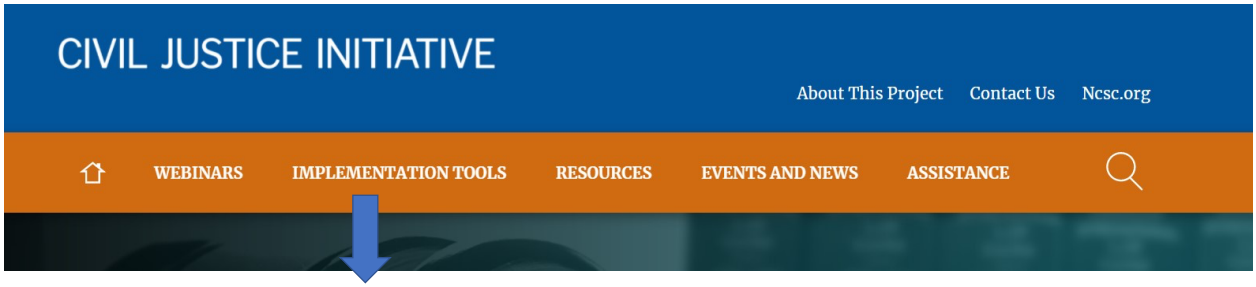
Ms. McQueen: The way forward in change is empirical data. The National Center for State Courts has made data the bedrock for changing procedural rules in state court across the country.

An examination of the five highest-performing state trial courts in the country found one common trait among them. That trait was leadership. Leadership in the court proved more important than calendaring, dockets, funding, or any other feature previously equated to efficiency. Specifically, these courts all had judges who were courageous enough to step up and ask what needed to be changes in order to get things done. Because the specific practices employed by these high-performing state trial courts varied, the finding that leadership was the common indicator of positive change strongly suggests that courts are best served by model principles that guide improvements at a high level.

More effective than just looking to the judge, the best case management programs put responsibility on the court as a whole. Just as courts slowly made the shift away from managing cases to managing problems, responsibility needs to be put on the court as an institution. It takes a wholly committed team to manage cases effectively. It is much more efficient for the court as a team to leverage scarce resources. This doesn't mean that the judge doesn't lead or coordinate the efforts, but a network of resources is best suited to track and manage cases. NCSC has a certification program for case management teams.

The following chart (Figure 5.1) summarizes key initiatives of the National Center for State Courts to help state courts implement the recommendations of the Conference of Chief Justices' 2016 Civil Justice Initiative.

Figure 5.1. Key Initiatives of the NCSC's Civil Justice Initiative Implementation



- Getting Started:
  - Roadmap for CJI Implementation
  - Self-Assessment Questionnaire
  - Instructions for Do-It-Yourself *Landscape of Civil Litigation*
  - CJI Performance Measures
  - CJI Implementation Case Studies: Idaho, Maine, Missouri, Texas
- Technology:
  - Criteria for Automated Civil Triage
  - Civil Case Management System (CMS) Requirements

Civil Case Management Teams (CCMTs)
- Guide for Building CCMTs
- Miami-Dade Civil Case Management Manual

SOURCE: National Center for State Courts, Civil Justice Initiative. The top panel is the Civil Justice Initiative homepage.
NOTE: CJI = Civil Justice Initiative.

A powerful example of effectiveness of the team approach to moving cases toward resolution is provided by a comparison of the Maricopa County (Arizona) and Seattle (Washington) court systems. Both jurisdictions are nearly identical from a hard-data perspective, but Maricopa had a reputation for being the most efficient and Seattle the least. The difference was that, in Maricopa, each judge had a judicial assistant whose job it was to track cases, send notices, and inform lawyers about ongoing cases. After much convincing, Seattle's judiciary finally understood that a team of this sort is a good investment and improved its efficiency metrics by implementing a system like Maricopa's.

I agree with Chief Justice Hecht that the time for change is now. The sense of urgency in adopting changes to address the dislocations of the pandemic provided an example of how courts can be flexible in implementing change. We have seen that courts are more than capable of urgent adaption when the times call for it, but such change requires courts to address unexpected problems. For example, the procedures developed to handle oral arguments virtually had to be modified to preclude unwelcome visitors from digitally crashing virtual hearings.

In terms of testing new case management ideas, one particularly effective way to see the impact of different ideas is through running simulations. A backlog reduction simulator can predict the effect proposed streamlined case-tracking processes would have on a judge's docket if introduced. Judges are more willing to make these sorts of changes when they can see concrete

predictive data. This generation of judicial leaders knows that they must look to technology and to data if they want to be successful. There is no avoiding it at this point. Going forward, working with large tech vendors to generate reports about everything that occurs in the courts will be even more important and allow for a greater success in implementing change.

There need to be court rules regarding case processing. A mandate is needed in order to get lawyer participation. The Texas courts have demonstrated this need for rules to direct lawyer behavior.

In order to better meet the needs of self-represented litigants, courts should provide assistance by sending out notice of hearing dates and using technology to help litigants keep track of their cases. However, there is a digital divide in providing access to the courts. For example, in order to be able to conduct voir dire remotely, prospective jurors need to be provided with access to iPads.

In order to motivate judges to change (e.g., to eliminate backlogs), there needs to be an "excellence strategy." No different than a businessperson, a judge has personal, professional, and moral ("justice") motivations. Simply taking the time to talk with each judge to understand how those motivations are playing out in their courtrooms can be a powerful tool in devising a path forward. For example, if judges are concerned about not having enough personal time, they can be presented with the concept that if they put in so many additional hours over the next six months, it will be feasible to catch up on the backlog, and they can go back to their eight-hour days. This type of thinking and planning was successful in solving a major backlog in the New York courts.

Leading Leaders is an excellent book by the dean of the Southern Methodist University Law School (Salacuse, 2005). It focuses on approaching change by building on relationships.

Judge Kuhl: On behalf of the moderators for this panel and the conference organizers, I would like to suggest several next steps for conference participants:

1. We invite everyone to suggest topics for additional empirical research. We especially would like to identify local courts' ongoing experiments in handling particular categories of cases or in using different case management techniques.
2. It seems promising to develop protocols for empirical researchers using court data. The goal would be to propose reasonable conditions that would make it more acceptable and productive for courts to provide data.
3. The discussion in Panel 3 suggested that an interdisciplinary panel drawn from this group could propose and then study an ideal model for debt collection cases. The model could include rules and forms to simplify procedure. development of IT tools to provide better understanding and access for litigants without lawyers. and low-cost pathways for litigants to consult with counsel.

We believe there is a consensus in this room that

- improvements in how civil cases are handled in the courts should be directed toward defined goals
- one size does not fit all in case management
- promoting a culture of experimentation and reform requires empirical measurement and evangelizing successful results.

Today, the judges and academics present at this conference have expressed enthusiasm for working together to provide access to court data and to develop research protocols for measuring the effects of judicial and court experimentation. We look forward to facilitating these collaborations and providing updates to conference participants on future projects.

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PART B
Conference Papers

This part consists of four papers submitted for the conference.

Chapter 6. A Systematic Approach to Principled Civil Case Management

Carolyn B. Kuhl and William F. Highberger***

This paper has been reformatted and reviewed for spelling but is otherwise presented as submitted to the conference.

Abstract

Whether judges and court administrators should be more pro-active in managing their civil cases has been a subject of debate and experimentation for many years. What we will call "pro-active management" has been tried in varying ways with some degree of success, but it also has generated criticism from academics and some appellate courts as either a waste of time or an essentially lawless exercise in judicial imperialism.

The purpose of this article is to describe the most common current forms of pro-active management, to discuss the key critiques, and to outline a unified theory of when and how pro-active management produces desirable consequences. We believe our approach enables one to set forth objective goals, strategies and tactics that produce more benefits than costs, and that apply to the full continuum of case types ranging from simple, repetitive litigation in which many litigants currently are self-represented to complex civil litigation. Each docket type, under these principles, calls for a specific "toolkit" guiding judicial supervision—aggressive with some docket types, and very limited in others. Our approach also is intended to pave the way for empirical research to measure the effectiveness of case management techniques against the objective goals of case management.

I. Introduction

Our interest in the topic of case management comes from our forty-seven combined years as California state court judges assigned to various docket types, with most of these years spent managing complex civil litigation.[1] We are keenly aware of the challenges our system poses for

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[1] California Rule of Court 3.400 defines a complex case as "an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." The Judicial Council of California created a Complex Civil Litigation Pilot Program in 2000, and Complex courts were established in Los Angeles and several other counties. For more details about the program's genesis, see Mitchell L. Bach & Lee Applebaum, *A*

the many litigants who attempt to access the civil justice system without a lawyer. Judge Kuhl spent four years leading the largest trial court system in the country during a time of drastic budget reductions.[2] The need to restructure civil operations brought into sharp focus the challenges of large-volume civil dockets—small claims, debt collection, eviction, and limited jurisdiction (cases involving less than $25,000)—in which many litigants lack legal representation.[3]

In this article we explore whether practical, efficient case management can help make meaningful access to justice more affordable and promote outcomes that reflect the merits of the case. For self-represented litigants, effective case management should contribute both to improving outcomes when laymen represent themselves and to making legal representation more affordable.

This article begins with a definition of case management that includes both administrative and judicial management of civil cases. The definition acknowledges that civil case management intervenes to direct case activity that otherwise would be left to each litigant's choices about how to employ the rules of civil procedure. Section II also acknowledges academic and appellate court criticisms of case management. We believe those criticisms are addressed by having clearly stated goals and transparency about case management strategies and tactics.

The literature on case management generally has overlooked the commonality, across all civil case types, of the fundamental goals of procedural justice. We set forth a systematic approach that (1) defines the goals of civil litigation, broadly considered, (2) suggests overall

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History of the Creation and Jurisdiction of Business Courts in the Last Decade, 60 THE BUSINESS LAWYER 151, 206–221 (Nov. 2004).

Each of us has over 200 class actions on our docket, coordinated case groupings under California law (see Cal.R.Ct. 3.501 *et seq*.), mass tort actions and other complex cases (for example, insurance coverage cases involving multiple policies over multiple years). Typically, each of us has two to four coordinated proceedings pending that are companion litigation to multidistrict litigation (MDL) proceedings. Each of us has handled litigation involving more than 30,000 litigants.

[2] Due to the lingering impact of the 2008 recession on the California state budget and derivatively on the state courts' budget, the Los Angeles Superior Court was required to reduce its budget by $185 million. Between 2010 and 2013 the Court cut one-quarter of its staff in order to meet payroll. Consequently, the court contracted by closing eight of its 40 courthouses and 79 courtrooms (14 percent). The court also eliminated court-provided court reporters in civil cases and terminated its civil Alternative Dispute Resolution (ADR) program. As a result of the courtroom closures, civil operations were significantly downsized and restructured. Specialized, high-volume dockets were created for debt collection and personal injury cases, geographic concentration increased, and caseloads increased for all civil case types, including unlawful detainer, small claims, and general jurisdiction civil cases handled in direct-calendar courts and in complex litigation courts. (PowerPoint Presentations by Judge Kuhl; Jan. 10, 2013, and Oct. 6, 2016, on file with co-authors).

[3] CIVIL JUSTICE INITIATIVE, NATIONAL CENTER FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015) (hereinafter LANDSCAPE OF CIVIL LITIGATION). The asymmetry in representation status also is confirmed by a Pew Research Memorandum from May 2020. THE PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 13–15 (May 2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf (hereinafter PEW DEBT COLLECTOR REPORT).

strategies that may be used to achieve those goals, and (3) applies the strategies to derive what we call "toolkits," consisting of case management techniques for civil litigation case types that share common characteristics.

The penultimate section of the article discusses whether the rules of procedure inhibit effective case management.[4] We conclude that, for the most part, the rules of procedure allow sufficient leeway to manage all case types effectively, but we note two exceptions. Finally, we suggest ways in which a systematic approach to case management can be broadly implemented through judicial education and administrative implementation of differential case management.

Two caveats are worth noting at the outset, and they are related. First, the proposals we make in this article are based on current thinking reflected in the work of the Conference of Chief Justices' Civil Justice Initiative[5] and on our own experience as judges and in court administration. By no means are our proposals intended as definitive; we only hope to begin the conversation. Second, many of the assertions we make, though based on decades of judicial experience, would benefit from empirical investigation. We hope this article will encourage interest in empirical research to determine which approaches to case management further the ultimate goal of case management: fair dispute resolution.

II. What Is "Case Management"?

We think of case management as intervention to direct case activity that otherwise would proceed according to each litigant's independent decisions about its own use of the adversary tools of civil procedure.

A. Judicial Versus Administrative Case Management

Case management can operate through judicial intervention to direct case activity. Case management also can be organized administratively so that case activity is directed by uniform policies, rules, or processes that are independent of judicial discretion.

Judicial case management generally was distrusted by the framers of the Federal Rules of Civil Procedure.[6] Nevertheless, the Federal Rules as originally enacted included Rule 16, which

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[4] In this article we often refer generically to "rules of procedure" without specifying a particular jurisdiction. The adoption of the Federal Rules of Civil Procedure in 1938 set in place a model of core due process structures that most states have followed.

[5] NATIONAL CENTER FOR STATE COURTS, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, RECOMMENDATIONS TO THE CONFERENCE OF CHIEF JUSTICE BY THE CIVIL JUSTICE IMPROVEMENTS COMMITTEE (2016) (hereinafter CCJ CALL TO ACTION).

[6] The framers of the Federal Rules of Civil Procedure "showed concern about tying their own hands as lawyers and trusting judges and other court personnel with discretionary power to contain and to control litigation." Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 975–976 (1987). For example, the framers rejected a proposal for depositions to be taken before masters who could rule on objections, a proposal that depositions be permitted only on motion brought in advance, and a proposal for judges to be able to issue an "order formulating issues." *Id.* at pp. 978–979. Charles Clark, the

gave judges discretion to engage with counsel to consider simplifying issues, amending pleadings and obtaining admissions to avoid unnecessary proof.[7] Over the last thirty years, calls for increasing judicial control over the progress of litigation have come from legislative bodies,[8] court rules[9] and the judiciary.[10]

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major draftsman of the Federal Rules, "was most resistant to judges' using the pretrial conference rule to deprive lawyers and their clients of their freedom of action." *Id.* at p. 982.

[7] Federal Rule of Civil Procedure 16 originally provided:

> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by the jury;
>
> (6) Such other matters as may aid in the disposition of the action.
>
> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

[8] The Civil Justice Reform Act of 1990 required "civil justice expense and delay reduction plans" in order to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy and inexpensive resolutions of civil disputes." 28 U.S.C. § 471. California Government Code § 68607 (enacted in 1990) gave judges "the responsibility to eliminate delay in the progress and ultimate resolution of litigation, to assume and maintain control over the pace of litigation, to actively manage the processing of litigation from commencement to disposition, and to compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document invoking court jurisdiction to final disposition of the action."

[9] In 1983, Federal Rule of Civil Procedure 16 was amended to require a mandatory scheduling order, which was required to set a deadline for joinder of parties and amendment of pleadings, a time limit for interposing various motions, a deadline for completion of discovery and dates for conferences and for trial. The rule changes were designed to "assure[ ] that the judge will take some early control over the litigation . . ." (Notes of Advisory Committee on Rules, 1983 Amendment to Rule 16).

California Rule of Court 3.722, adopted in 2007, requires the judge to set an initial case management conference to "review the case comprehensively and decide whether to assign the case to an alternative dispute resolution process, whether to set the case for trial, and whether to take action regarding any of the other matters identified in" two additional rules of court (Rules 3.727 and 3.728), which collectively have 33 subsections.

[10] See, e.g., CHIEF JUSTICE JOHN G. ROBERTS JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10–11 ("Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation. Faced with crushing dockets, judges can be tempted to postpone engagement in pretrial activities. Experience has shown, however, that judges who are knowledgeable, actively engaged, and accessible early in the process are far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine the appropriate breadth of discovery, and

Case management does not always depend on individualized judicial discretion, however. In varying degrees case management can be directed administratively. For example, the Federal Rules set a deadline for a judge to issue a scheduling order in each case and specify the contents of a required report to be submitted by the parties prior to the scheduling conference.[11] Case management reform in the state courts has focused increasingly on administrative implementation of case management.[12] One of the principal recommendations of the Conference of Chief Justices' Civil Justice Improvements Committee calls for increased institutional responsibility for case management: "The court, including its personnel and IT systems, must work in conjunction with individual judges to manage each case toward resolution."[13]

Whether implemented by exercise of judicial discretion or by administrative direction, case management generally takes two forms: (1) setting deadlines for case activity, and (2) regulation of the parties' use of the rules of procedure.

B. Case Management by Setting Deadlines

Inherent in presiding over disputes as a neutral is a need to manage scarce public resources, including judicial time, juror time, staff time and the large overhead expense of operating a court system. The task of allocating scarce court time has always been with us. The Roman Forum has ancient ruins of a clepsydra, a water clock, which was used to limit how long litigants could argue cases.[14]

From the outset of the Federal Rules, case management was embraced as a technique for "relieving the congested condition of trial calendars . . ."[15] By the 1980s, however, the Rule 16 meetings of counsel and reports to the court came to be perceived as "a mere exchange of legalistic contentions without any real analysis of the particular case," accomplishing "nothing but a formal agreement on minutiae."[16] The Federal Rules Committee's primary solution was to require judges to set deadlines for motions, discovery and trial.[17] Similarly, the federal courts'

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curtail dilatory tactics, gamesmanship, and procedural posturing."). Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV.U.L.REV. 227, 231–232 (2010).

[11] Fed.R.Civ.P. 16(b)(2) (setting deadline for judge to issue scheduling order). Fed.R.Civ.P. 26(f)(2)–(3) (specifying elements of a discovery plan that must be submitted to the court). The California Rules of Court require a court to set an initial case management conference, specify the topics to be discussed by the parties in advance and require counsel to file a report on a specified form. (Cal.R.Ct. 3.722(a), 3.724, 3.725.) By local rule, some courts have adopted administrative rules to closely regulate the progress of certain types of cases. *See, e.g.*, Patent Rules of the Federal District Court for the Northern District of California (requiring, *inter alia*, time deadlines for specifying patent invalidity contentions, accompanying document production and damages contentions in specified categories).

[12] CCJ CALL TO ACTION, *supra* note 5, at 12.

[13] *Id.* at 16, Recommendation 1.1.

[14] J.E.R. Stephens, *The Advocates of Greece and Rome*, 54 ALBANY L.J. 12, 13 (1896).

[15] Notes of Advisory Committee on Rules regarding Rule 16 (1937).

[16] Notes of Advisory Committee on Rules, 1983 Amendment to Rule 16.

[17] 1983 Amendments to Fed.R.Civ.P. 16. See Notes of Advisory Committee on Rules, 1983 Amendment to Rule 16.

primary response to the Civil Justice Reform Act of 1990[18] was to encourage "setting early and firm trial dates and shorter discovery periods,"[19] which a RAND study found to reduce delay without increasing costs.[20]

C. Case Management by Regulating the Parties' Use of Rules of Procedure

In addition to setting deadlines, courts use case management to regulate parties' use of the rules of civil procedure. Federal Rule of Civil Procedure 16 provides judges with broad authority to regulate parties' pretrial adversarial choices, including by "controlling and scheduling discovery," taking action to eliminate "frivolous claims or defenses," and determining "the appropriateness and timing of summary adjudication."[21]

Case management practices developed for complex litigation have been a guide for management of cases that are not complex.[22] In California, case management practices to resolve discovery disputes that initially were used in the Complex Litigation Courts now are specifically authorized by the rules applicable to all civil cases.[23] The 2016 Conference of Chief Justices' Recommendations take active management to the level of cases with "uncomplicated facts and legal issues," recommending that such cases begin not with open discovery but rather with "mandatory disclosures as an early opportunity to clarify issues," with tracking by court staff to ensure compliance.[24]

Thus, case management may consist of setting deadlines or of determining the course of the factual and legal development of a case by regulating lawyers' adversarial use of the rules of procedure. Case management may be a product of judicial discretion, it may be embodied in

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[18] S.2027 (1990). The Civil Justice Reform Act of 1990 was motivated both by a desire to ensure "deliberate and prompt disposition and adjudication of cases" (S.2027, § 2(5)), and by a concern that "litigation transaction costs, in complex as well as in relatively routine cases, are high and are increasing" (§ 2(4)).

[19] THE CIVIL JUSTICE REFORM ACT OF 1990, FINAL REPORT SUBMITTED BY THE JUDICIAL CONFERENCE OF THE UNITED STATES 3 (May 1997).

[20] JAMES S. KAKALIK ET AL., INSTITUTE FOR CIVIL JUSTICE, RAND, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 26 (1996).

[21] Fed.R.Civ.P. 16(c)(2).

[22] DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION (4TH ED. 2021) iii; Jay Tidmarsh, *Civil Procedure: The Last Ten Years*, 46 J. LEGAL EDUC. 503 (1996); Curtis E. A. Karnow, *Complexity In Litigation: A Differential Diagnosis*, 18 U.PA.J.BUS.L. 1, 2 (Fall 2015).

[23] Cal. Code Civ. Proc. § 2016.080 (authorizing informal discovery conferences). This section of the California Code of Civil Procedure was enacted in 2017. The judges working in the Complex Litigation Program in the California trial courts had used informal discovery conferences since about 2000. The positive experience in those Courts, and in some other general jurisdiction courts, influenced the California Judicial Council and the Bar to agree that authority for informal discovery conferences should be institutionalized in the Code of Civil Procedure.

[24] CCJ CALL TO ACTION, *supra* note 5, at 21 & 23, Recommendation 4, 4.1 (presumptive deadlines established by rule with compliance monitored through "a management system powered by technology"), Recommendation 4.3 (mandatory disclosures).

rules of court, or it may be imposed by courts' institutional decisions to track case development with personnel or technology systems.

D. A Unitary Approach to Case Management Addresses Critiques of Case Management as Currently Practiced

In practice, case management has tended to be highly individualized. The rules of procedure at the federal and state level outline expectations that deadlines will be set and that something will be done to guide cases toward resolution. At best, the rules are open-textured and provide little guidance as to how these expectations should be met. Judicial education has been left to fill the gap. Overall, the result has been individualized judicial approaches to "what works."

These well-meaning but ad hoc approaches have generated criticism in the academy[25] and in some appellate decisions.[26] Some of the criticism is well-taken, but can be addressed by a more intentional and reproducible approach to case management such as we present in our article.

We agree with critics of managerial judging that case management should not be used to promote a preconceived substantive outcome.[27] Consistency in case management practices promotes fairness to the parties and impartiality. Moreover, critics are correct that ad hoc judicial

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[25] One of the most thoughtful articulations of the concerns of academics and practitioners about judicial case management was published by Yale Law Professor Resnik. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). Similar concerns were expressed thereafter by Professor Bone. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 19061 (2007). *See generally*, Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 678–679, 721–722 (2010) (summarizing academic critiques of case management). Judge Higginbotham argues that judges have been captured by the administrative model of judging and that they should return to their historical role as trial judges. Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 759–762 (2010).

[26] Some appellate courts have criticized case management that appears to short-cut strict adherence to procedural rules. See, e.g., *In re National Prescription Opiate Litigation*, 956 F.3d 838, 844 (6th Cir. 2020) (reversing an MDL transferee judge's decision to allow a new claim to be added to a case after the deadline previously set by the judge for amendments and stating broadly that "MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance"); *Williams v. Superior* Court, 3 Cal.5th 531 (2017) (overturning the trial court's decision to phase plaintiff's discovery, pointing to a lack of express findings of undue burden; the Supreme Court nevertheless stated that trial court's ruling might have been proper if defendant had filed a formal counter-motion to phase discovery); *Magana Cathcart McCarthy v. CB Richard Ellis, Inc.*, 174 Cal.App.4th 106 (2009) (refusing to review a dispositive legal ruling because the judge and all parties had agreed to dispense with procedural formalities of California summary judgment rules; the dissenting judge noted the inefficiencies created by the majority ruling).

[27] Professor Resnik argues that case management too quickly involves judges in the facts of a case and that judges will not be able to maintain neutrality until a substantive issue is presented to them for review. Resnik, *Managerial Judges*, *supra* note 25, at 374, 426–428. Early pleading challenges also can tempt a judge to draw premature conclusions about the ultimate merits of a case. Indeed, lawyers often use litigation over initial pleadings to attempt to do just that. Nevertheless, as we discuss below, a systematic approach to case management should expressly acknowledge the importance of maintaining substantive neutrality. See discussion, *infra*, of the fourth subsidiary goal of case management: creating an even playing field that will facilitate outcomes based on the merits of the case rather than represented status or procedural gamesmanship.

management can produce poor overall results.[28] As we discuss below, consistent case management practices create expectations in the legal community about how cases will move forward, thereby promoting cooperation from the Bar and ultimately more efficient litigation practices. A systematic approach to case management also addresses the criticism that judicial case management lacks transparency.[29]

That said, we disagree with two of the common criticisms of case management: (1) that case management is illegitimate because it interferes with the adversary system,[30] and (2) that case management is simply unnecessary because civil litigation is generally conducted in a cost-effective manner.[31] Both of these criticisms, in our view, fail to acknowledge the continuing

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[28] Resnik, *Managerial Judges*, *supra* note 25 at 374, 380, 417–419. Even Judge Lee Rosenthal, an enthusiastic supporter of judicial case management, concedes that "[m]any judges" take a "minimalist approach" to case management. Rosenthal, *supra* note 10, at 227, 241.

[29] Resnik, *Managerial Judges*, *supra* note 25, at 374, 380, 426 ("no explicit norms or standards guide judges in their decisions about what to demand of litigants"); Bone, *Who Decides? supra* note 25, at 1974 (delegation of discretion to trial judges "allows rulemakers to dodge difficult and controversial normative choices by handing them to trial judges in individual cases, where they are less transparent and less likely to trigger public debate").

[30] *Id.* at p. 382 (it is a "basic principle" of our system of justice "that the parties, not the judge, have the major responsibility for and control over the definition of the dispute.") Three United States Supreme Court Justices opposed the 1993 amendment to Federal Rule of Civil Procedure 26 (requiring exchange of information a party would use in proving its case) on the ground that "[t]he proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker." 146 F.R.D. 507, 511 (1993).

[31] Some scholarship concludes that civil litigation, at least in the federal court system, is cost-effective and efficient. In 2009 the Federal Judicial Center, at the request of the Advisory Committee on Civil Rules, conducted a nation-wide survey of attorneys who had handled civil cases which had concluded in the last quarter of 2008; the sample was part random but intentionally inclusive of all cases closed during that period that ended via trial or after four years' duration on the docket. Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (2009). An aggregate response rate of 47.3% was obtained. *Id.* Certain civil case types were excluded (e.g., Social Security, prisoner civil rights suits, student loan collection, asbestos, and others), but the mix of cases which were included is not disclosed. Presumably it included a goodly mix of diversity contract suits, federal employment discrimination claims, Federal Employers Liability Act claims for railroad workplace injury as well as more complicated federal antitrust, patent and copyright suits. It is notable that the median attorney fee cost for plaintiffs for a given case where at least one reported type of discovery was conducted was only $15,000 and for defendants was only $20,000. The lawyers who responded gave the federal courts and federal rules passing marks as compared to their perceptions of state court, with a majority of respondents disagreeing with the proposition that discovery in federal court was more expensive than state court (Figure 33) and the lawyers basically split on whether litigation in federal courts was more expensive than in state court (Figure 32). In a follow-up paper explaining their multivariate analysis of the survey data, the same authors concluded, inter alia, that higher stakes cases generally had higher costs and that cases taking longer to resolve had higher costs. They noted "for clarity's sake: the model estimates presented in this section are only as good as the respondents' reports of costs in the closed cases." Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., Litigation Costs in Civil Cases: Multivariate Analysis (2010).

Emery and Willging then published a paper which considered both their own work and a contemporaneous report issued by the Institute for the Advancement of the American Legal System (hereinafter "IAALS") in 2010 which had found "a very strong consensus among nearly all respondent groups that broadly speaking, the civil justice system is too expensive." IAALS, PRESERVING ACCESS AND IDENTIFYING EXCESS: AREAS OF CONVERGENCE AND CONSENSUS IN THE 2010 CONFERENCE MATERIALS (2010). Those authors asserted in rebuttal to the IAALS report that "our empirical research calls into question the view that litigation is always expensive." Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation,* 60 DUKE L. J. 765, 769 (2010).

importance of the century-old observation of Dean Roscoe Pound that "contentious procedure," and the "sporting theory of justice" often will be employed by lawyers to take advantage of procedural technicalities, undermining parties' efforts to assert their substantive rights and obtain justice.[32] Contemporary surveys of lawyers and judges confirm that participants in litigation believe that litigation costs are more expensive than they should be.[33]

The individual motivations of the parties and their counsel can incentivize strategic use of the rules of procedure to favor parties' and attorneys' interests in ways that are unrelated to the merits of the case. Tactical gamesmanship should not displace fair evaluation of the legal and factual merits of a dispute. Some neutral intervention in an otherwise wide-open litigation process has a public benefit and a benefit, ultimately, to litigants caught up in the process.

Moreover, increasing numbers of civil litigants are not represented by counsel,[34] and one may question whether an unmediated adversarial process can produce just outcomes for self-represented litigants. If effective case management can be employed to lower litigation costs, new market entrants may be able to provide affordable legal services to those for whom self-

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Similarly, Professor Stephen Yeazell opined in 2018 that "In the vast majority of federal cases, discovery causes neither excessive delay nor excessive expense," citing to data collected by the federal courts Administrative Office. STEPHEN C. YEAZELL, LAWSUITS IN A MARKET ECONOMY 111.

Notably, the Federal Rules' Committee response to the 2009 Federal Judicial Center study was the adoption of changes in 2015 to Rule 26 in an express attempt to reduce costs: "The burden and expense of proposed discovery should be determined in a realistic way. *** Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available." Committee Notes on Rules—2015 Amendment.

There are few empirical studies that successfully quantify litigation expense, no doubt because lawyers and clients are understandably reluctant to share such data. One notable exception to this pattern is a detailed RAND study in 2012 on the cost of electronic discovery. Nicholas M. Pace & Laura Zakaras, Institute for Civil Justice, RAND, Where The Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery.

[32] R. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 40 AM. L. REV. 729, 738 (1906).

[33] For example, in 2008 IAALS surveyed Fellows of the American College of Trial Lawyers, a group including both lawyers representing plaintiffs and lawyers representing defendants. The survey yielded a 42 percent response rate (1492 responding lawyers) and respondents averaged 38 years' experience in the practice of law. IAALS, INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS 2 (2008). Eight-five percent of respondents thought that litigation in general and discovery in particular are too expensive. Sixty-four percent said that the economic models of many law firms encourage more discovery than is necessary. *Id.* at p. 4.

In 2009 the Litigation Section of the American Bar Association surveyed its members concerning civil practice; responses were obtained from 3300 lawyers, averaging 23 years of experience in the practice of law. Eighty-one percent of survey respondents said they believed litigation is too expensive. Eighty-nine percent believed that litigation costs are not proportional to the value in a small case, and 40 percent believed that litigation costs are not proportional to the value in a large case. Eighty-three percent agreed that the cost of litigation forces cases to settle that should not settle based on the merits.

[34] See, *e.g.,* CCJ CALL TO ACTION, *supra* note 5, at 9–10; PEW DEBT COLLECTOR REPORT, *supra* note 3, at 13–15.

representation is the only current option.[35] Well-conceived case management is, we believe, particularly important where parties have unequal access to adversarial methods.

III. Guiding Neutral Principles for Civil Case Management

We believe that effective case management must be rooted in fundamental principles that can be applied fairly and consistently.[36] Agreement on principles of case management should be a process, not a revelation. Nevertheless, the process needs to begin, and we offer a first draft.

We start with a set of **goals**—*what* should case management try to achieve? The goals are put into practice using defined **strategies**—principles of implementation for *how* case management can best proceed to further the goals. The strategies are translated into tactics to achieve the goals in particular categories of civil litigation. We call the sets of tactics **toolkits**.

A. Goals of Case Management

1. "Fair Dispute Resolution"—the Ultimate Goal of Case Management

Rule 1 of the Federal Rules of Civil Procedure, the historical touchstone for thinking about case management, states that the Civil Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[37] It has changed little since it was drafted in 1937.[38] Our specification of case management goals unpacks and reshapes the directive of Rule 1 to reflect the realities of contemporary litigation and to provide more granular directives to the case manager.

To define the ultimate goal of case management, we use the word "resolution" in lieu of "determination" and the word "fair" in place of "just."[39] "Determination" implies an outcome provided to combatants by a judge or jury. We use the phrase "dispute resolution" instead to

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[35] YEAZELL, LAWSUITS IN A MARKET ECONOMY, *supra* note 31, at 48–55 has an excellent discussion of how the cost of litigation impacts the kinds of cases which are brought and not brought by lawyers and the classes of litigation which are handled by self-represented litigants for lack of affordable professional help.

[36] Bone, *Who Decides? supra* note 25, at 1964, urges as the last of four recommendations for restraining otherwise unbounded discretion that the Advisory Committee on Federal Rules "articulat[e] general principles to help the trial judge make normative judgments among the competing adjudicative values at stake." This concern is valid and animates our efforts to set form a unified, coherent approach to civil case management which can be reproduced, taught and applied consistently across many different case types.

[37] Fed.R.Civ.P. 1.

[38] The text of Federal Rule of Civil Procedure 1, effective September 16, 1938, was: "These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action." In 2015, Rule 1 was amended to emphasize that the parties share with the court the responsibility to employ the rules to further the just, speedy and inexpensive determination of every action. Notes of the Advisory Committee on Rules, 2015 Amendment to Rule 1.

[39] Cal.R.Ct. 3.713(c) provides: "It is the responsibility of judges to achieve a just and effective *resolution* of each general civil case through active management and supervision of the pace of litigation from the date of filing to disposition" (emphasis added).

encompass both consensual disposition and "determination" by adjudication. Although the rate of settlement of contemporary civil litigation is debated in the literature, it is clear that, for cases with significant stakes, the vast majority are resolved consensually.[40] Case management should guide both potential litigation pathways.

The adjective "just" looks to the substantive outcome of litigation, which is a product of statutory and common law as applied in the adjudicative forum of a court.[41] The rules of procedure address process, not merits. The outcome will not be perceived as "fair" unless the parties feel they had an opportunity to be heard.[42] Case management should create an even playing field on which substantive issues of law and disputed issues of fact can be determined. This is the ultimate goal of rules of procedure and of case management within the context of those rules.

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[40] While the "[c]asual conventional wisdom" that about 95 percent of cases settle is unsupported by sound empirical data, "settlement is the modal civil case outcome." Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?* 6 J. EMPIR. LEG. STUD. 111, 112 (2009). Supposed settlement rates of 95 percent have include cases abandoned by plaintiffs, cases dismissed for lack of prosecution and default judgments. *Id.* at pp. 115–116. Using federal data, Eisenberg and Lanvers nevertheless found tort settlement rates of between 64 and 87 percent and settlement rates in employment discrimination cases of between 56 and 82 percent. *Id.* at pp. 130, 135–137, 133–135.

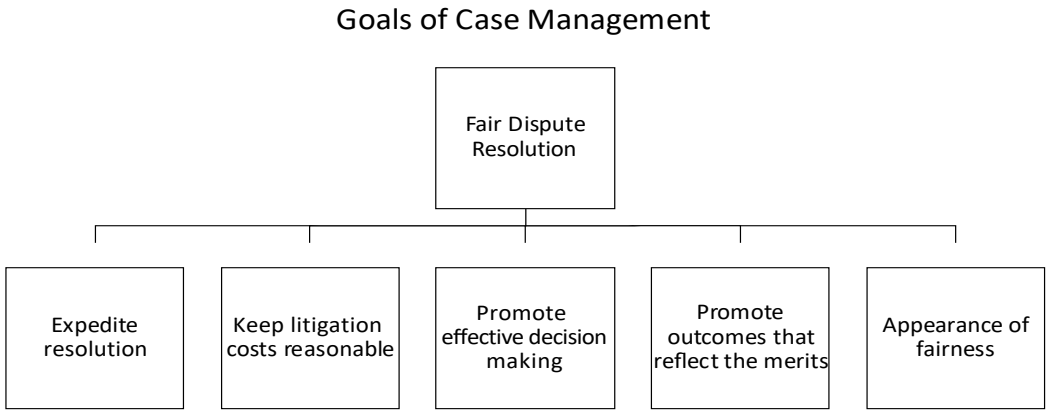
We can say from our own experience that court records do not consistently record the reasons for case dismissals.

[41] In his book "A Theory of Justice," John Rawls draws a distinction between "formal justice" and "substantive justice." The "impartial and consistent administration of laws and institutions, whatever their substantive principles, we may call formal justice. . . . Formal justice is adherence to principle, or as some have said, obedience to system." JOHN RAWLS, A THEORY OF JUSTICE 58 (1971). "Formal justice in the case of legal institutions is simply an aspect of the rule of law which supports and secures legitimate expectations." *Id.* at p. 59. However, adherence to the rule of law may result in substantive injustice. "Treating similar cases similarly [formal justice] is not a sufficient guarantee of substantive justice. This depends upon the principles in accordance with which the basic structure is framed. . . . In general, all that can be said is that the strength of the claims of formal justice, of obedience to system, clearly depend upon the substantive justice of institutions and the possibilities of their reform." *Id.*

The phrase "fair dispute resolution," as we use it in this article, is analogous to Rawls' concept of formal justice. Fair dispute resolution does not ensure a substantively just outcome, which depends upon whether the statutory or common law the court is called upon to apply is just or unjust.

[42] "Perhaps surprisingly, research indicates that perceptions of procedural fairness exert more influence on litigants' overall view of the court than their perceptions of distributive fairness." CENTER FOR COURT INNOVATIONS, JUDICIAL COUNCIL OF CALIFORNIA PROCEDURAL FAIRNESS IN CALIFORNIA: INITIATIVES, CHALLENGES, AND RECOMMENDATIONS 1 (2011).

Figure 6.1. Goals of Case Management



2. Subsidiary Goals of Case Management

We propose the following supportive or subsidiary goals of case management to supplement the ultimate goal of fair dispute resolution:

1. Expedite case resolution;
2. Keep litigation costs reasonable;
3. Promote effective decision-making for the parties, counsel, the court and the jury;
4. Create an even playing field that will facilitate outcomes based on the merits of the case rather than represented status or procedural gamesmanship;
5. Provide a process that is perceived as fair.

The first two subsidiary goals—expedition and reduction of transaction costs—are clearly expressed in Rule 1. The goal of cost reduction is particularly important for the significant percentage of civil cases where lesser dollar amounts ordinarily are at issue and many litigants currently are self-represented. In these types of cases, the goal of reducing litigation costs should be considered not only as an end in itself but also as a means to facilitate the ability of litigants to obtain low-cost legal advice.

The third subsidiary goal—promoting effective decision-making for the parties, counsel, the court and the jury—is directed to all participants in the litigation and addresses not only adjudication but also consensual resolution.[43] Case management should make fact-gathering effective not only to ensure a fair presentation of facts to a jury, but also to facilitate fair consensual resolution. Fair dispute resolution should promote settlement negotiations that occur at arm's length with parity of information for all parties.

[43] California Rule of Court 3.400(a) provides that a complex case requires judicial management in order to, *inter alia*, "promote effective decision making by the court, the parties, and counsel."

The fourth subsidiary goal, which we describe as creating an even playing field so that case outcomes reflect the merits, precludes using case management to "put a thumb on the scale" to affect case outcome. A fair case management system should guard against result-oriented applications by a judge. Litigation outcomes should be based on the merits of the case as dictated by application of governing law to the facts of the case. This goal harkens back to Pound's observation that procedural technicalities should not be allowed to undermine substantive rights.

The final subsidiary goal—to provide a process that is *perceived* as fair—is a kind of quality control for case management. Users of the court system ought to leave with the feeling that they were respected, given time to present their case and heard by an unbiased decision maker. They should participate in the process, whether the result is adjudicated or negotiated, and receive a result they understand, even if the outcome is unfavorable to them.

B. Strategies for Achieving the Goals of Case Management

The goals of case management are not self-executing. In addition to understanding what case management should attempt to accomplish, a case manager needs to consider how to reach the case management goals. Strategies for case management also are needed to address trade-offs between goals. Extreme expedition may increase litigation costs in some contexts. Facilitating outcomes based on the merits can unreasonably retard case resolution if a party is allowed unlimited "do overs" for a poorly prepared case. The strategies seek to modulate case management efforts in conformity with all elements of fair dispute resolution and are intended to be widely applicable across diverse case types.

In brief, strategies for case management include:

1. Using differential case management, including triage of cases by readily determinable characteristics;
2. Active judicial management applied only to case types that will benefit from such effort and only using case events that meaningfully advance the goals of case management;
3. Giving priority to case activity reducing uncertainty as to core issues of fact and law;
4. Giving priority to case activity that focuses on substantive merits, rather than procedural wrangling;
5. Setting process and completion deadlines in a manner that furthers case management goals;
6. Ensuring transparency of purpose with parties and counsel;
7. Implementing uniform case management practices across and within a legal community.

1. Using Differential Case Management, Including Triage of Cases by Readily Determinable Characteristics

The concept of differential or differentiated case management is not new. It has been recommended as a result of empirical studies of state and federal cases in the 1980s and 1990s,[44] and strongly reiterated in more recent civil justice reform efforts.[45]

Everyone who has attempted a home repair or improvement project knows that having the right tool can be immensely helpful and that using the wrong tool can produce disaster. When courts and judges ignore that methodology and use a one-size-fits-all case management approach, the outcome can be as disastrous as using a hammer instead of a screwdriver.

Over our years on the Los Angeles Superior Court, we have seen case management that has worked well for some case types (general jurisdiction cases) applied to other types of cases (limited jurisdiction cases) with results that were disastrous from the standpoint of members of the Bar handling those cases because more lawyer attention was demanded by the court than the typical case was worth. Conversely, court leadership hypothesized that *less* judicial intervention in personal injury cases (eliminating case management conferences that were of low value in directing the litigation and setting deadlines automatically when the case is filed) might create efficiencies for the court and lower litigation costs for the parties.[46] This experiment has been well-accepted by the Bar, although there has not been an empirical study of the outcomes measured against case management goals.

A strategy of case management that is tailored to easily distinguishable case types has guided our development of "toolkits" for case management. As we discuss below, as case complexity increases, differential case management should rely less on objective case characteristics and more on judicial evaluation of individual cases.

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[44] See, *e.g.,* MOLLY SELVIN & PATRICIA A. EBENER, INSTITUTE FOR CIVIL JUSTICE, RAND, MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT 118–19 (1984) (recommending that substantial delays in civil case processing be addressed in part by assigning court resources to cases whose characteristics predict that the case will be lengthy or time-consuming and by tracking cases by litigation type); JUDICIAL CONFERENCE OF THE UNITED STATES, THE CIVIL JUSTICE REFORM ACT OF 1990, FINAL REPORT *27–28* (1997) (the Judicial Conference found that a formalized differential case management concept "may provide its greatest benefits by offering standardized case management procedures to those plaintiffs whose claims are the least amenable to more formal adversarial procedures and whose litigation dollars are most limited," but that many courts found it easier for individual judges to establish individual differential case management schedules based on the characteristics of a case).

[45] CCJ CALL TO ACTION, *supra* note 5, at 13; BRITTANY K.T. KAUFFMAN & NATALIE ANNE KNOWLTON, IIALS, REDEFINING CASE MANAGEMENT 20 (2018).

[46] In 2012 Court leadership compiled a study of case management needs for general jurisdiction personal injury cases, which at that time were handled in over 40 Independent Calendar courtrooms located throughout Los Angeles County. Looking at cases filed in 2010 and 2011, the study found that nearly 75 percent of those cases had three or fewer events (court appearances or motions) in the life of the case. Compendium of data for personal injury cases created by Los Angeles Superior Court staff October 2012 (on file with authors). Out of 10,575 personal injury cases, case management conferences or initial status conferences were held in 9191 cases. There were no events in 1809 cases.

2. Active Judicial Management Applied Only to Case Types That Will Benefit from Such Effort and Only Using Case Events That Are Likely to Meaningfully Advance the Goals of Case Management

Active judicial management is not beneficial for its own sake. A corollary of the strategy of differential case management is that active *judicial* management should be reserved for case types that will benefit from individualized case management efforts. For example, active judicial management is essential in complex cases.

In any case type, creating judicial case management events without evaluation of whether a specific intervention provides a discernable benefit may not further the goals of case management. Courts' track records for effective case management have been mixed.[47] Even where judicial case management is appropriate for a particular case type, it will be ineffective unless the judge actively engages in the case management event and requires and facilitates counsels' engagement.[48]

3. Giving Priority to Case Activity That Reduces Uncertainty as to Core Issues of Fact and Law

Because case management should focus in part on preparing parties to resolve their disputes consensually, reducing uncertainty about the facts and law that frame a dispute is critical. Reducing uncertainty as to core issues of fact and law directly serves the case management goal of promoting effective decision making for the parties and counsel. Early reduction of uncertainty furthers the goal of reducing litigation cost insofar as it allows earlier evaluation and resolution of litigation.[49]

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[47] *See* Rosenthal, *supra* note 10, at 227, 241 (many judges comply with Fed.R.Civ.P. 16 by having a "paper hearing" and limiting the Rule 16 order to the setting required deadlines).

[48] As an example, the California Rules of Court require counsel to file a mandatory form prior to a mandatory case management conference in every general jurisdiction civil case. Cal.R.Ct. 3.721 (requiring case management review, except where the Rule is suspended by local rule pursuant to Rule 3.720(b)); Rule 3.725(c) (requiring use of a mandatory Case Management Statement, Form CM-110). However, the form is so general that it appears to invite pro forma responses and often provides very little useful information to the judge prior to the case management conference. For example, there is no prompt to state what discovery is agreed to be exchanged, and the space available to discuss discovery is constrained by the form-fillable nature of the electronic version of the document. Because little preparation is required, lawyers frequently come to the case management conference without preparation or send "appearance counsel" who are unfamiliar with the case. All but the most diligent judges give up on case management in such cases rather than set a follow-up case management conference on their busy calendars in order to require the lawyers to engage in meaningful case planning. In our view, the non-differentiated and insufficient mandatory form tends to start a downward spiral in which lawyers fail to prepare adequately for a case management conference, and busy judges fail to insist on adequate preparation, thereby enforcing a perception that the case management conference is a meaningless event.

[49] It is our observed experience, and that of our colleagues in the California Complex Litigation Program, that reducing uncertainty early favors early case resolution. There is support for this observation in the work of Christina Boyd and David Hoffman, who looked at the effect of substantive motion practice on the timing of settlement. Their empirical modeling found that "the filing of a substantive, nondiscovery motion speeds case settlement. In addition, . . . motions that are granted are more immediately important to the settlement rate than motions denied and plaintiff

The emphasis on "core" issues is critical. For example, even when pleading challenges are successful, the outcome often does not meaningfully shift case evaluation. By contrast, parties often delay until late in the litigation motions that significantly narrow legal issues, such as motions for partial summary judgment or motions in limine that address admissibility of key evidence and theories of compensable damages. Similarly, the goal of keeping litigation costs reasonable is best served by an early focus on factual questions that are most essential to the ultimate merits of the case in order to facilitate parties' case evaluation.

Our combined forty-plus years of experience in the Los Angeles Complex Litigation Program leads us to conclude, and to teach in judicial education, that early resolution of core issues of fact and law facilitates earlier consensual case resolution. For example, early use of Plaintiff Fact Sheets in mass tort litigation allows a sifting out of claims included in error due to mass recruitment of prospective plaintiffs. In simpler cases where the legal issues are well-defined, there have been efforts endorsed by the Federal Judicial Center to specify core discovery to be produced automatically by each side.[50] Thus, the strategy of reducing uncertainly as to core factual and legal issues can be adapted for implementation in cases of varying complexity, as illustrated in the toolkits outlined below.

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victories have a more substantial effect than defendant victories." Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement,* 29 J. L. Econ. & Org. 898, 927 (2012).

[50] IAALS has developed protocols for mandatory initial written discovery in several case types:

(1) Employment Cases Alleging Adverse Action (https://iaals.du.edu/sites/default/files/documents/publications/federal_employment_protocols_pilot_project.pdf, November 2011);
(2) Fair Labor Standards Act Cases not pleaded as Collective Actions (https://iaals.du.edu/sites/default/files/documents/publications/flsa_initial_discovery_protocols.pdf, January 2018);
(3) First-Party Insurance Property Damages Cases arising from Disasters (https://iaals.du.edu/sites/default/files/documents/publications/initial_disaster_protocols.pdf, Feb. 20, 2019) and
(4) Business Interruption Insurance Disputes arising from Covid-19 Pandemic and Similar Public Health Threats (https://iaals.du.edu/sites/default/files/documents/publications/pandemic_protocols.pdf, Feb. 9, 2021)

The first two initial discovery protocols are included on the Federal Judicial Center website with the following legend: "The Federal Judicial Center is making this document available at the request of the Advisory Committee on Civil Rules, in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the contents as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center." (https://www.fjc.gov/sites/default/files/2012/DiscEmpl.pdf; https://www.fjc.gov/sites/default/files/materials/12/Initial_Discovery_Protocols_FLSA_Jan_2018.pdf.)

At the request of the federal Advisory Committee on Rules of Civil Procedure, the Federal Judicial Center studied a pilot project in federal district courts using the Initial Discovery Protocols for Employment Cases Alleging Adverse Action. The study found that the time to resolution did not decrease for this case type when the judge required the initial discovery, but that the number of discovery motions did decrease. "The average number of discovery motions filed for both pilot and comparison cases is less than one per case, but pilot cases average fewer discovery motions per case, .359, than comparison cases, .503 ($p < .01$)." JASON A. CANTONE & EMERY G. LEE, FEDERAL JUDICIAL CENTER, INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION: REPORT ON A PILOT PROJECT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE 1, 6 (2018).

4. Giving Priority to Case Activity That Focuses on Substantive Merits, Rather Than Procedural Wrangling

Even if parties' litigation efforts are directed toward issues of core significance, the goals of case management are thwarted if counsel are allowed to use procedural rules as blocking maneuvers to achieve an advantage unrelated to the merits of the case. Case management seeks to facilitate outcomes based on the merits of the case rather than represented status or procedural gamesmanship.

Case management can focus the parties at the outset on accomplishing substantive tasks (*e.g.*, agreeing to produce a certain categories of documents) rather than being satisfied with vague discovery plans (*e.g.*, written discovery followed by depositions with a cut-off date). When disputes arise, a court can direct the parties to address a requesting party's entitlement to certain information in discovery and the availability of such information from the opposing party. By contrast, typical discovery motion practice consists of individualized parsing of a multiplicity of overlapping discovery requests and equally repetitive objections.

Access to the court on an informal basis can head off a mounting escalation of tit-for-tat adversarial practices that reflect procedural gamesmanship rather than the merits of the case. One such avenue to informal access is the "informal discovery conference" or "IDC." An IDC requires that the parties file a brief joint report on the nature of their discovery dispute and then attend (in person, virtually or telephonically) a conference with the court in which the court provides its tentative view on the dispute.[51] Experienced judges believe that often such conferences not only address the current dispute between counsel but also can "reset" expectations for the relationship between counsel so as to diminish future conflict.[52]

5. Setting Process and Completion Deadlines in a Manner That Furthers the Case Management Goals

Most lawyers are working on multiple clients' problems concurrently and time management is driven by which deadline is most imminent; a case with no deadlines can become the orphan. One homespun phrase that judges often use is "if it weren't for the last minute, nothing would ever get done."

Delays in the legal system at various times have motivated legislatures to direct the judiciary to expedite case resolution.[53] The case management goal of expediting case resolution can be

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[51] California Code of Civil Procedure §2016.080. Under the Arizona Rules of Civil Procedure adopted in 2017, all discovery disputes may be decided based on a three-page joint statement and a conference with the court (telephonic or in person) unless the court permits full briefing. Ariz. R. Civ. Proc. 26(d).

[52] See CCJ CALL TO ACTION, *supra* note 5, at 27 (informal conferences can encourage narrowing of issues and can give the parties an opportunity to have an in-depth discussion of issues and case needs).

[53] See authorities cited *supra* note 8.

measured in numerical terms and lends itself to empirical study.[54] Nevertheless, enforcing deadlines for their own sake has the potential to increase costs. An all-too-common example of this is the expense suffered by the parties waiting for a ruling on summary judgment or partial summary judgment filed late in the case. An impending trial date may force the parties to complete the final, often most expensive, push toward trial, notwithstanding a potential ruling that may make trial unnecessary or change its scope. Requiring a civil case to lie on a Procrustean bed of deadlines may further the goal of expediting case resolution while compromising the goal of moderating litigation costs,[55] or may reduce the parties' opportunity for effective decision-making based on the core issues of fact and law revealed in litigation. For example, if the parties, after some core discovery, ask for a pause in the litigation to pursue mediation, a judge should consider that request even though her "time to resolution" statistics may suffer.

6. Transparency of Purpose with Parties and Counsel

An attempt to affect how litigation is practiced needs to proceed with a high degree of peripheral vision to be sure that those involved understand and accept reasons for variations from familiar practices. If new case management tools are perceived as beneficial to the lawyers and the parties, acceptance should follow in the ordinary course. If not, the case management practice should be reexamined and perhaps revised.

The process of creating and implementing a toolkit for case management should involve stakeholders.[56] The California Complex Litigation Courts have benefited greatly from

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[54] A notable example of an empirical study of how pro-active case management with added staff resources might favorably impact disposition times as compared to a control group of cases in the same jurisdiction following pre-existing procedures was conducted in the Eleventh Judicial Circuit of Florida (Miami-Dade County) from November 2016 to October 2017. Results confirming reduced disposition times were published by the National Center for State Courts. LYDIA HAMBLIN & PAULA HANNAFORD-AGOR, RESEARCH DIVISION, NATIONAL CENTER FOR STATE COURTS, EVALUATION OF THE CIVIL JUSTICE INITIATIVE PILOT PROJECT (April 2019).

[55] The RAND study of federal district court pilot projects implemented pursuant to the Civil Justice Reform Act of 1990 found that setting deadlines reduced time to resolution but increased lawyer work hours. "[O]nce judicial case management has begun, a discovery cutoff date has usually been established, and attorneys may feel an obligation to begin discovery. Doing so could shorten time to disposition, but it may also increase lawyer work hours on cases that were about to settle when the judge began early management." KAKALIK, *supra* note 20, at xxiii–xxiv.

[56] CCJ CALL TO ACTION, *supra* note 5, at 40. When IAALS sponsored the development of proposed required common discovery in federal Federal Employee Liability Act and Fair Labor Standards Act cases, the committee working on the issue included judges as well as lawyers who typically represented plaintiffs and those who typically represented defendants in these case types. See IAALS Discovery Protocols, *supra* note 51, at Introduction.

Lawyer involvement has assisted in shaping the Complex Litigation Courts in California. Shortly after these specialized courts were created in 2000, the judges and the Bar organized programs with panels of lawyers and judges in an effort to seek broad and candid input on the case management practices that the judges were trying. Thereafter, Bench-Bar programs have been organized annually to discuss substantive and procedural issues affecting case management in the Complex Courts. In addition, in Los Angeles a Complex Litigation Bar Liaison Committee meets at least quarterly with the judges assigned to the Complex Courts. This open discussion has made judges more aware of the effects of their case management practices, so that those practices can continue to evolve constructively, and has allowed lawyers to understand the reasons for the judges' case management expectations.

encouraging lawyer feedback on the effectiveness of particular case management techniques. In areas where self-represented litigations are prevalent, the process should involve litigants in addition to lawyers. The Conference of Chief Justices' Civil Justice Initiative recommends this approach.[57]

7. Implementing Uniform Case Management Practices Across and Within a Legal Community

As judges, we accept that rules bind each judge equally. However, most judges consider case management as an individualized effort and resist efforts to impose uniformity as an interference with judicial independence. Lawyers, by contrast, detest "local, local rules," *i.e.*, general orders by which each judge sets events, timing, substance of required submissions at various stages of litigation, format of such submissions and on and on.

The toolkits we propose for effective case management of lesser and medium complexity cases presuppose uniformity. And even for complex cases, when judges use similar tools for case management, lawyers can respond more effectively because they become used to the common judicial expectations for their performance.

We realize that the importance of uniformity in case management is a hard message for judges. However, it has become clear to us from experience that when judges, working together, create similar expectations for preparation and participation by counsel, counsel come to court more prepared and responsive to the court's expectations. One judge alone will not have such a significant influence on the conduct of the legal community. Moreover, litigants should have the benefits of effective case management without reference to the judge to whom they are assigned.

Of course, if case management practices were completely uniform, there would be no opportunity for experimentation and innovation. One can achieve the best of both worlds if experiments are clearly articulated and empirically evaluated, and then, when shown to be effective, advanced for general adoption. Through such a process, the legal community can work together toward a common understanding of case management expectations in a particular field of practice.

C. Linking Case Management Goals and Strategies

In the chart below, we identify linkages between the case management strategies described above and the case management goals they serve. Not every goal is supported by every strategy, but the large number of connecting lines helps to illustrate, we think, that these goals and strategies are "interlocking" and mutually reinforcing. The overall approach produces additional gains beyond the sum of the parts.

Of all the strategies, "case management differentiated by case characteristics" is perhaps most central—note that it supports each of the case management goals. A case with self-

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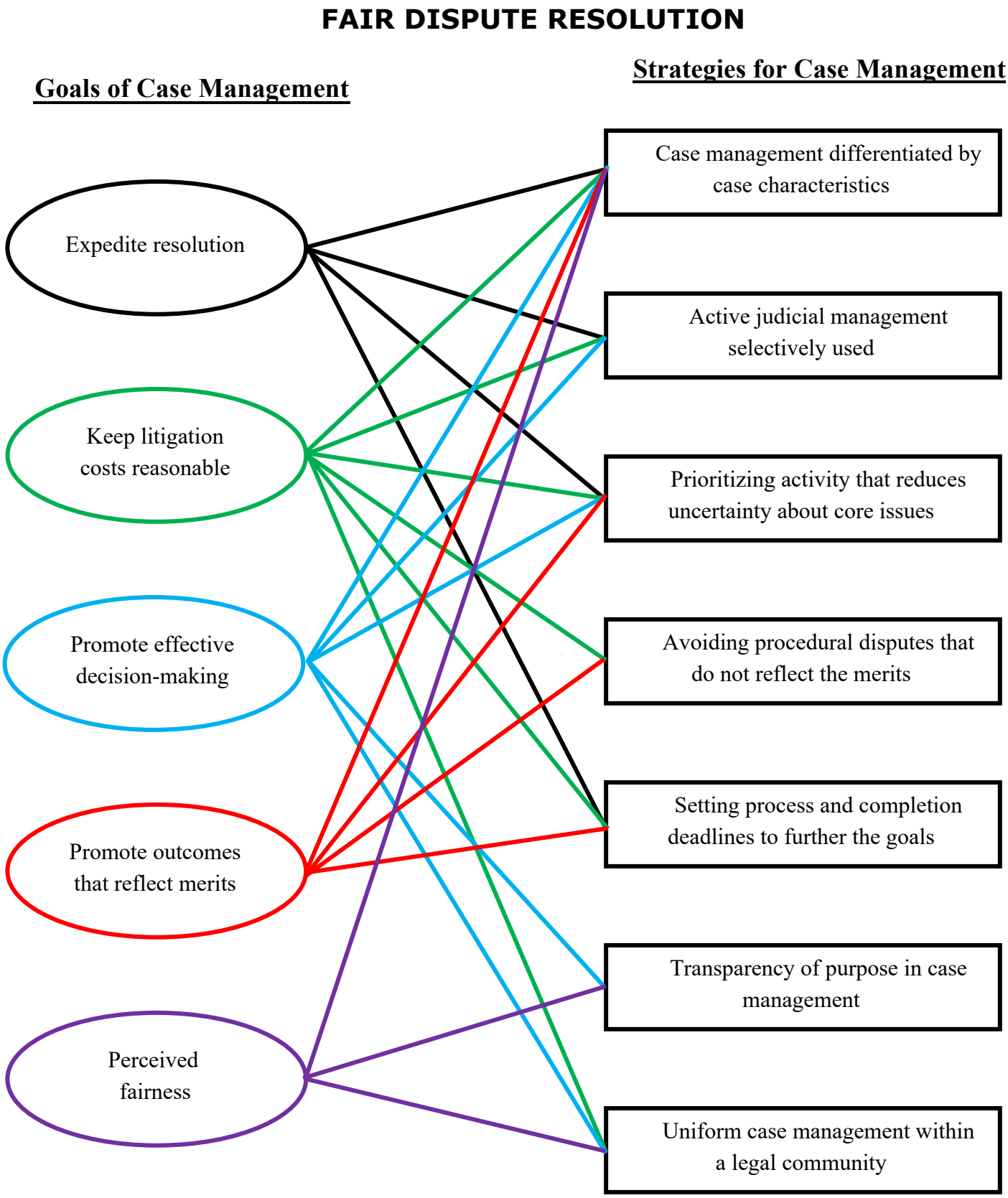
[57] CCJ CALL TO ACTION, *supra* note 5, at 37–38.

represented litigants and $20,000 at issue cannot be litigated efficiently or fairly using the same case management a judge would apply to complex litigation. For this reason, in the section that follows, the “toolkits” for case management are organized by groupings of case characteristics.

Figure 6.2. Fair Dispute Resolution



IV. Toolkits for Case Management

We summarize below case management tactics appropriate for four categories of cases defined by objective characteristics of the cases.[58] The case groups categorize cases according to relative complexity, considering applicable legal principles and the difficulty of gathering relevant facts.

A. ***Toolkit for Simple, Repetitive Litigation in Which the Plaintiff Ordinarily Controls All Information Necessary to Prove the Claim Asserted*** *(Examples: Collection, Eviction, Judicial Foreclosure)*

The NCSC 2015 study of the Landscape of Civil Litigation brought into sharp focus the large number of civil cases in which plaintiffs are represented but defendants are not.[59] These cases often conclude with a default judgment.[60] Expediting case resolution and keeping litigation costs reasonable are important to plaintiffs in these cases. But fair dispute resolution equally requires that outcomes reflect the actual merits of the case despite the defendant's lack of representation. If costs of access to the civil justice system can be lowered for defendants, it may be possible for them to obtain meaningful legal advice.

These case types involve straightforward legal principles. Ordinarily plaintiffs have available at the outset of the case all facts necessary to prove their claims. Disclosure should be mandatory and automatic in order to reduce uncertainty as to core facts without requiring defendants to master the technical procedural rules of discovery.[61]

The toolkit for this case category includes:

- A requirement that the plaintiff provide specified documents and information at the outset of the litigation (with the complaint or as an initial disclosure).[62]
- Meaningful assurance that service on the defendant is effective.[63]

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[58] Bone, *Who Decides? supra* note 25, at 1964, urges four methods to constrain judicial discretion to avoid abuse: "These four alternatives are ordered from most limiting to least limiting, and they are appropriate in different situations." The differing application of our several strategies to different case types is consistent with this general approach.

[59] LANDSCAPE OF CIVIL LITIGATION, *supra* note 3, at 31–33.

[60] *See* PEW DEBT COLLECTOR REPORT*, supra* note 3, at 16 (citing examples of localities where between 70% to 80% of debt collection cases ended in default).

[61] Bone, *Who Decides, supra* note 25, at 1964, urges as its first recommendation "eliminating discretion as much as possible with strict rules strictly enforced," and the elements of this toolkit largely reflect this recommendation.

[62] *See, e.g.,* Cal. Civ. Code § 1788.58 (requiring the complaint in a collection action brought by a "debt buyer" to allege specific facts concerning the debt and the default, and requiring that a copy of the contract be attached to the complaint); Or. Unif. Trial Ct. R. 5.180 (b) (requiring the complaint in an action by a debt buyer or a debt collector to attach a completed Consumer Debt Collection Disclosure Statement).

[63] *See* PEW DEBT COLLECTOR REPORT*, supra* note 3, at 16 (discussing concerns regarding whether defendants in debt collection cases actually receive notice of having been sued). In California, in unlawful detainer (eviction)

- Defendants (and plaintiffs) are provided with mandatory forms, links to self-help resources and referrals for potential individualized legal advice or representation.[64]
- Court staff, with judicial oversight, audit compliance with disclosure requirements at the outset of the litigation or at least before entry of default.[65]
- Litigants have meaningful access to trial (e.g., expedited jury trial).[66]

B. ***Toolkit for Simple, Repetitive Litigation in Which Both Sides Ordinarily Need Additional Facts to Prove Their Claims and Defenses*** *(Examples: Personal Injury [Other Than Product Liability], Federal Employee Liability Act [FELA], Fair Labor Standards Act [FLSA])*

Some litigation types typically involve a straightforward application of well-developed principles of law, but require consideration of facts in the possession of the opposing party or a third party. In this category of litigation, courts need to consider a "less is more" approach to expediting case resolution while keeping costs reasonable. Judicial management should be applied only to cases that will benefit from such effort and case management should be organized primarily administratively. In these types of cases, plaintiffs ordinarily are represented.[67] Cases are filed when a lawyer can afford to take on a plaintiff's case, and lowering litigation costs may make cases involving lesser sums financially viable.[68]

The toolkit for this case category includes:

- Deadlines are set administratively without individualized judicial determination, but are subject to modification by the judge on request of a party.[69]

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cases, a prejudgment claim of right to possession must be served by a marshal, sheriff, or registered process server. Cal. Code Civ. Proc. § 415.46(b).

[64] See Judicial Council of California Mandatory Form SUM-130 (Summons-Unlawful Detainer-Eviction), providing self-help information and attorney referral information; Los Angeles Superior Court Form CIV 038 09-03 (instructions for completing and serving unlawful detainer answer).

[65] CCJ CALL TO ACTION, *supra* note 5, at 21, Recommendation 4.1.

[66] Rules for mandatory and voluntary expedited jury trials in California are set forth in Cal.R.Ct. 3.1545-3.1548. *See generally,* PAULA L. HANNAFORD-AGOR ET AL., NATIONAL CENTER FOR STATE COURTS, SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS (2012), (examining the development of summary jury trial programs in Charleston County, South Carolina; New York; Maricopa County, Arizona; Clark County, Nevada; Multnomah County, Oregon; and California).

[67] LANDSCAPE OF CIVIL LITIGATION, *supra* note 60.

[68] YEAZELL, LAWSUITS IN A MARKET ECONOMY, *supra* note 31, at 102–03, accurately notes the problem with obtaining professional legal help for small-value cases given the current cost structure of service delivery. Reducing the cost of such services should improve access to justice.

[69] See CCJ CALL TO ACTION, *supra* note 5, at 21–22*,* Recommendation 4.2. Superior Court of the State of California for the County of Los Angeles, First Amended Standing Order Re: Personal Injury Cases at the Spring Street Courthouse (http://www.lacourt.org/division/civil/pdf/1stAmendedSOrePIPSSC.pdf) (hereinafter LASC PI Case Standing Order), providing, *inter alia*, that trial dates are set independently of the exercise of judicial discretion in personal injury cases.

- Each side is ordered by the court to answer form discovery specific to the subject matter of the case. Additional (but not duplicative) discovery may be propounded without court approval.[70]
- Judicial accessibility for cases that require it due to relatively greater complexity or in order to head-off procedural gamesmanship.[71]
- Informal discovery conferences to solve discovery disputes.[72]
- Litigants have meaningful access to trial (*e.g.,* expedited jury trial).[73]

C. ***Toolkit for Cases of Intermediate Complexity*** *(Examples: Contract, Construction Defect, Violation of Civil Rights (1983), Employment Discrimination, Statutory Violations)*

This case category includes the middle ground between the simple, repetitive cases discussed above and complex litigation, addressed below. Effective case management for this category of cases requires good choices and should take into account local Bar culture. In a substantive litigation type where a specialized Bar handles cases relatively predictably (focusing on merits-related case activities rather than procedural wrangling), the court should consider managing the case type with a toolkit similar to that used in the second category discussed above.[74]

The common goals and methodologies should guide decision-making about where judicial resources can be spent profitably and where judicial intervention needlessly increases costs by multiplying case events. Such empirical work as is available on litigation costs confirms that discovery is the largest expense in pretrial litigation,[75] and courts should pro-actively set expectations for early exchange of core discovery.[76]

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[70] See *supra* note 51, where discovery protocols created by IAALS for certain employment discrimination and FLSA cases were made available via the Federal Judicial Center public website without formal endorsement of their use.

[71] *See* CCJ CALL TO ACTION, *supra* note 5, at 21, Recommendation 4.1 ("the process should be flexible and allow court involvement, including judges, as necessary"). LASC PI Case Standing Order, *supra* note 70, providing that "complicated" personal injury cases may be transferred by the master calendar judge to a general jurisdiction individual calendar court.

[72] LASC PI Case Standing Order, *supra* note 70, providing that counsel request an informal discovery conference before a motion to compel further responses may be filed.

[73] See *supra* note 67.

[74] *See* Carolyn B. Kuhl, *Winning Through Cooperation,* ABTL REPORT (ASSOCIATION OF BUSINESS TRIAL LAWYERS OF LOS ANGELES) 24 (Summer 2019) (arguing that the theories of Professor Robert Axelrod in his seminal work *The Evolution of Cooperation* [Basic Books, rev. ed. 2006] "are consistent with the observation that, in litigation specialties [for example, construction defect] or other close-knit practice groups, lawyers tend to find ways to cooperate on procedural aspects of a case").

[75] PACE & ZAKARAS, WHERE THE MONEY GOES, *supra* note 31.

[76] The Advisory Committee Note to the 2015 Amendments to Federal Rule of Civil Procedure 26 includes a perceptive comment going to the core of the problem of overbroad and contentious discovery: "A party requesting discovery . . . may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party." Notes of Advisory Committee on Rules, 2015 Amendment to Rule 26. This "black box"

The toolkit for this case category includes:

- The court or the judicial officer evaluates whether some case types ordinarily can be litigated efficiently without significant judicial management and sets default deadlines for that case type.
- Mandatory early meetings of counsel to discuss litigation planning, including agreed core discovery exchange and discussion of what information (e.g., a legal ruling) is needed in order to evaluate case value.[77]
- For case types that ordinarily benefit from judicial case management, an early, substantive case management conference to set a pathway for the case, including a discussion of agreed discovery, the substance and timing of motions, and how case activity can be coordinated with exploring settlement potential.[78]
- Judicially set deadlines based on knowledge of the progression of similar cases and/or information provided by the parties.
- Judicial accessibility to head-off procedural gamesmanship and promote productive litigation activity; informal discovery conferences and pre-motion conferences.[79]
- Meaningful access to trial.

*D. **Toolkit for Complex Case Management** (Examples: Antitrust, Securities, Class Actions, Mass Actions, Insurance Coverage with Multiple Policies over Multiple Time Periods, Environmental, Patent)*

The goal of promoting effective decision-making for the parties and counsel is particularly important in complex cases. In addition to costly discovery, a substantial number of decisions by the court may be necessary before a jury trial can begin. Indeed, a trial involving all parties may

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problem motivates the party propounding discovery to state requests in broadest terms. The responding party, in turn, is motivated to state broad objections. Federal Rule of Civil Procedure 34(b)(2)(C) requires response to what is not overbroad, but there is great temptation to state a tit-for-tat, overbroad objection.

The Advisory Committee's answer to the "black box" problem is a meaningful discussion between counsel followed by a discussion with the court: "Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in pretrial conferences with the court." Notes of Advisory Committee on Rules, 2015 Amendment to Rule 26.

[77] A case management order should direct the parties to the topics to be discussed and include required discussion of documents and information that can be voluntarily exchanged. See *supra* note 46 regarding the problems created by a case management report form that is so general it invites pro forma responses.

[78] CCJ CALL TO ACTION, *supra* note 5, at 27 ("[A]n in-person case management conference can play a critical role in reducing cost and delay by affording the judge and parties the opportunity to have an in-depth discussion regarding the issues and case needs). As an example of coordinating case activity with exploring settlement, in wrongful discharge or employment discrimination cases, the parties might exchange basic documents and then conduct time-limited depositions of the plaintiff and the defendant's principal decision-maker, leaving the depositions "open" to be continued if the case does not settle. At that point the parties may have enough information to effectively evaluate the case for settlement. If the case does not settle, neither side is at a strategic disadvantage.

[79] Rosenthal, *supra* note 10, at 227, 242–243.

be literally impossible. Yet amounts at issue may be such as to affect the lives or corporate existence of parties.

The strategy of reducing uncertainty as to core issues of fact and law directs the parties toward effective decision making. Attention to these core issues as early as possible in the litigation may allow the parties to reach a consensual case resolution earlier and based on reliable evidence and legal analysis.

The tools for complex case management, as practiced by federal and state judges and as expressed in the federal Manual for Complex Litigation, can be powerful. The goals and strategies we have defined are intended not only to make case management effective, but also to place appropriate boundaries on judicial case management in two ways. First, the goals and strategies attempt to keep case management activities directed toward fair dispute resolution, ensuring that litigation activity moves expeditiously with reasonable expense. Second, the goals and strategies are intended to restrain the judge from overreaching in case management, requiring that he create an "even playing field" so that substantive legal issues can be fairly argued and disputed fact issues can be evaluated by both sides and ultimately determined by a neutral finder of fact.

The toolkit for this case category includes:

- Early selection of cases for complex case management.[80]
- Mandatory early meetings of counsel to discuss litigation planning, including agreed core discovery exchange and discussion of what information (*e.g.*, a legal ruling) is needed in order to evaluate case value.
- A stay of all litigation activity until counsel have an early, substantive case management conference to set a pathway for the case, including a discussion of agreed discovery, the substance and timing of motions, and how case activity can be coordinated with exploring settlement potential.[81]
- A plan for litigation activity that will take place between each case management conference and firm deadlines for those activities.
- Legal issue management tools:
  - Encouraging candid discussion among counsel and with the court to define legal issues to be resolved.[82]
  - A plan for fair, early presentation of legal issues to the court; sometimes limiting discovery to the subject matter of a motion.

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[80] *See* Cal.R.Ct. 3.400-3.403 regarding definition and selection of complex cases. *See also* Los Angeles County Court Rules, Rule 3.3(k) (selection of complex cases). *See generally,* CCJ CALL TO ACTION, *supra* note 5, at 23, Recommendation 5.

[81] A complex case should be stayed as soon as it is identified so that the court may control the timing of motions and discovery and work with the parties to direct effort to reducing uncertainty on core factual and legal issues. Unwinding broad discovery issued without consultation with opposing counsel and the court is highly likely to waste time. See the "black box" problem of discovery discussed *supra* note 77.

[82] An off-the-record conference in an informal setting can be helpful to encourage candid discussion, if this can be done consistent with the goal of perceived fairness.

  - Requiring a pre-motion conference with the court to discuss whether issues to be presented are meaningful to the evaluation of the case and whether they can be resolved through the proposed procedural mechanism.[83]
  - Opportunity for interlocutory review of issues that are central to the case where early review is likely to facilitate cost-effective case resolution.[84]

- Fact issue management tools:
  - Production of agreed categories of discovery.
  - Plaintiff fact sheets; defense fact sheets.
  - Court-ordered discovery.
  - Discovery in stages so that a sample of information or more targeted discovery is produced before more voluminous discovery.
  - Judicial accessibility to head off procedural gamesmanship and promote productive litigation activity; informal discovery conferences.
  - Resolution of privilege disputes on the basis of selected examples of disputed privilege issues.
- Bifurcation of issues for court or jury trial.
- Bellwether trials.[85]

V. Are There Rules of Procedure That Negatively Impact the Goals or Strategies of Case Management?

We reiterate that our proposed unified theory of case management is a work in progress. However, even at this stage it is important to consider whether current law governing procedure is consonant with the vision of case management we have outlined, or whether certain features of federal or state civil procedure inhibit sound case management.

In general, the rules of civil procedure have stood the test of time. They are fair. They allow parties to make their own pathway in framing their case and to bring the issues they frame to the judge for resolution. For the most part, they leave room for effective, goal-oriented case management. However, we suggest that in two areas the rules of procedure marginally constrain effective case management.

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[83] See Rosenthal, *supra* note 80.

[84] California Code of Civil Procedure §166.1 was enacted at the urging of the California Judicial Council, which acted at the suggestion of judges assigned to Complex Civil Litigation Program Courts. Section 166.1 allows a trial judge to indicate in an interlocutory order "a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation."

[85] Best practices for trial in general, and for selection and management of bellwether trials, are beyond the scope of this article.

A. Rule 16 Scheduling Orders

As proponents of case management, it may be surprising that we believe the Rule 16 requirement—mandating an initial scheduling order in every case—may deter effective case management. However, in our view, Rule 16 violates two key strategic principles: differential case management and ensuring every case management event is meaningful.

The toolkits propose that some simpler, repetitive cases benefit from a rule across the entire case type addressing both timing and initial disclosures without requiring judicial or lawyer input. Individualized scheduling orders after lawyer input are unnecessary so long as parties have an opportunity to ask the court to make exceptions. Conversely, in complex cases it is unwise to allow the parties to proceed individually until they make a plan for the case with judicial input. A scheduling order alone is insufficient and addresses only one narrow aspect of effective case management for complex cases.

Further, to the extent Rule 16 conferences are not held, or are pro forma events when they are held, they may undermine effective case management. On the one hand, costs may increase if lawyers are allowed to begin to litigate a case without a focus on case events that reduce uncertainty about the core of the factual and legal issues that shape case outcomes. On the other hand, ineffective or unnecessary case management events undermine case management goals because lawyers may come to routinely ignore them.

B. Procedural Rules That Do Not Allow Sufficient Leeway for Court Intervention to Solve Disputes Efficiently

We have argued that informal judicial intervention to solve discovery disputes is effective in reducing unproductive adversarial conduct in a wide range of cases. Requiring consultation with the court before other types of motions are filed may save litigation costs if judicial involvement avoids motions that do not have a significant effect on case evaluation. The Federal Rules allow judges to require parties to consult with the court before filing motions.[86] Under California procedure, a court may require a timely informal discovery conference before a discovery motion is filed, but no rule of procedure specifically authorizes a judge to require a pre-filing conference for other types of motions, with one limited exception.[87]

Judges should not be able to preclude counsel from filing any motion.[88] And judges should not be able to delay the filing of a motion indefinitely. Case management to attempt to reduce

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[86] Fed.R.Civ.P. § 16(c)(2)(E).

[87] Cal. Code Civ. Proc. § 430.41(c) allows a court to order a conference of the parties after a demurrer is sustained with leave to amend and before an amended complaint, or a demurrer to an amended complaint, is filed. This subsection also states: "Nothing in this section prohibits the court from ordering a conference on its own motion at any time . . ."

[88] *But see,* Ariz. R. Civ. Proc. § 26(d)(1) addressing discovery disputes, precluding a fully briefed motion, and limiting the parties to a three-page joint statement "[u]nless the court decides to permit full briefing . . ."

litigation costs must be balanced against the goal of timely case resolution. However, courts should be permitted the leeway (in cases of sufficient complexity) to discuss prospective motions with counsel before they are filed, within appropriate time constraints.[89] California state court procedure should permit that option.

VI. Implementing Effective Case Management

As we acknowledge at the outset of this article, our thinking about the goals and strategies for effective case management is intended to begin a conversation. General agreement in the legal community on enumerated goals of the civil justice system would create a shared consciousness of purpose for lawyers, judges and academics in their respective roles. This agreement could be reflected in education programs developed for judges, lawyers and court administrators. Civil justice reforms guided by the goals also might require rule changes, perhaps starting with local rule experiments.

Empirical research is crucial to determining what case management techniques work effectively to further the goals.[90] If the academic community were able to develop standard protocols for empirical research (for example, involving volunteer judicial advisers in the research and agreeing not to identify particular judges in published results), judicial leaders and court administrators may be more agreeable to providing data for empirical projects. Our separately organized state and federal judicial systems can provide case management experiments to be studied.

To give a straightforward example, a state rulemaking body might adopt a general rule articulating goals and strategies for case management. In furtherance of the general case management scheme, the rulemaking body at the state level could initiate a process with Bar leaders to devise mandatory default discovery in one or more case types (either cases that fit a simple, repetitive category or an intermediate category). The mandatory default discovery rules could have a sunset provision, and the judiciary's administrative office could partner with an interested academic to measure the effects of the new rule, measured according to the articulated case management goals.

A conversation about the role of case management in improving the civil justice system and access to justice may begin in the academic community, or among judges, or, better, with both together. But the conversation also needs to move outward to include the users of civil litigation—lawyers and their clients (institutional as well as individual clients), and litigants who

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[89] *See, e.g.,* Cal. Code Civ. Proc. § 2016.080 (if a court does not schedule a request for an informal discovery conference within 10 days of the initial request, or hold the conference within 30 days, the request for the informal conference is deemed denied and a discovery motion may be filed).

[90] See HAMBLIN, EVALUATION OF CIVIL JUSTICE INITIATIVE PILOT PROJECT, *supra* note 55, for an example of a thorough analysis of the impact of case management reform on case outcomes, as compared to a control group of cases, considering such measurables as disposition time, amount of case activity, and lawyer satisfaction.

currently are self-represented. Empirical researchers can assist in gathering information about the needs, motivations and experiences of court users.

We hope the RAND-UCLA Conference on "Rethinking Case Management" will begin this conversation, perhaps reach agreement on case management goals, and consider how to move forward with promising experiments and accompanying empirical studies.

VII. Conclusion

The systematic approach to case management we propose is in many ways derivative of longstanding judicial experience. However, in some ways our proposed unified theory challenges assumptions underlying traditional frameworks for civil case management (setting deadlines and otherwise allowing the adversarial process to operate independently).

We define the goals of civil litigation to include promoting fair consensual resolution as well as fair adjudication. We define case management to include administrative as well as judicial management. We recognize that case management is a check on parties' adversarial choices, but suggest that frequently parties' individual motivations in litigation do not tend to further fair dispute resolution. We propose that the goals of and strategies for case management should address high-volume litigation that is of low dollar value but of high importance to the parties as well as addressing the needs of complex litigation.

The systemic approach we outline is consonant with the rules of civil procedure although some rules could benefit from amendments. The great challenge, however, is creating a pathway to consensus on goals and strategies to guide civil case management and a pathway to implementation of toolkits across jurisdictions and with appropriate deference to judicial discretion. We do not know if implementation is possible, but we do know that, without a reproduceable approach to civil case management, effective case management practices will continue to be applied episodically and without measurable benefits.

Chapter 7. Methods for Assessing Civil Justice Reform: The Case of "Meet and Confer" Requirements for California Demurrers

Richard Sander, Minjae Yun, Henry Kim, Jacob Kempf, Richard Fruin, and Eric Helland[91]

This paper has been reformatted and reviewed for spelling but is otherwise presented as submitted to the conference.

There is a great and growing interest in the cause of civil justice reform. Most observers agree that our current systems are too expensive and too slow to deliver the kind of dispute resolution most parties need. But the reform process is challenging, not least because we generally do not have—especially at the state court level—good mechanisms in place for even understanding the content of modern civil litigation, much less the effects of reforms. Developing good methods for measuring what state courts do in civil cases, and efficient means of assessing the effects of reforms, are key steps in fostering a "culture of innovation and experimentation" in civil justice.

This paper has two objectives. At a substantive level, we evaluate a modest experiment launched by the state of California in October 2015,[92] which requires parties that file a demurrer in most civil cases to first "meet and confer" with opposing counsel to attempt to resolve the issues raised by the demurrer.[93] At a methodological level, we present an innovative and efficient strategy that we use to evaluate the "meet and confer" experiment, and which can, we hope, be readily adapted to other types of evaluation. Our methodology involves using a "web-scraping" tool to gather information on the universe of cases, and investigating a small, random sample of those cases in more detail to provide a check on our inferences from the scraped data.

Our findings suggest that both California's reform, and our methodological experiment, worked largely as hoped. Although the "meet and confer" requirement was dismissed by many practicing litigators as another time-wasting procedural hoop, we find that upon implementation

[91] The authors are grateful for the collaboration of Judge Carolyn Kuhl in suggesting this topic and providing advice on Los Angeles Superior Court filing and assignment practices (and complexities of California civil procedure) throughout this project. We are also grateful to Judge Richard Fruin, who pioneered investigation into the effects of the demurrer reform, and who provided valuable feedback on an earlier draft.

[92] The reform became § 430.41 of the California Code of Civil Procedure. In keeping with its experimental spirit, the requirement was originally set to expire at the end of 2020; it has since been extended without a sunset provision.

[93] "Demurrer" is an archaic usage in most American states, but in some it is still used to refer to a "motion to dismiss"—i.e., a pleading that contends that even if all the opposing party's allegations can be proven, the party is still not entitled to prevail as a matter of law.

it quickly reduced the volume of demurrers by over 30%, likely producing significant cost savings and reducing the length of many lawsuits. We suspect that most of the eliminated demurrers were on relatively non-substantive matters easily resolved by the parties, but establishing that will require further research. On the methodological side, we were able to verify that, for specific and previously time-consuming tasks, "web-scraping" a court's website can provide rich and comprehensive data that can be verified and used for efficient and wide-ranging analyses.

The Los Angeles "Major Civil" Courts Project

In the summer and fall of 2019, Helland and Sander, together with Judge Kuhl, launched discussions about how researchers might evaluate case management techniques using data already generated by the court. Kuhl was a long-time judge in the complex litigation section of the Los Angeles Superior Court, and had served as presiding judge over the massive county court system.[94] Helland had wide experience in studying litigation processes. As Kuhl explained, the Los Angeles Superior Court had made significant progress during the 2010s in scanning court documents and making them available online. For virtually all cases, at least summary calendars of filings could be accessed on the court's website, and for most, one could access (for free) the first page of every filed document, and (for a fee) download the full text of most filings (though not usually documents produced through discovery). It was thus possible that we could learn a significant amount about civil litigation in Los Angeles County, and even conduct evaluations of policy innovations, using already available data that would not be very costly to collect.

We decided on the following strategy:

1. We would focus on "major civil" cases within the LA Superior Court system—i.e., cases where the amount in controversy is $25,000 or more, and which are not petitions but actual disputes. There are over a quarter million civil filings in the court system each year; limiting our analysis to "major civil" cases brought our focus to the roughly 40,000 cases per year that account for the vast majority of litigation activity (because they are the large cases) and that would be most affected by the procedural experiments of interest.
2. Our colleague Minjae Yun, assisted by Helland and Henry Kim, would "scrape" the Los Angeles Courts public website to develop a complete count of major civil cases filed from July 2012 through October 2018. During this period, cases were assigned sequential case numbers, so we could be fairly confident that we were obtaining a complete count. This procedure thus gave us a population count of roughly a quarter million cases.
3. From the cases filed in 2015, we would draw a random sample of 625 "major civil" cases, and law students under the supervision of Sander and Jacob Kempf would visit the

[94] Los Angeles County, with some ten million residents, is by far the most populous county in the United States, and its court system, with nearly five hundred judges and over 1.5 million new cases (including all types) filed each year, is by far the largest local court system in the United States. Unlike many jurisdictions, California has consolidated all trial court functions into a single Superior Court, organized county by county. Many other jurisdictions separate civil case types into Municipal, Superior, and/or District Courts based on case value.

court website and manually develop a "biography" of each case. Our larger group, with additional input from civil procedure scholars, developed a codebook identifying about one hundred "quantifiable" characteristics of these cases. Our theory was that this in-depth sample would provide a way of checking other work we did with the web-scraping and would also provide a "base" sample which we could complement with other specialized samples of cases to explore particular questions of interest.

4. Finally, Yun would do a more detailed scraping of the major civil cases to pick up the text from all of the first-page documents on the court's public website.[95]

These steps would give us two complementary tools for examining specific research questions and for providing a way of testing the reliability of the other method.

The "Meet and Confer" Reform

In October 2015, Governor Jerry Brown signed a measure that, among other things, amended portions of the California Code of Civil Procedure ("CCP") dealing with demurrers. The "demurrer" is the common-law ancestor of the modern motion to dismiss; in most jurisdictions it is an archaic term, but it lives on in California and half-a-dozen other American states. When a plaintiff files a complaint against a defendant, the defendant's most direct legal strategy for defeating the complaint is to file a demurrer, usually within a couple of months of receiving service on the complaint, and usually contending that even if the facts alleged by the plaintiff are true, the complaint has failed to articulate a legal basis for recovery.[96] Often, demurrers have more modest objectives: trimming down the number of causes of action in a complaint, or gaining time by forcing the plaintiff to eliminate minor filing errors (such as misspelling the defendant's name).

The 2015 measure, which added § 430.41 to the CCP, added four requirements for any demurrer filed after January 1, 2016:[97]

1. At least five days before filing a demurrer, a party was required to "meet and confer" with the opposing party (in person or by telephone), to determine "whether an agreement can be reached that can resolve the objections that would be raised in the demurrer."
2. As part of this "meet and confer" process, both sides were required to articulate the sort of arguments they would raise in a filed demurrer and a response.[98]

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[95] Similar scraping has been done in recent years by a variety of commercial firms, including the Lex Mechina service created by Lexis-Nexis.

[96] Generally, less factual specificity is required for pleadings under California law than under the Federal Rules of Civil Procedure. § 430.10(3). When faced with a demurrer to the complaint, a plaintiff may amend the complaint once without court approval. Such an amendment may be filed up to the time when an opposition to the demurrer would be due. § 472.

[97] § 430.41.

[98] This is not, at least in principle, a trivial task. Under 430.41(a)(1): "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes [are] subject to demurrer and identify with legal support the basis for the deficiencies. The party who files [the pleading] shall provide legal

3. Any filed demurrer should include a declaration either indicating that the "meet and confer" process did not resolve the issue, or that the opposing party failed to respond to the party's request to confer, or otherwise did not act in good faith.

The statute also provided for automatic extensions in the time permitted to file a demurrer, presumably on the assumption that the "meet and confer" process would require additional time to complete.

The "meet and confer" measure was met with grumbling in many quarters, such as lawyers contending that it was a "hoop-jumping" exercise that would add to delays in litigation, and skepticism about whether anyone would take it seriously. One commentator noted that the measure specifically provided that "a determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer."[99]

One early champion of the reform was Richard Fruin, a Los Angeles Superior Court judge who for many years preserved paper copies of his daily calendars and could thus track, on an annual basis, the volume of motions of various types heard in his courtroom. In a series of memos to his colleagues and in articles in the *Los Angeles Daily Journal*, Fruin's data suggested that demurrer hearings in his courtroom had fallen by 35% from 2013–15 to 2016–19.[100] Fruin speculated that "meet and confer" had such a dramatic effect because it pushed the parties to evaluate their demurrers—or grounds for resisting a demurrer—more carefully. In a 2021 memo he wrote,

> This new procedural step reminds me of the "nudge" principle—a concept from behavioral economics . . . individual and group decision-making can be influenced by small prompts and positive reinforcements. . . . A minor procedural change that requires counsel to meet and confer . . . is a nudge toward informed and rational behavior, and merits support and enforcement from judges.[101]

Fruin's data certainly suggested that the "meet and confer" requirement reduced demurrers. But several assumptions would be needed to infer that the patterns in his courtroom applied throughout the superior courts. The types of cases before different judges varied considerably, and the "meet and confer" effects might also vary across these case types. Fruin was observing hearings rather than actual filings. And perhaps most important, as the quote above suggests, Fruin was actively seeking to encourage good-faith compliance with the "meet and confer" rule. For example, his tentative rulings routinely noted whether the demurrer filing showed reasonable

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support of its position that the pleading is legally sufficient or . . . how [the pleading] could be amended to cure any legal insufficiency."

[99] § 430.41(a)(4).

[100] Fruin's data groups together three related types of motions: demurrers, motions to strike, and judgment on the pleadings. Demurrers are by far the most common of these three. For the three categories combined, Fruin's records showed the following number of hearings, by year: 2013: 158; 2014: 176; 2015: 208; 2016: 129; 2017: 114; 2018: 110; 2019: 116.

[101] Richard Fruin, "Year in Review: Motion Statistics in my IC Court," *Los Angeles Daily Journal*, Jan. 25, 2021.

compliance by the parties with § 430; lawyers who knew their case was assigned to Fruin would likely take the requirement more seriously. However clear his experience might be, evidence drawn from across all the judges would be more compelling.

A Two-Track Exploration

By the summer of 2020, our team had developed our detailed coding scheme for cases, tried it out on a small sample, refined the codebook, and started to document our sample of 625 cases filed in 2015. By the fall of 2020, we had coded roughly four hundred cases. In somewhat over ten percent of our cases, the defendant filed at least one demurrer.[102] Even though the total number of demurrers in our sample was small (just over forty), we could observe statistically significant relationships between case-type and the likelihood of a demurrer.

With Judge Fruin's findings, we embarked on developing other samples that would focus on demurrers and the possible effects of the § 430.41 requirement. First, we created a random sample of four hundred "major civil" cases filed in 2017. Second, we created a large oversample of cases before Judge Fruin. This would allow us to both compare what happened to demurrer filings over the 2015–17 period, and to see whether we could (a) replicate Fruin's findings as to his own cases and (b) assess whether Fruin's experience was representative of the Superior Court generally. The process of building this "Expanded Sample" was easier, because for these new samples we measured only about a dozen variables on each case, relating mainly to whether demurrers were filed, the case type, the date of filing, and so on.

Using this expanded data we were able to conduct an analysis similar to Judge Fruin's, but across dozens of judges. As a proportion of all filed cases, demurrers clearly fell from 2015 to 2017. We estimated a decline of 24%, but our margin of error was wide. Demurrer rates varied widely with case type (more on that below). We found a larger decline in demurrers among cases before Judge Fruin (we estimated about a 36% decline, very similar to what his own data showed), but Fruin also had a higher rate of demurrers, and a larger decline, then the sample as a whole, and the differences were at least partly explained by the portfolio of cases before him.[103]

We then turned to the "scraping" methodology. In our first run of scraped data, we quickly noticed something odd—demurrers showed up in only about four percent of our cases. This was

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[102] Multiple demurrers are possible, both because a party can file separate demurrers against different counts in a complaint, and because judges often grant parties "leave to amend" a demurrer even when they rule against it. We found that in about one-third of the cases that involved a demurrer, more than one was filed.

[103] Over the 2013–18 period, roughly 19% of Judge Fruin's cases had at least one demurrer; for all "major civil" cases, the rate was only 9%. When we control for major case type, this ten-point difference declines to only 2.8 percentage points; the main reason why this makes such a large difference is that auto and personal injury cases—which have very large volumes but the lowest demurrer rates—are assigned to specialized courts. Interestingly, when we refine our focus, and compare Judge Fruin to judges who were outside the "personal injury hub" and had substantial dockets both before and after the 2016 reform, the "Fruin effect" essentially disappears—in other words, the decline in demurrers he observed closely parallels the decline of judges with similar types of cases.

far too low, so we examined our program, found an error, and ran new data. We mention this only because it illustrates the utility of having a substantial hand-coded sample to stack against the scraped data; the general point is to have methods of checking results and patterns.

With the revised scraped data, we used case numbers to match the scraping results with our hand-coded results, and found the following pattern:

Table 7.1. Comparing Initial Findings of Demurrers in Scraped vs. Hand-Coded Samples

		Scrapped Data		
		No Demurrer	**Demurrer**	**Total**
Hand-coded data	No demurrer	1,343	21	1,364
	Demurrer	6	210	216
Total		1,349	231	1,580

Note that the percentage of demurrers here is higher than in the main analysis because of the Judge Fruin oversample.

This was encouraging; the two methods reached the same finding about the presence or absence of a demurrer in over 98% of the cases. Moreover, by identifying discrepant cases we were able to investigate and improve our methods. Most of the discrepancies were resolved in favor of the scraped data; our hand-coding had missed a fair number of demurrers because the full case dockets were sometimes floating on and off the court's website. The comparison process enabled us to identify additional procedures that made the hand-coding more reliable. The errors we detected were, so far as we could tell, unrelated to any substantive characteristic of the cases.

Our comparisons allowed us to see where the web-scraping was highly reliable (e.g., case type) and where it was spotty (demurrer resolution). In other words, the interaction between the hand-coding and the scraping is organic, with the combined effort producing more than the sum of the parts.

Findings: Demurrer Patterns Before and After Reform

Table 7.2 and Figure 7.1, both below, show our basic finding on the rate of demurrer filings before and after "meet and confer" went into effect. There are a couple of challenges in developing an accurate estimate. First, filings in the court system increased over time (a cumulative increase of 24% from 2013–14 to 2017–18) and also follow a seasonal cycle (more filings in the summer than the winter), so it was important to adjust for both of these effects. Second, there is (of course) a lag between the filing of a case and the filing of a demurer, commonly thirty-to-sixty days but often much longer, with a median gap of 75 days. Since one cannot very accurately predict *which* filings will lead to demurrers, it is not a simple matter to determine the correct denominator (of filings) to which each period's demurrers should be

compared. Our approach was to compare the volume of demurrers with the volume of filings two months earlier.

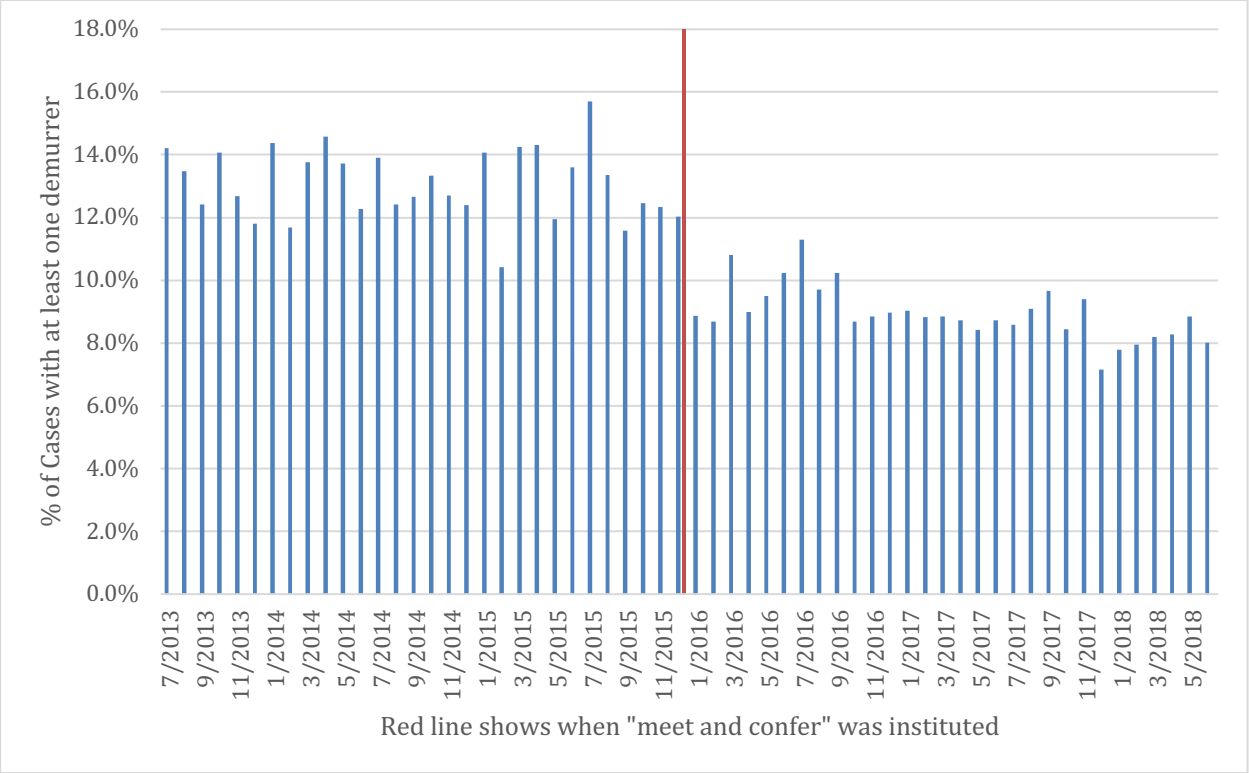
In Table 7.2, we break our five years of data into four one-year intervals and two six-month intervals that bracket the introduction of the "meet and confer" reform (which went into effect in January 2016 and thus affected, in our calculation, filings after October 2015). The pattern is striking: the demurrer rate is quite steady the first three periods we examine, and sharply lower in the next three periods. Some observers speculated that the effect might initially be substantial, but would fade over time as attorneys adapted to the new procedure, realized there were no pejorative consequences of merely formalistic compliance, and simply went through the motions. This data is inconsistent with that story—the decline deepens over time.

Table 7.2. Pattern of LA Superior Court "Major Civil" Filings and Demurrers, 2013–18

Period	Average monthly Case Filings (a)	Average Monthly Demurrers Two Months Later (b)	Rate (b / a)	Change in rate from 2013-15 average
May '13–April '14	3,012	398	13.2%	n/a
May '14–April '15	2,992	389	13.0%	n/a
May '15–Oct. '15	3,191	411	12.9%	n/a
Nov '15–April '16	3,185	303	9.5%	–28%
May '16–April '17	3,383	311	9.2%	–30%
May '17–April '18	3,715	313	8.4%	–35%

Figure 7.1 breaks out the data by month; each bar represents demurrers as a percentage of "major civil" cases filed two months earlier. The pattern could be described as *res ipsa loquitur*; although there are seasonal fluctuations, there is a large and abrupt drop in the demurrer percentage starting in the month that § 430.41 goes into effect, and a continued gradual decline afterwards. Given that we are limited to observational data, we don't think the cause-and-effect story could be much stronger.

Figure 7.1. Percentage of "Major Civil" Case Filings with a Demurrer, 2013–18



Explanations

"Meet and confer" reduced demurrers. But why? In the next phase of this project, we plan to interview a sample of lawyers to explore this and other issues that have arisen from our analyses. With purely quantitative data on the mechanics of litigation, there is a limited amount we can say about how the reform influenced incentives and attitudes around demurrers. Nonetheless, it is worth considering some hypotheses and what partial light the data might shed on them.

Three factors, perhaps working in tandem, seem plausible drivers of declining demurrer filings:

1. "Meet and confer" increased the time and effort involved in filing demurrers. Simply raising their cost naturally reduced their incidence. The counter to this explanation is that, if defense counsel is developing a demurrer, the marginal additional cost of the meet-and-confer process is minimal for the defendant.
2. The process of "meet and confer" had its intended effect of improving communication between parties, and thus resolving, outside the demurrer process, defects in pleadings that could be easily remedied by plaintiffs. In particular, "meet and confer" sends a strong signal to plaintiffs and plaintiffs' counsel that defense counsel has invested the effort in developing a demurrer strategy. This may preemptively cause many plaintiffs to amend their complaints to remove defects or frivolous counts.

3. The prospect of "meet and confer" created a disincentive for defendants to file meritless demurrers as a delaying tactic, thus raising the average "quality" of demurrers.

We have no direct means, within the confines of our data, of testing any of these explanations. All of them could be true to varying degrees. And it is worth pointing out that, even if hypothesis (1) is true, raising the cost of filing a demurrer could be efficient, because the alternatives that it propels parties toward (such as negotiating with opposing counsel to resolve side issues) could in the aggregate reduce costs and save both court and litigant time.

In the final section of this paper, we will discuss some of the next steps we are contemplating to test these hypotheses and understand why "meet and confer" had such a substantial effect. In the meantime, we present a few intriguing patterns in the data that offer some clues.

For example, the time elapsing between the filing of complaints and the filing of demurrers increased under "meet and confer," as shown in Table 7.3. This is, at least in part, an inevitable consequence of making the process of filing a demurrer somewhat more involved and bringing more negotiation between the parties into the process. But it also suggests that "meet and confer" made the demurrer process more costly for defendants. It is notable that the filing periods continued to stretch a little longer as the demurrer rate continued to fall in 2016–17 and 2017–18.

Table 7.3. Change in Lag Time Between Complaints and First Demurrers, 2013–18

Period of Case Filing	Median Days Between Complaint Filing and Demurer Filing
May '13–April '14	71
May '14–April '15	70
May '15–Oct. '15	67
Nov '15–April '16	83
May '16–April '17	87
May '17–April '18	91

Table 7.4 examines, from our hand-coded sample, the distribution of demurrer resolutions in 2015 and 2017. The sample is small, of course, but it certainly provides no evidence that only "weak" demurrers were somehow weeded out by the "meet and confer" requirement. Instead, it suggests a more complicated hypothesis: "meet and confer" may have weeded out both the weakest demurrers (because plaintiffs pointed out to defendants, before the demurrer was filed, how unlikely the demurrer was to be sustained) and the strongest demurrers (because plaintiffs bowed to the likelihood that they would lose, and pre-emptively amended their pleadings).

Table 7.4. Resolution of Demurrers in the Hand-Coded Sample

Outcome	Case Filed in 2015	Case Filed in 2017
Sustained without leave to amend	27%	24%
Sustained in part or with leave	18%	18%
Overruled	11%	16%
Moot	44%	42%
Total demurrers in sample	131	79

Examining the consequences of the reform across different types of cases is quite revealing. For this analysis we used our larger database. Table 7.5 shows the distribution of "major civil" cases for each of the six filing periods we have examined in prior tables. The table generally shows great continuity over the 2013–18 period. Tort claims arising from auto accidents increased, while other personal-injury tort claims declined a bit. Otherwise, in a period of rising case filing, the distribution of cases remained remarkably even.

Table 7.5. Distribution of "Major Civil" Cases by Type, 2013–18

Period of Case Filing	Distribution of Civil Case Filings, by Subject						
	Auto	Other PI	Other Tort	Employment	Contract	Real Property	All Other
May '13–April '14	31%	24%	6%	11%	19%	5%	5%
May '14–April '15	32%	22%	6%	12%	19%	4%	4%
May '15–Oct. '15	34%	21%	6%	12%	19%	5%	4%
Nov '15–April '16	34%	21%	5%	11%	18%	4%	5%
May '16–April '17	36%	20%	5%	12%	19%	4%	4%
May '17–April '18	37%	18%	5%	12%	20%	4%	4%

PI = personal injury.

This was not, however, true of demurrer patterns. "Meet and confer" appears to have had very different effects upon different types of cases, as shown in Table 7.6. The key takeaways from Table 7.6 are that (a) the pattern of demurrers during the "before" period was fairly steady across case types, with demurrers particularly common in "Other Tort" and "Property" cases; (b) it was fairly steady across case types during the "after" period as well; but (c) the size of the "reform" effect was very different across case types, with "Employment" and "Property" cases experiencing very large declines. These disparities easily meet standards of statistical significance.

Table 7.6. Rate of Demurrers per Case Filing, by Case Type and Period

Period of Case Filing	Distribution of Civil Case Filings, by Subject						
	Auto	Other PI	Other Tort	Employment	Contract	Real Property	All Other
May '13–April '14	2.1%	15.1%	30.5%	18.6%	19.2%	39.7%	17.9%
May '14–April '15	2.2%	14.5%	29.8%	17.3%	17.9%	38.4%	18.4%
May '15–Oct. '15	2.2%	14.9%	30.5%	17.3%	16.6%	33.3%	20.6%
Nov '15–April '16	1.9%	11.4%	23.8%	11.8%	14.6%	27.7%	15.6%
May '16–April '17	1.7%	11.4%	26.2%	10.7%	14.1%	26.8%	15.8%
May '17–April '18	1.7%	11.1%	23.8%	10.9%	12.7%	23.0%	17.6%
Average change from Periods 1–3 to Periods 4–6	–19%	–24%	–19%	–37%	–23%	–30%	–14%

It seems clear that the reform interacted with particular types of lawsuits to produce variable results. If we can understand the reasons for those variations, we can probably understand with some precision the ways the reform changed the calculus of demurrer filings. As an example of this type of reasoning, consider employment cases. Prevailing plaintiffs in these cases are entitled to recover attorney's fees; this gives defendants extra incentives to minimize legal costs. The "meet and confer" procedure may provide a particularly attractive tool for defendants in employment cases to discuss the substance of a case with their opposite number and to nudge the filing of an amended complaint to simplify the litigation. This might at least partially explain why "meet and confer" seemed to have a particularly dramatic effect in pushing down demurrers in employment cases.

Conclusions and Next Steps

Even litigators often complain that the demurrer (or its analogous incarnations in other jurisdictions) is an overused device. It rarely brings a case to an end, and when it focuses on minor or technical defects in a pleading, its main effect seems to be additional delay and expense. It is therefore plausible, at least, that a substantial reduction in demurrer filings is a largely unambiguous good.

The "meet and confer" reform clearly produced a large drop in demurrer filings in Los Angeles Superior Court civil litigation. Our next task is to better understand why. One way of getting at this is through interviews with litigators and judges—and in the next phase of this

project, we will do this. But the existence of this large drop also means that by comparing the composition of demurrers before and after the reform, we can develop some objective evidence about the type of demurrers that tended to disappear post-reform, and the type that remained undiminished.

Here again, our two-track research method will help our effort. Since we can readily identify nearly all demurrers in "before" and "after" periods, it will be relatively easy to pull and study those cases, develop hypotheses about how the composition of demurrers changed, create more detailed coding schemes to classify cases and demurrers, and then conduct a more detailed "objective" analysis of larger samples. Alongside this effort, we hope to use lawyer interviews to develop estimates of the litigation costs and effort involved in different types of cases. If all goes well, we will learn not only why particular types of demurrers declined precipitously post-reform, but also how that decline affected the efficiency, cost, and fairness of the underlying litigation.

Chapter 8. Summary of More Talk Less Conflict: Evidence from Requiring Informal Discovery Conferences

Eric Helland and Minjae Yun

This paper has been reformatted and reviewed for spelling but is otherwise presented as submitted to the conference.

Summary

Discovery is the formal process of exchanging information under the supervision of the courts. Since discovery often constitutes the single most expensive part of the litigation process, efforts at controlling discovery costs have focused on the efficacy of discovery management by judges. This study examines whether case management techniques can reduce litigation costs. We attempt to untangle the impact of specific judges from the use of a particular case management technique. We focus on the use of informal discovery conferences (IDCs), in which parties meet with the judge before filing a motion to compel. The problem with simply testing whether IDCs reduce the number of discovery motions is that IDCs are likely endogenous. Our solution to this endogeneity is to use the random assignment of judges. Using this estimation strategy, we find that IDCs reduce the number and presence of discovery motions by 64%.

1. Discovery Costs Are Litigation Costs

As the formal process of exchanging information under the supervision of the courts, the discovery process represents one of the essential elements of litigation. It involves one side revealing the evidence it will present at trial to the opposing side, giving each side a chance to prepare counterarguments. These can be questions that the other side must answer (interrogatories), the opportunity to depose witnesses under oath, requests for documents, or physical examinations. If parties do not respond to these requests, they face potential sanctions by the court. Parties can object to requests for information on the grounds that the request is too broad or that the information requested is not germane to the case. If such an objection is successful, the court will not sanction the party for not providing the information.

One potential concern is that in the US discovery system, the producer of the information pays a disproportionate share of the discovery costs. That is, the party who pays for most of the cost of a discovery request is not the party requesting the information but the party who must respond (Fitzpatrick, 2018). Theoretically, a producer pays system, like the American Rule for litigation costs, leads to excessive spending on discovery. Under such a rule, parties have no

incentive to be careful in the scope of their requests and may request information they would not have requested if they had been forced to bear the full cost of the production of the information.

Several suggested discovery reforms involve allocating costs to the parties (see Fitzpatrick, 2018). These reforms, such as a loser pays fee structure, may mitigate the incentives to engage in excessive discovery, but they do not eliminate it. In fact, except for Fitzpatrick's proposal to have both sides pay the full amount of the discovery costs and simply tax away the excess, it would be impossible to provide both sides with the proper incentives for discovery.

Schrag (1999) was the first to model the effects of allowing judges to manage discovery in order to reduce costs. Schrag takes as a starting point that managerial judging is largely about reducing the scope of discovery to reduce costs and speed up litigation. Schrag models judges' early intervention as having the effect of promoting early settlement and reducing expenditures on litigation.

The problem with managerial judging as a solution to discovery-induced litigation costs and delay is that judges appear to vary in their ability or willingness to undertake early discovery management. One proposal to mitigate discovery costs would be to have case management orders that all judges in a court are required to follow. These orders would lay out procedures that generally reduce discovery costs.

One such procedure, known as an informal discovery conference (IDC), is a rule requiring parties to meet with a judge informally and try and resolve the dispute before they file a motion to compel the provision of information. The theory is that the parties could reach a compromise before incurring the cost of drafting motions, and the judge informally signals her views on the dispute. Theoretically, this would allow parties to narrow the scope of their requests and reduce the cost of discovery by reducing the cost of provision and the legal costs involved in providing and reviewing discovery disputes (Schrag 1999).

Can Case Management Mitigate Discovery Costs?

A series of empirical evaluations in the 1990s looked at various policy experiments in case management. They suggested that the success of case management techniques depended highly on which judge was assigned the case. Several RAND studies examined the Civil Justice Reform Act (CJRA) of 1990, a law whose passage was motivated in part by concerns about abuse of discovery (Kakalik et al., 2000). The RAND studies found that the impact of CJRA reforms on proxies for discovery costs was minor and dependent on judges deciding to engage in active case management. Put differently, the researchers could not untangle the impact of specific rules from how successfully or even how aggressively individual judges tried to manage discovery. It was impossible to differentiate the specific judge from a court-wide case management order. This left researchers with no basis for recommending case management orders or specific rules as a method for controlling discovery costs since active management by specific judges might explain

any observed impact, and imposing a case management order across all judges in a court would have no effect on discovery costs.[104]

Can IDCs Reduce Litigation Costs?

In our study of IDCs, we return to the question of whether court management techniques can reduce litigation costs by untangling the impact of specific judges from the use of a particular case management technique. We focus on the use of informal discovery conferences (IDCs), in which parties meet with the judge before filing a motion to compel. Courts have created IDCs to reduce discovery costs by reducing the need for discovery motions. Given the high cost of discovery motions in terms of litigants and judicial time, it seems likely that the proponents of IDCs are correct. If IDCs reduce discovery motions, they will almost certainly reduce litigation costs. However, if IDCs are not effective, it is possible that they could, on the one hand, reduce judicial attention and delay litigation while also leaving discovery motions undiminished. We evaluate whether using an IDC reduces the number of discovery motions in that case.

Our Data Come from Civil Cases at the Stanley Mosk Courthouse in LA

To evaluate the effectiveness of IDCs, we turn to judges in general jurisdiction cases (cases with over $25,000 in dispute). We focus on cases at the Stanley Mosk Courthouse (Central Court) in downtown Los Angeles. The Stanley Mosk Courthouse is near the Los Angeles Superior Court (LASC) complex courts. This proximity has led to a high level of communication between complex litigation judges and judges at Stanley Mosk. This communication has led more Stanley Mosk-based judges to use IDCs as a case management technique. The judge can make her preference for using IDCs either 1) in the initial status conference with the parties and 2) in a statement of judicial policy on the LASC website. Notably, LASC does not require general jurisdiction judges to use IDCs.

Moreover, general jurisdiction judges vary in the frequency with which they use IDCs. We provide some evidence of the variation in the frequency of the use of IDCs in Figure 8.1. Of the 75 judges, one judge used IDCs in almost 80% of the cases they were assigned, while about a third of the judges do not use IDCs at all.

How Do We Separate the Impact of IDCs from Specific Judges?

The problem with simply testing whether IDCs reduce the number of discovery motions is that, as the RAND and FJC studies suggest, the use of IDCs is likely endogenous. That is,

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[104] Although focusing on a somewhat different set of issues than the RAND study, a 1998 Federal Judicial Center (FJC) study examined the scope, nature, and cost of discovery in federal cases by surveying attorneys in a sample of civil cases (Willging, 1998). As part of this survey, the FJC also examined the impact of case management and found, much as RAND did, a limited effect of case management upon discovery costs.

litigants are probably more likely to request IDCs—and judges are probably more likely to impose them—in cases that are also more likely to have complex discovery issues. This endogeneity will produce a positive coefficient if we simply correlate, across cases, the number of IDCs and the number of discovery motions. Our solution to this endogeneity is to use the random assignment of judges within the largest courthouse of the Los Angeles Superior Court (LASC). Since some judges have a higher propensity to use IDCs and some branches of the LASC have begun requiring them, we have two sources of policy variation. Put more succinctly, since LASC assigns judges to cases randomly, we can use a judge's propensity to use an IDC as a quasi-experiment in the effects of IDCs. In other words, the propensity to use an IDC is our instrumental variable in the Two-Stage Least Squares (2SLS) regression.

We Find IDCs Reduce Discovery Motions

Using this estimation strategy, we find that IDCs reduce the number and presence of discovery motions by .54 when we do not control for endogeneity (ordinary least squares [OLS]) and .64 when we use judge fixed effects as an instrument. We also estimate the impact of IDCs on the most common motions in discovery disputes which are motions to compel, in which a litigant asks the court to enforce a request for information (e.g., production of documents, a deposition, interrogatories, a request for facts, and/or a subpoena, etc.). We find a robust negative and significant effect across all specifications and instrument measures, ranging from –.513 to –.59. The results for all motions are motions to compel are presented in Figure 8.2.

Figure 8.3 examines the impact on other motions in discovery disputes. Specifically, we look at motions to quash, order motions, and protective order motions. Motions to quash ask the court to rule that the target of a discovery request does not have to respond to a discovery request. Protective order motions, by contrast, aim to prevent the disclosure of sensitive information such as client lists or trade secrets or to preclude the opposing party from taking specific discovery actions. Parties typically request an order motion after a party has failed to comply with an earlier discovery order.

As shown in Figure 8.3, we also find a negative and robust impact of IDCs on motions to quash. The impact is a –.08 reduction in the probability of a motion to quash. We also estimate the results for order motions that parties typically request after a party has failed to comply with an earlier discovery order and find a similarly negative effect. Across our different instrumental variable (IV) measures and sample specifications, we find that IDCs reduce order motions by .04 to .08 percent. Finally, we estimate the effect on protective order motions, which seek to prevent the disclosure of sensitive information or to preclude the opposing party from taking specific discovery actions. Here we do not find an effect across any specification.

Conclusions

The cost of discovery in litigation is broadly debated, but there is little consensus among scholars on mitigating discovery costs. One solution is judicial intervention to prevent costly discovery requests and promote settlement. Our study examines the impact of one such rule, informal discovery conferences (IDCs), on discovery disputes. As a case management technique, the promise of IDCs is that they will reduce the cost of litigation by reducing discovery disputes and the need to file motions to compel discovery. To the extent that IDCs reduce the number of discovery motions, they reduce litigation costs in terms of attorney and judge time.

Our results suggest that IDCs do reduce the number of discovery motions filed in the case by almost 80% and, to the extent that these motions are key determinants of litigation costs, reduce the overall cost of litigation. More broadly, the results suggest that case management orders that instruct all judges in specific jurisdictions to undertake certain case management techniques hold the promise of reducing discovery costs.

Figure 8.1. IDC Use by Judge

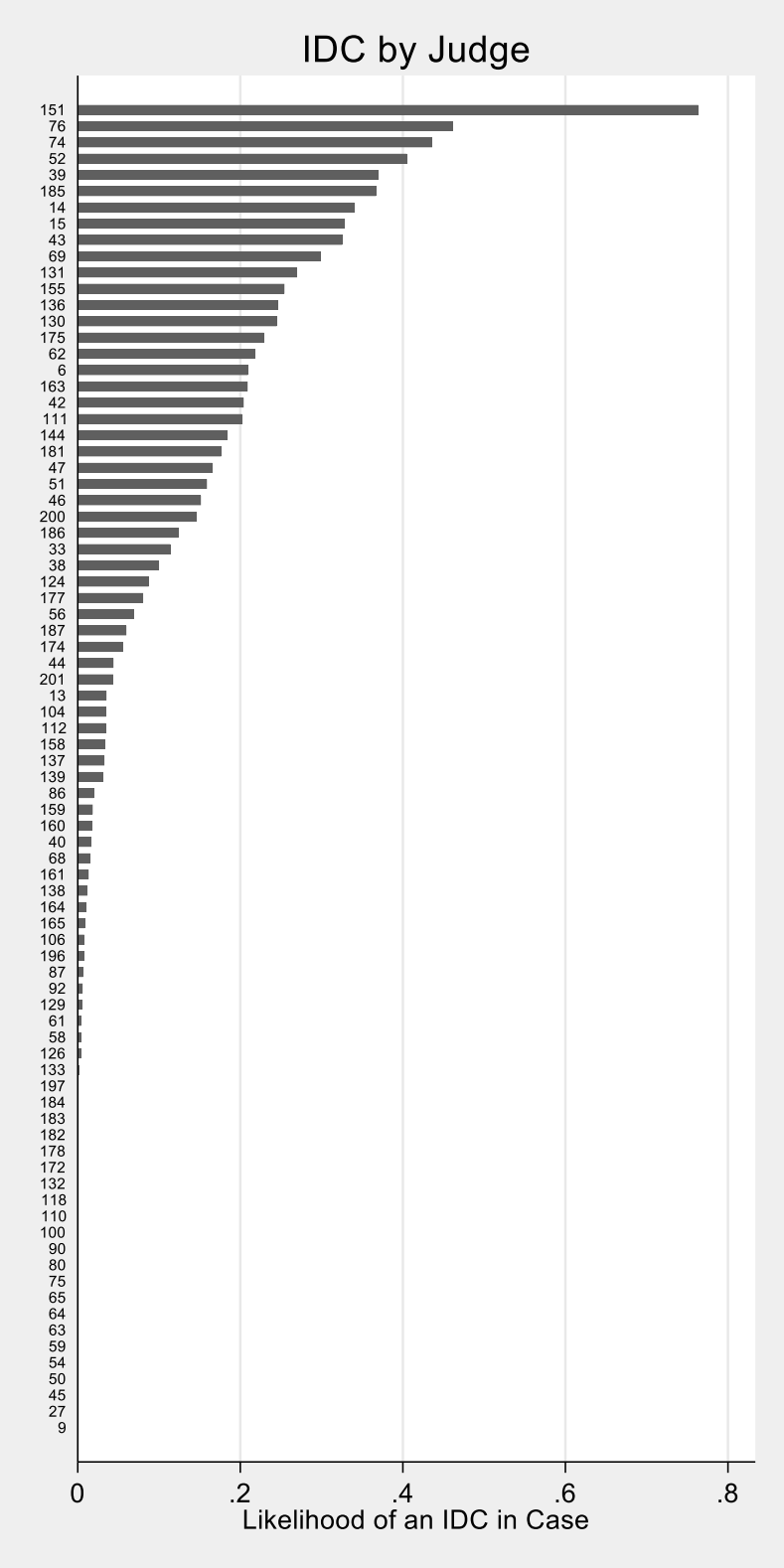


Figure 8.2. The Impact of IDC Use on the Likelihood a Case Has Any Discovery Motions (All Motions) and Any Motions to Compel (Compel).

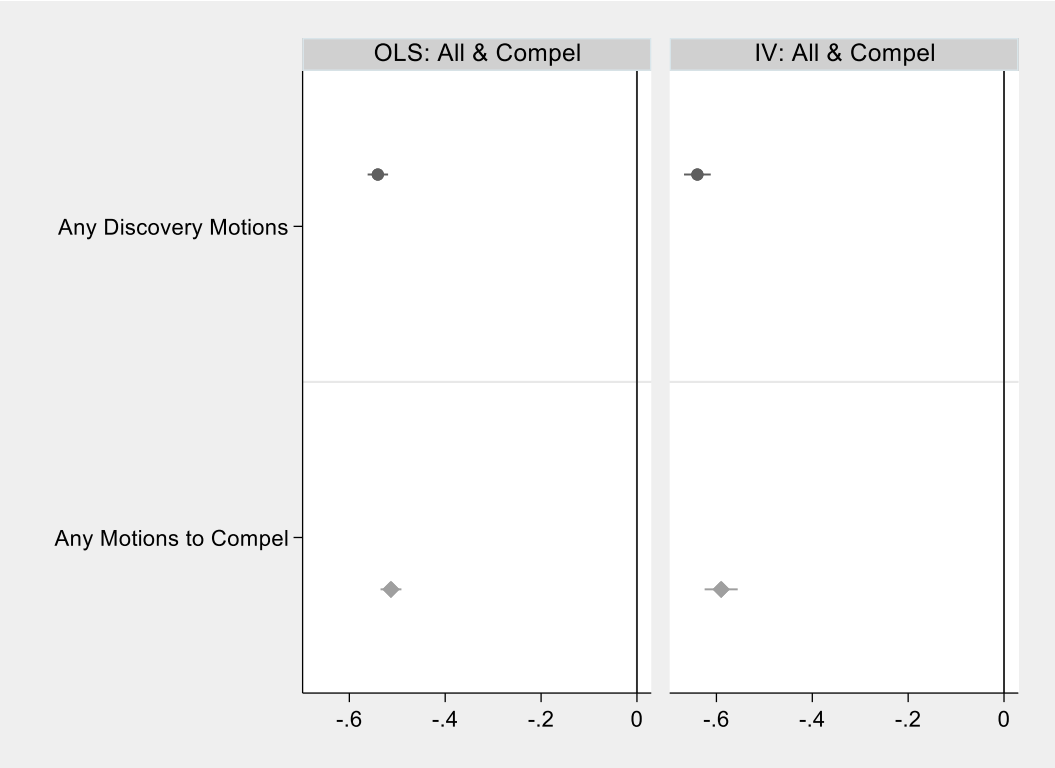
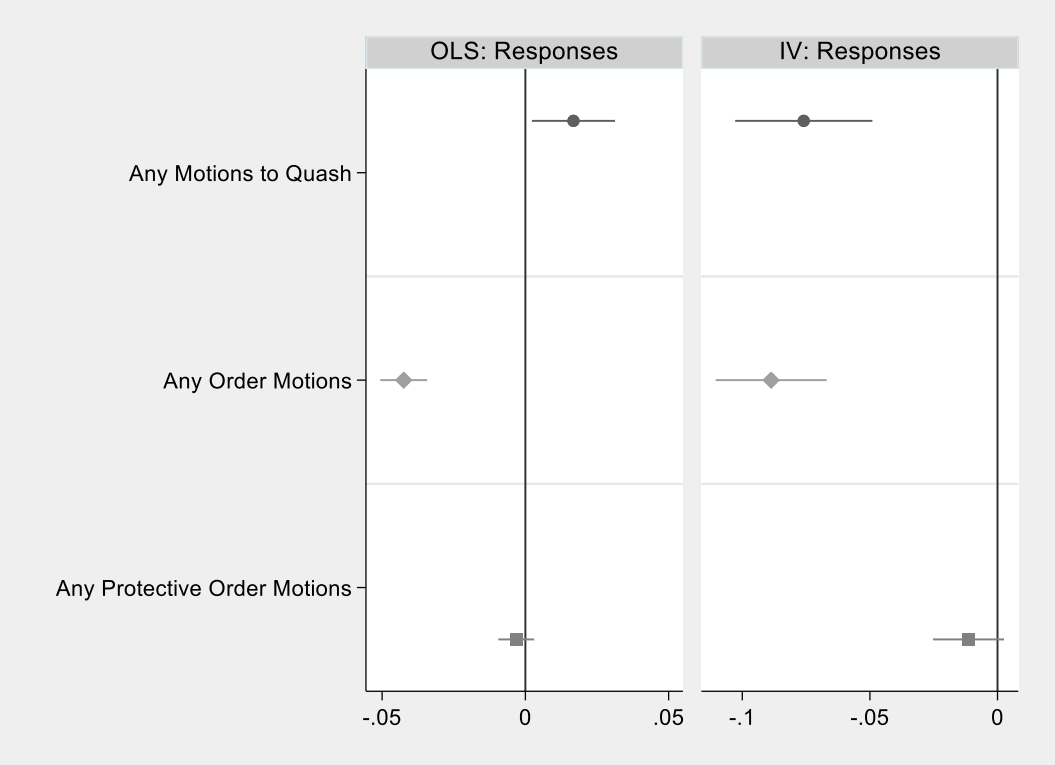


Figure 8.3. The Impact of IDC Use on the Likelihood of Any Response Motions in the Case



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Chapter 9. Report on the Mandatory Initial Discovery Pilot: Results of Closed-Case Attorney Surveys Fall 2017–Spring 2019

Emery G. Lee III and Jason A. Cantone

This paper has been reformatted and reviewed for spelling but is otherwise presented as submitted to the conference. It was originally prepared for the Judicial Conference Advisory Committee on Civil Rules and published in September 2019 by the Federal Judicial Center.

Executive Summary

This initial report on the Mandatory Initial Discovery Pilot (MIDP) summarizes the results of surveys, conducted by Federal Judicial Center (Center) researchers, of attorneys in MIDP cases in the District of Arizona and the Northern District of Illinois, closed through the spring of 2019. The MIDP replaces the initial disclosures required by the Federal Rules of Civil Procedure with broader disclosure requirements. More than half of survey respondents in the District of Arizona and about half of survey respondents in the Northern District of Illinois reported having participated in MIDP disclosures in pilot cases terminated on or before March 31, 2019.

Pilot participants were asked to evaluate their experience with the MIDP in closed cases. Survey respondents generally agreed that the MIDP resulted in relevant information being provided to the other side earlier in the case. Additionally, most survey respondents either disagreed with or were neutral to the concern that the required MIDP exchanges would result in disclosures that would not otherwise have occurred in the discovery process. They were more or less evenly divided on whether the MIDP focused discovery on important issues, reduced the volume of discovery requests, or reduced the number of discovery disputes in the closed cases. Plaintiff attorney respondents were more likely than defendant attorney respondents to agree that the MIDP enhanced the effectiveness of settlement negotiations, expedited settlement negotiation discussions among the parties, and reduced the number of subsequent discovery requests. In general, survey respondents tended not to agree that the MIDP reduced discovery costs or overall costs in the closed cases, nor did they agree that the disclosures reduced disposition times in the closed cases. Survey respondents were also invited to provide open-ended comments about the MIDP, which are included in the Appendix.[105]

[105] The appendix is available in the original publication; see Emery G. Lee III and Jason A. Cantone, *Report on the Mandatory Initial Discovery Pilot: Results of Closed-Case Attorney Surveys Fall 2017–Spring 2019*, Federal Judicial Center, September 2019.

This is not a final report on the MIDP, as the participating districts continue to assign newly filed cases to the pilot. Center researchers will continue to conduct attorney surveys in terminated pilot cases on a regular cycle. In addition, Center researchers are collecting docket-level data on pilot cases and conducting interviews in the participating districts as part of a larger MIDP project.

Background

In June 2016, the Judicial Conference Committee on Rules of Practice and Procedure approved the MIDP for use in the district courts. The MIDP is based on the expectation that "civil litigation will be resolved more quickly and less expensively if relevant information is disclosed earlier and with less discovery practice."[106] The pilot is modeled in part on "the robust initial disclosure rules used in various states," including state courts in Arizona.[107] In the participating districts, it applies broadly to all civil cases subject to mandatory initial disclosures under Fed. R. Civ. P. 26(a)(1), except patent cases governed by local rules and those included in a multidistrict litigation consolidation. The MIDP disclosures are broader than those under the existing rule because they require disclosure of both favorable and unfavorable information; the existing rule requires a party to disclose only favorable information. Much more information about the MIDP can be accessed on the Center's public website.[108]

As part of the MIDP study, Center researchers have surveyed attorneys of record in recently closed pilot cases to measure participation in the pilot and participants' evaluations of it. The District of Arizona began using the MIDP in civil cases filed as of May 1, 2017, and a large number of judges in the Northern District of Illinois began using it in civil cases filed as of June 1, 2017. Both districts expect to apply the MIDP to newly filed civil cases for three years. Pilot cases are identified by searching each district's electronic records for closed cases in which the pilot standing order was docketed. In addition, certain kinds of case dispositions in which discovery is unlikely to have occurred, such as default judgments, are generally excluded from the surveys. The lists are deduplicated each round, so no attorney in either district should receive more than one survey per round. In both the District of Arizona and the Northern District of Illinois, closed-case attorney surveys have been conducted four times, as of this writing, on roughly a six-month cycle: fall 2017, spring 2018, fall 2018, and spring 2019. Each round of surveys includes pilot cases closed in the six months prior to the survey release. The first round of surveys in fall 2017 included the small number of pilot cases closed since the start of the MIDP a few months earlier.

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[106] Advisory Comm. On Civil Rules, Report to the Standing Committee, May 12, 2016, at 27 (available at https://www.uscourts.gov/sites/default/files/2016-06-standing-agenda-book.pdf).

[107] Id. at 26.

[108] https://www.fjc.gov/content/320224/midpp-standing-order.

Through four rounds, 1,612 surveys have been emailed in the District of Arizona, and 3,163 in the Northern District of Illinois. The overall response rate for the District of Arizona, as of this writing, is 29% (473 responses received).

For the Northern District of Illinois, the comparable figure is 35% (1,103 responses received). These response rates are consistent with response rates in similar Center surveys of attorneys.

In terms of representativeness, plaintiff attorneys and defendant attorneys responded in roughly equal numbers, and in similar types of cases, overall. Broadly speaking, respondents' cases are representative of the farraginous dockets of the federal courts: insurance and other contract actions, personal injury torts, civil rights, consumer credit, wage and hour litigation, trademark and copyright, and the catchall "other" statutory actions. The closed cases underlying this report are not representative of case dispositions, however. Some types of case dispositions are likely underrepresented, especially summary judgments, which take longer than most other types of dispositions, on average, and thus may not have closed. For example, if a pilot case was filed on the first day of the pilot and closed by March 31, 2019 (the end of the last survey period), it would have lasted 23 months in the District of Arizona and 22 months in the Northern District of Illinois. Cases filed more recently have, accordingly, had even less time to resolve. Survey responses from attorneys in longer-pending pilot cases will have to be analyzed in subsequent reports. Because the survey results presented in this report are, at best, representative of shorter duration cases, they should be interpreted with caution.

Results for the most part are reported separately for plaintiff attorneys and defendant attorneys because of the study's sampling design. For each closed case included in the study, a survey was distributed to both a plaintiff attorney and a defendant attorney, if possible. That means that in each round of surveys, some closed cases are represented by two responses (one each for plaintiff attorney and defendant attorney) and others by only one response. Reporting responses separately for plaintiff attorneys and defendant attorneys eliminates any double counting of cases that may occur. Reporting the responses separately can also reveal meaningful differences in evaluations of the pilot between plaintiff attorneys and defendant attorneys; these differences will be discussed where appropriate. Respondents' open-ended comments regarding the MIDP, provided in the Appendix, are also presented separately for plaintiff attorneys and defendant attorneys.

Participation in the Pilot

The surveys asked respondents to answer if, in the recently closed case, "either side provide[d] the other side with mandatory initial discovery, as required by the standing order." All respondents were informed that their answers applied only to the named closed case. Response options were, "Yes, all required exchanges were made," "Yes, my side did but all sides did not," "Yes, other sides did but my side did not," "No," and "I do not recall."

MIDP disclosures were reported in a majority of closed pilot cases in the District of Arizona, where 43% of plaintiff attorneys and 46% of defendant attorneys responded, "Yes, all required exchanges were made." Another 12% of plaintiff attorneys and 13% of defendant attorneys responded that at least one side, but not all sides, made the required exchanges. As shown in **Table 9.1**, for most of these responses the attorney noted that their side was the only one to make the required exchanges. At the same time, 37% of plaintiff attorneys and 36% of defendant attorneys reported that the MIDP exchanges were not made in the recently closed case. Additionally, 8% of plaintiff attorneys and 5% of defendant attorneys could not recall whether MIDP exchanges were made in the closed case.

Table 9.1. Pilot Participation in the District of Arizona (Fall 2017–Spring 2019)

	Plaintiff Attorneys	Defendant Attorneys
Yes, all	43%	46%
Yes, my side	10%	10%
Yes, other sides	2%	3%
No	37%	36%
I do not recall	8%	5%
N	231	236

When survey respondents answered that the MIDP exchanges were not made in the closed case, they were asked a follow-up question about why the exchanges were not made. The primary reason Arizona respondents (N=467) gave for not making the MIDP exchanges was early resolution of the case. Fully 87% of plaintiff attorneys and 76% of defendant attorneys responded that the case was dismissed, transferred, or otherwise resolved before the pilot's discovery obligations arose. Only about 6% of Arizona respondents indicated that they had either stipulated that no discovery would be conducted or certified that they were engaged in good-faith settlement efforts.

In the Northern District of Illinois, 37% of plaintiff attorneys and 38% of defendant attorneys responded, "Yes, all required exchanges were made." Another 7% of plaintiff attorneys and 10% of defendant attorneys responded that at least one side, but not all sides, made the required exchanges. Again, as shown in **Table 9.2**, almost all of these attorneys reported that it was their side that provided the required exchanges. At the same time, 48% of plaintiff attorneys and 46% of defendant attorneys reported that the MIDP exchanges were not made in the recently closed case. Additionally, 8% of plaintiff attorneys and 7% of defendant attorneys could not recall whether MIDP exchanges were made in the closed case.

Table 9.2. Pilot Participation in the Northern District of Illinois (Fall 2017–Spring 2019)

	Plaintiff Attorneys	Defendant Attorneys
Yes, all	37%	38%
Yes, my side	7%	9%
Yes, other sides	0%	1%
No	48%	46%
I do not recall	8%	7%
N	531	533

The primary reason Illinois Northern respondents (N=498) gave for not making the MIDP exchanges was early resolution of the case. Fully 65% of plaintiff attorneys and 66% of defendant attorneys responded that the case was dismissed, transferred, or otherwise resolved before the pilot's discovery obligations arose. Only about 11% of respondents indicated that they had either stipulated that no discovery would be conducted or certified that they were engaged in good-faith settlement efforts. Relatively few survey respondents reported having made use of these specified exceptions. Many more respondents in Illinois Northern than in Arizona selected "Other," although their open-ended responses generally indicated that cases were resolved before the pilot's discovery obligations arose.

In considering rates of MIDP disclosures in both districts, it is important to keep in mind that the pilot's initial discovery obligations are triggered by the filing of a responsive pleading and that in many civil cases no responsive pleading is ever filed. Even when a responsive pleading is filed, many cases assigned to the pilot settle or are resolved without MIDP exchanges.

The extent to which these participation rates reflect opposition to the initial discovery obligations imposed by the pilot is difficult to estimate. It is impossible to know, for example, how many defendants sought an extension to file a responsive pleading to avoid triggering MIDP obligations. (Docket-level data will assist greatly in interpreting the survey results on participation rates.) It is clear, however, from MIDP disclosure rates and from open-ended survey responses, that many of the MIDP cases do not involve the required exchanges, especially in Illinois Northern.

To better understand the attorneys' reviews of the MIDP, the surveys also included two open-ended prompts:

- "Please provide any additional comments you have regarding the initial discovery in the above-named case."
- "Please provide any comments you have about the district's mandatory initial discovery pilot program."

The second prompt was only added to the survey for the Spring 2019 round. The appendix to this report provides all responses to these prompts, edited only for spelling and to remove

identifying information (e.g., name of the case or client). The responses are briefly summarized in the discussion section of this report.

Participant Evaluations of the Pilot

Survey respondents who reported that at least one side provided MIDP exchanges in the closed case were then asked a series of twelve questions about their recent experience with the pilot and how they believed it affected their case. These questions were designed to address the goals of the pilot, such as reducing discovery disputes and motions practice, and, in a few instances, to address concerns that were raised about potential effects of the MIDP exchanges, such as disclosure of information that would not otherwise have been requested. Respondents stated agreement or disagreement with the following statements about the "exchange of initial discovery" in the closed case:

- Provided relevant information earlier in the case
- Led to disclosure of information that would not likely have been requested otherwise
- Focused subsequent discovery on the important issues in the case
- Enhanced effectiveness of settlement negotiations
- Expedited settlement discussions among the parties
- Reduced the number of discovery requests that would have otherwise been made in the case
- Reduced the volume of discovery required to resolve the case
- Reduced the number of motions filed in the case
- Reduced the number of discovery disputes that would have otherwise been made in the case
- Reduced the discovery costs in the case for my client
- Reduced the overall costs in the case for my client
- Reduced the time from filing to resolution in the case

Responses to each question are discussed in order below.

Participant Evaluations of the Pilot—Relevant Information

Provided Relevant Information Earlier in the Case

Respondents agreed with this statement at higher rates than with any other. As seen in Figure 9.1, 70% of plaintiff attorneys in Arizona either agreed (48%) or strongly agreed (22%) with this statement, compared to 14% who either disagreed (7%) or strongly disagreed (7%). Sixty-four percent of defendant attorneys in the same district agreed (53%) or strongly agreed (11%), compared to 20% who disagreed (14%) or strongly disagreed (6%). About one in seven respondents (13% of plaintiff attorneys and 15% of defendant attorneys) neither agreed nor disagreed.

Results for Illinois Northern are displayed in Figure 9.2. In that district, 69% of plaintiff attorneys either agreed (46%) or strongly agreed (23%) with this statement, compared to 16% who either disagreed (9%) or strongly disagreed (7%). Fourteen percent of plaintiff attorneys in that district neither agreed nor disagreed. Fifty-two percent of defendant attorneys in the same district either agreed (41%) or strongly agreed (11%), compared to 25% who either disagreed (18%) or strongly disagreed (7%). Twenty-one percent of defendant attorneys neither agreed nor disagreed.

Figure 9.1. District of Arizona (N=254)

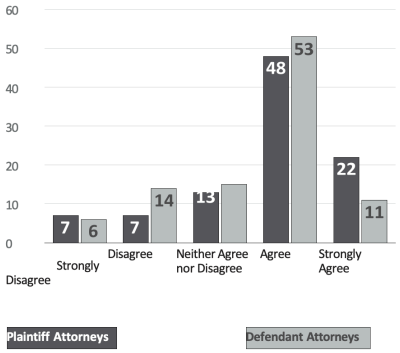
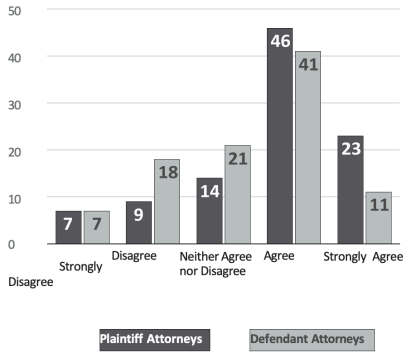


Figure 9.2. Northern District of Illinois (N=468)



Participant Evaluations of the Pilot—Disclosure of Information

Led to Disclosure of Information That Would Not Likely Have Been Requested Otherwise

Respondents tended to disagree with or express neutrality toward this statement. In Arizona (Figure 9.3), 51% of plaintiff attorneys either disagreed (38%) or strongly disagreed (13%) with the statement, and another 25% neither agreed nor disagreed. Only 20% of plaintiff attorneys either agreed (14%) or strongly agreed (6%). Fifty-three percent of defendant attorneys either disagreed (39%) or strongly disagreed (14%), and another 33% neither agreed nor disagreed. Only 13% of defendant attorneys in Arizona either agreed (11%) or strongly agreed (2%).

Similarly, in Illinois Northern (Figure 9.4), 55% of plaintiff attorneys either disagreed (33%) or strongly disagreed (22%), and another 21% neither agreed nor disagreed. Twenty-two percent of plaintiff attorneys in that district either agreed (13%) or strongly agreed (9%). Sixty-four percent of defendant attorneys in the district disagreed (39%) or strongly disagreed (25%); 21% neither agreed nor disagreed, 9% agreed, and only 3% strongly disagreed.

Figure 9.3. District of Arizona (N=255)

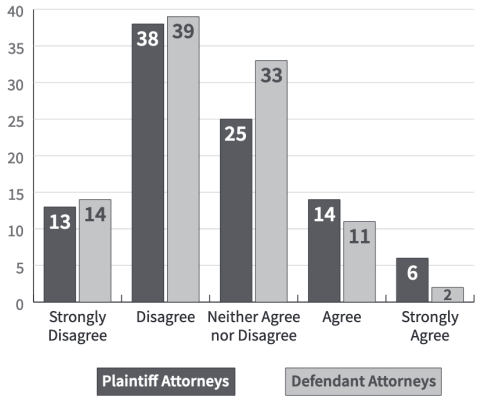
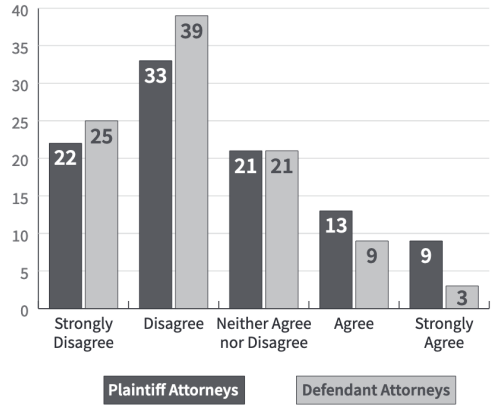


Figure 9.4. Northern District of Illinois (N=468)



Participant Evaluations of the Pilot—Focused Discovery

Focused Subsequent Discovery on the Important Issues in the Case

Respondents tended to be evenly divided on this question, except defendant attorneys in Illinois Northern, who were more negative by a 2:1 margin. In Arizona (Figure 9.5), 35% of plaintiff attorneys either agreed (26%) or strongly agreed (9%), 35% neither agreed nor disagreed, and 22% either disagreed (13%) or strongly disagreed (9%). Among defendant attorneys, 27% either agreed (22%) or strongly agreed (5%), 36% neither agreed nor disagreed, and 31% either disagreed (20%) or strongly disagreed (11%).

In Illinois Northern (Figure 9.6), 38% of plaintiff attorneys either agreed (28%) or strongly agreed (10%), 31% neither agreed nor disagreed, and 29% either disagreed (18%) or strongly disagreed (11%). Among defendant attorneys, 19% either agreed (15%) or strongly agreed (4%), 32% neither agreed nor disagreed, and 43% either disagreed (26%) or strongly disagreed (17%).

Figure 9.5. District of Arizona (N=254)

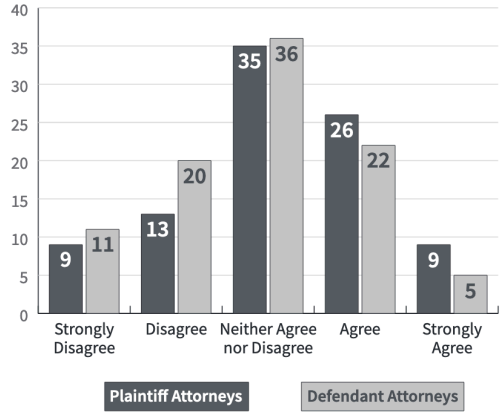
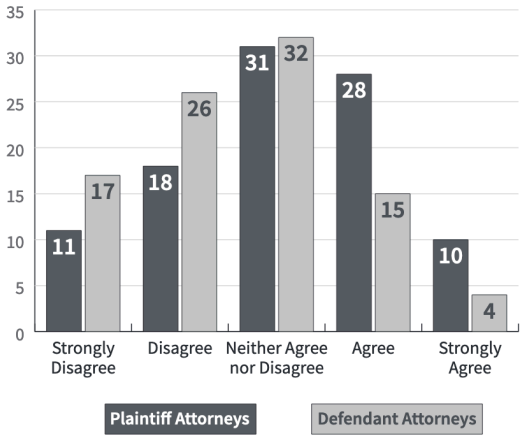


Figure 9.6. Northern District of Illinois (N=467)



Participant Evaluations of the Pilot—Settlement Negotiations

Enhanced Effectiveness of Settlement Negotiations

Plaintiff attorneys were more likely to agree with this statement, and defendant attorneys were more likely to disagree. In Arizona (Figure 9.7), 44% of plaintiff attorneys agreed (33%) or strongly agreed (11%), 31% neither agreed nor disagreed, and 21% disagreed (12%) or strongly disagreed (9%). In contrast, 34% of defendant attorneys either agreed (25%) or strongly agreed (9%), 27% neither agreed nor disagreed, and 38% either disagreed (24%) or strongly disagreed (14%).

In Illinois Northern (Figure 9.8), 42% of plaintiff attorneys either agreed (29%) or strongly agreed (13%), 26% neither agreed nor disagreed, and 30% either disagreed (17%) or strongly disagreed (13%). In contrast, 26% of defendant attorneys either agreed (20%) or strongly agreed (6%), 28% neither agreed nor disagreed, and 42% either disagreed (26%) or strongly disagreed (16%).

Figure 9.7. District of Arizona (N=256)

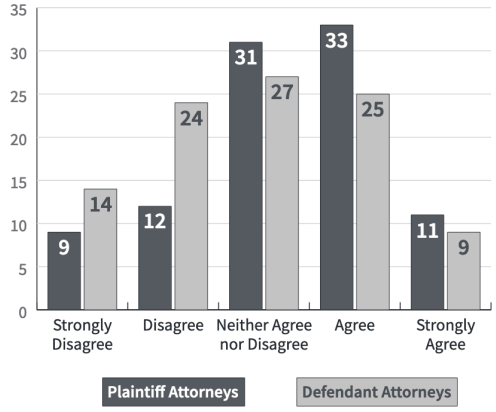
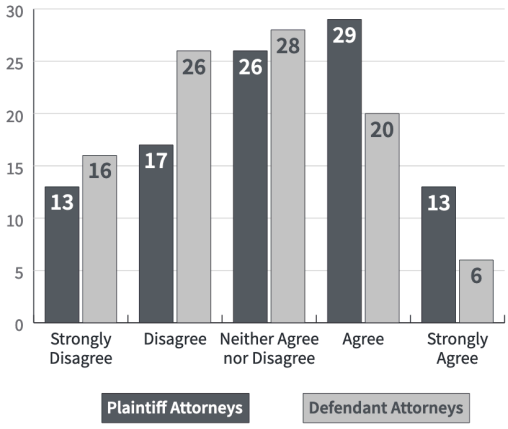


Figure 9.8. Northern District of Illinois (N=468)



Participant Evaluations of the Pilot—Settlement Discussions

Expedited Settlement discussions Among the Parties

Similar to the preceding question, plaintiff attorneys were more likely to agree with this statement than defendant attorneys; defendant attorneys evenly split on the question in Arizona but were more negative in Illinois Northern. In Arizona (Figure 9.9), 44% of plaintiff attorneys either agreed (32%) or strongly agreed (12%), 27% neither agreed nor disagreed, and 24% either disagreed (17%) or strongly disagreed (7%). In contrast, 35% of defendant attorneys either agreed (24%) or strongly agreed (11%), 28% neither agreed nor disagreed, and 36% either disagreed (26%) or strongly disagreed (10%).

In Illinois Northern (Figure 9.10), 44% of plaintiff attorneys either agreed (31%) or strongly agreed (13%), 21% neither agreed nor disagreed, and 33% either disagreed (18%) or strongly disagreed (15%). In contrast, 29% of defendant attorneys either agreed (22%) or strongly agreed (7%), 25% neither agreed nor disagreed, and 43% either disagreed (30%) or strongly disagreed (13%).

Figure 9.9. District of Arizona (N=256)

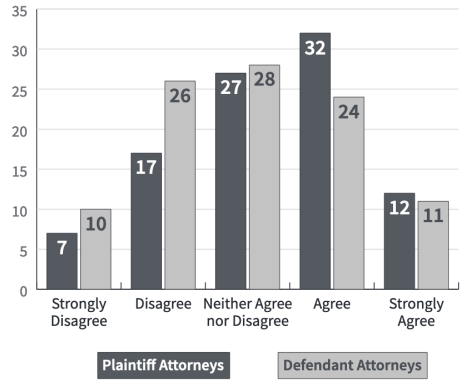
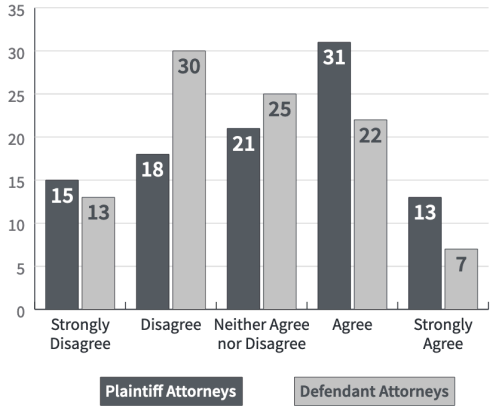


Figure 9.10. Northern District of Illinois (N=468)



Participant Evaluations of the Pilot—Number of Discovery Requests

Reduced the Number of Discovery Requests That Would Otherwise Been Made in the Case

As with the preceding question, defendant attorneys in Illinois Northern evaluated the pilot's effects most negatively (and much more negatively than Arizona defendant attorneys. In Arizona (Figure 9.11), 49% of plaintiff attorneys either agreed (34%) or strongly agreed (15%), 20% neither agreed nor disagreed, and 21% either disagreed (15%) or disagreed strongly (6%). Forty-three percent of defendant attorneys either agreed (33%) or strongly agreed (10%), 23% neither agreed nor disagreed, and 27% disagreed (22%) or strongly disagreed (5%).

In Illinois Northern (Figure 9.12), 48% of plaintiff attorneys either agreed (36%) or strongly agreed (12%), 19% neither agreed nor disagreed, and 30% either disagreed (15%) or strongly disagreed (15%). In contrast, 23% of defendant attorneys either agreed (15%) or strongly agreed (8%), 22% neither agreed nor disagreed, and 49% either disagreed (30%) or strongly disagreed (19%).

Figure 9.11. District of Arizona (N=256)

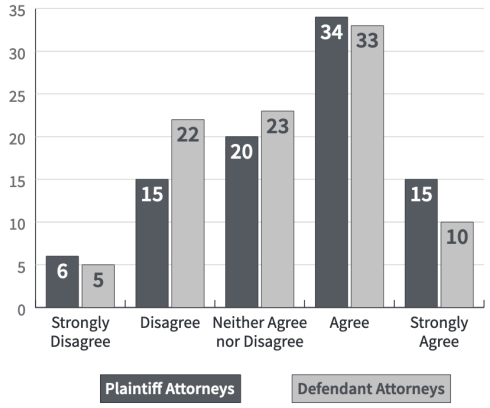
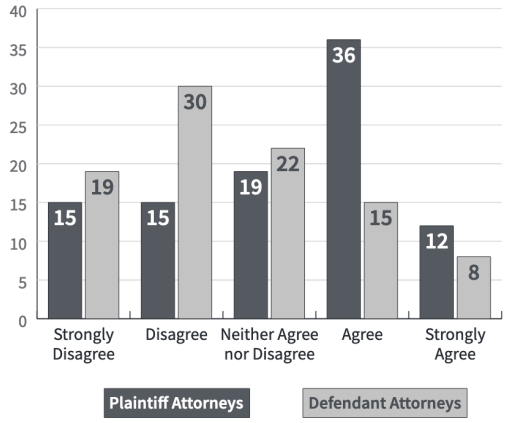


Figure 9.12. Northern District of Illinois (N=466)



Participant Evaluations of the Pilot—Volume of Discovery

Reduced the Volume of Discovery Required to Resolve the Case

As with the prior two questions, defendant attorneys in Illinois Northern evaluated the pilot's effects most negatively. In Arizona (Figure 9.13), 38% of plaintiff attorneys either agreed (28%) or strongly agreed (10%), 28% neither agreed nor disagreed, and 26% either disagreed (17%) or strongly disagreed (9%). For defendant attorneys, about one-third (32%) either agreed (26%) or strongly agreed (6%), 26% neither agreed nor disagreed, and 37% either disagreed (25%) or strongly disagreed (12%).

In Illinois Northern (Figure 9.14), 36% of plaintiff attorneys either agreed (25%) or strongly agreed (11%), 25% neither agreed nor disagreed, and 35% either disagreed (21%) or strongly disagreed (15%). In contrast, 16% of defendant attorneys either agreed (12%) or strongly agreed (4%), 25% neither agreed nor disagreed, and 55% either disagreed (31%) or strongly disagreed (24%).

Figure 9.13. District of Arizona (N=256)

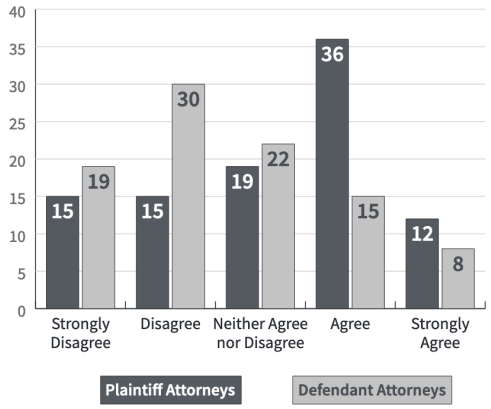
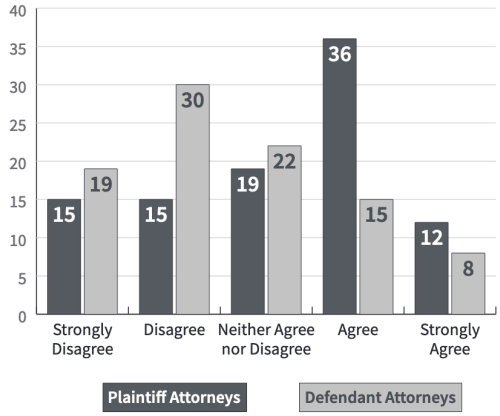


Figure 9.14. Northern District of Illinois (N=467)



Participant Evaluations of the Pilot—Number of Motions Filed

Reduced the Number of Motions Filed in the Case

Respondents tended to respond neutrally or disagree with this statement and were unlikely to agree with it (except Illinois Northern plaintiff attorneys). In Arizona (Figure 9.15), 19% of plaintiff attorneys either agreed (15%) or disagreed (4%), 40% neither agreed nor disagreed, and 31% either disagreed (20%) or disagreed strongly (11%). Defendant attorneys either agreed (9%) or strongly agreed (6%) in just 15% of closed cases, neither agreed nor disagreed in 37%, and disagreed (26%) or strongly disagreed (13%) in 39%.

In Illinois Northern (Figure 9.16), 30% of plaintiff attorneys either agreed (22%) or strongly agreed (8%), 37% neither agreed nor disagreed, and 27% either disagreed (17%) or strongly disagreed (10%). In contrast, 12% of defendant attorneys either agreed (7%) or strongly agreed (5%), 40% neither agreed nor disagreed, and 38% either disagreed (25%) or strongly disagreed (13%).

Figure 9.15. District of Arizona (N=256)

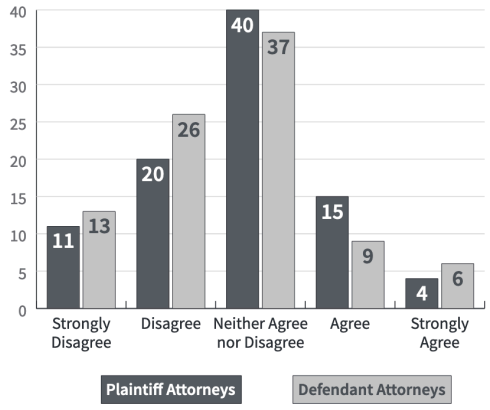
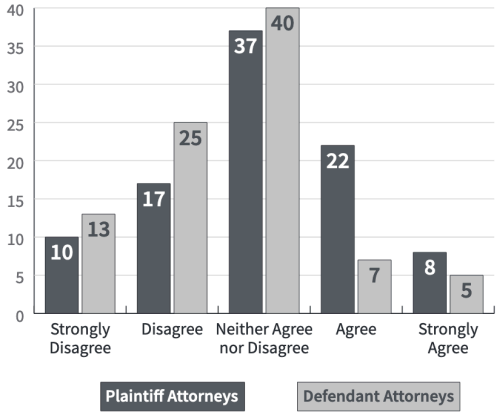


Figure 9.16. Northern District of Illinois (N=465)



Participant Evaluations of the Pilot—Number of Discovery Disputes

Reduced the Number of Discovery Disputes That Would Otherwise Have Been Made in the Case

Respondents tended to respond neutrally to this statement (except Illinois Northern defendant attorneys). In Arizona (Figure 9.17), 27% of plaintiff attorneys either agreed (20%) or strongly agreed (7%), 37% neither agreed nor disagreed, and 24% either disagreed (16%) or disagreed strongly (8%). Defendant attorneys agreed (13%) or strongly agreed (5%) in just 18% of closed cases, neither agreed nor disagreed in 38%, and either disagreed (23%) or strongly disagreed (8%) in 31% of closed cases.

In Illinois Northern (Figure 9.18), 28% of plaintiff attorneys either agreed (20%) or strongly agreed (8%), 35% neither agreed nor disagreed, and 30% either disagreed (20%) or strongly disagreed (10%). In that district, 18% of defendant attorneys either agreed (13%) or strongly agreed (5%), 31% neither agreed nor disagreed, and 39% either disagreed (25%) or strongly disagreed (14%).

Figure 9.17. District of Arizona (N=256)

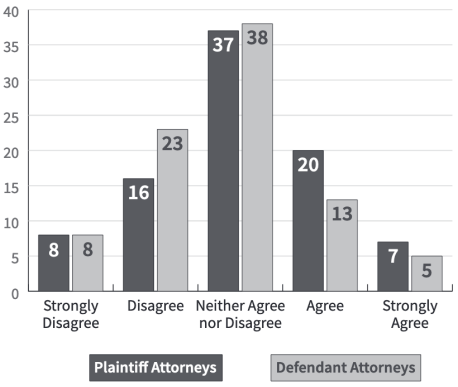
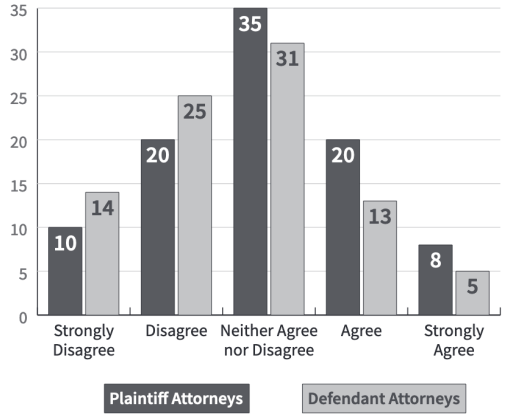


Figure 9.18. Northern District of Illinois (N=465)



Participant Evaluations of the Pilot—Discovery Costs

Reduced the Discovery Costs in the Case for My Client

Defendant respondents, in particular, tended to disagree with this statement, and all respondents expressed neutrality or disagreed at least 60% of the time. Defendant attorneys in Illinois Northern were, again, the most negative group in their evaluation of the pilot's effects. In Arizona (Figure 9.19), 29% of plaintiff attorneys either agreed (22%) or strongly agreed (7%), 32% neither agreed nor disagreed, and 31% either disagreed (20%) or strongly disagreed (11%). Defendant attorneys in that district either agreed (17%) or strongly agreed (9%) in 26% of closed cases, neither agreed nor disagreed in 23%, and disagreed (24%) or strongly disagreed (23%) in 47% of closed cases.

In Illinois Northern (Figure 9.20), 34% of plaintiff attorneys either agreed (23%) or strongly agreed (11%), 28% neither agreed nor disagreed, and 35% either disagreed (20%) or strongly disagreed (15%). Defendant attorneys in that district either agreed (14%) or strongly agreed (5%) in only 19% of the closed cases, neither agreed nor disagreed in 28%, and either disagreed (28%) or strongly disagreed (28%) in 56% of the cases.

Figure 9.19. District of Arizona (N=256)

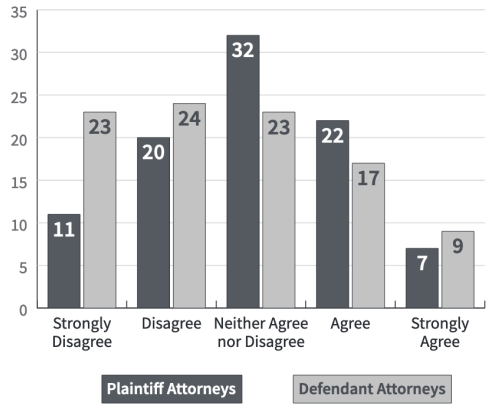
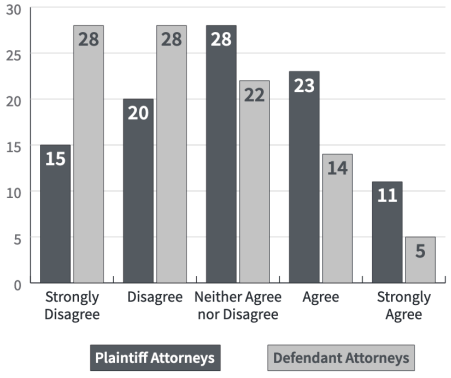


Figure 9.20. Northern District of Illinois (N=467)



Participant Evaluations of the Pilot—Overall Costs

Reduced the Overall Costs in the Case for My Client

In Arizona (Figure 9.21), 27% of plaintiff attorneys either agreed (21%) or strongly agreed (6%), 34% neither agreed nor disagreed, and 32% either disagreed (21%) or strongly disagreed (11%). Defendant attorneys either agreed (16%) or strongly agreed (8%) in 24% of closed cases, neither agreed nor disagreed in 25%, and disagreed (23%) or strongly disagreed (24%) in 47% of closed cases.

In Illinois Northern (Figure 9.22), 34% of plaintiff attorneys either agreed (21%) or strongly agreed (13%), 27% neither agreed nor disagreed, and 36% either disagreed (19%) or strongly disagreed (17%). Defendant attorneys in that district agreed (14%) or strongly agreed (4%) 18% of the time, neither agreed nor disagreed 21%, and disagreed (29%) or strongly disagreed (28%) in 57% of the closed cases.

Figure 9.21. District of Arizona (N=255)

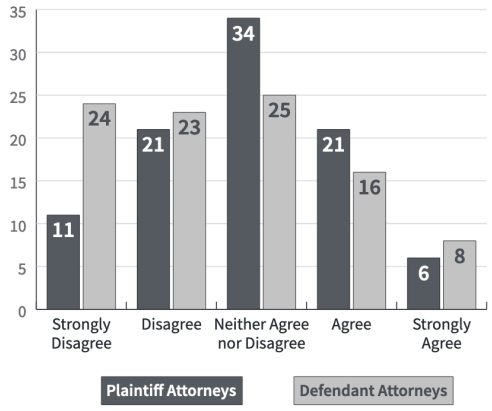
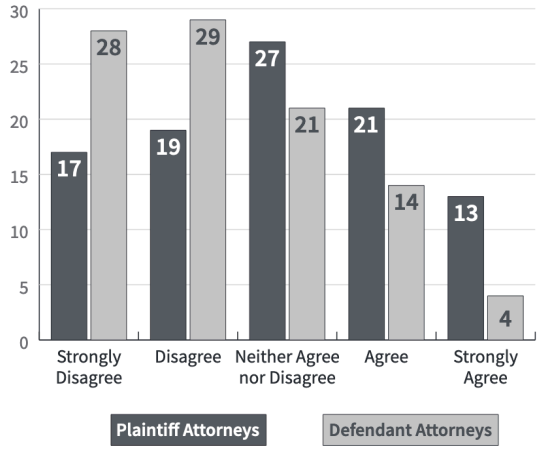


Figure 9.22. Northern District of Illinois (N=466)



Participant Evaluations of the Pilot—Length of Case

Reduced the Time from Filing to Resolution in the Case

Of course, docket-level data will provide a better measure of the effects of the pilot on disposition times, but this question rates participants' perceptions with respect to disposition times. Plaintiff attorneys were more likely to agree than defendant attorneys, and defendant attorneys were more likely to disagree than plaintiff attorneys. In Arizona (Figure 9.23), 35% of plaintiff attorneys either agreed (27%) or disagreed (8%), 30% neither agreed nor disagreed, and 26% either disagreed (19%) or strongly disagreed (7%). Defendant attorneys in that district either agreed (18%) or strongly agreed (8%) in 26% of closed cases, neither agreed nor disagreed 32%, and disagreed (25%) or strongly disagreed (14%) in 39% of closed cases.

In Illinois Northern (Figure 9.24), 38% of plaintiff attorneys either agreed (23%) or strongly agreed (15%), 27% neither agreed nor disagreed, and 31% either disagreed (17%) or strongly disagreed (14%). In that district, 27% of defendant attorneys either agreed (22%) or strongly agreed (5%), 26% neither agreed nor disagreed, and 43% either disagreed (25%) or strongly disagreed (18%).

Figure 9.23. District of Arizona (N=256)

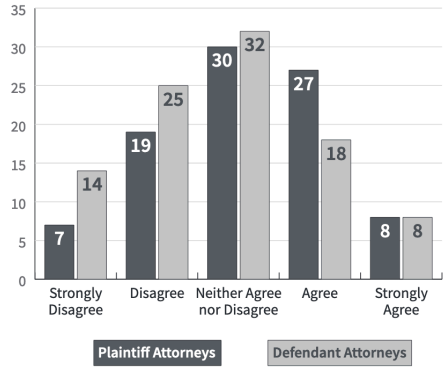
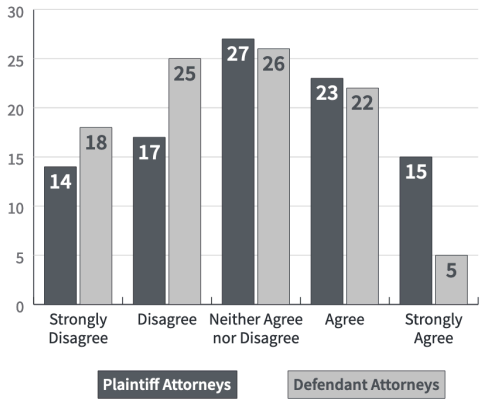


Figure 9.24. Northern District of Illinois (N=465)



Discussion

This is not a final report on the MIDP. These preliminary results represent the views of attorneys participating in only the relatively short-pending MIDP cases. Accordingly, the results presented here should be interpreted with a great deal of caution. It will be informative to see how attorneys in cases of longer duration evaluate the effects of the MIDP. Subsequent surveys will complement the figures presented here, as will analysis of docket-level data from pilot cases and structured interviews conducted in the participating districts.

Despite their preliminary nature, however, some of the survey results presented here merit discussion. It is noteworthy, for example, that participants generally did not rate the MIDP as having reduced discovery costs or overall costs for their clients in the closed cases about which they were surveyed. In the District of Arizona, for example, 29% of plaintiff attorneys and 26% of defendant attorneys agreed or strongly agreed that the MIDP reduced their client's discovery costs, and in the Northern District of Illinois, 34% of plaintiff attorneys and 26% of defendant attorneys agreed or strongly agreed that the MIDP reduced client discovery costs. Defendant attorneys were more negative about the pilot's effects on discovery costs, disagreeing or expressing neutrality in about three-quarters of cases in both districts and, in Illinois Northern, disagreeing or strongly disagreeing a majority of the time.

These evaluations can probably be explained, in some cases, by low expectations with respect to discovery in the first place. The MIDP can hardly be expected to reduce discovery costs in cases in which those costs typically would be limited regardless of the extent of the initial disclosures. At the same time, large pluralities of plaintiff attorneys tended to agree that the MIDP reduced the number of discovery requests in pilot cases—49% of the time in Arizona and 48% in Illinois Northern. That reducing the number of requests did not reduce overall costs, in some attorneys' estimation, may suggest that the disclosures made unnecessary some discovery requests that would typically be made but did not reduce the need for the discovery itself. But again, these findings are limited to the relatively short-pending MIDP cases that have already closed. If the MIDP is to have a demonstrable effect on discovery costs, it might be in longer MIDP pilot cases that have not yet become eligible for these surveys. Along these lines, majorities of both plaintiff and defendant attorney respondents agreed or strongly agreed that the pilot resulted in an earlier sharing of information than would otherwise have occurred.

In terms of reducing discovery disputes, respondents may have rated the MIDP neutrally because full-blown discovery disputes are likely relatively rare, especially in short-pending cases. As with the discovery costs question, one cannot expect the expanded disclosures that are part of the MIDP to influence cases where the problems it is aimed to address would not occur in the first place. To some extent, the same may be true of the question about focusing discovery on the important issues in the case. After all, if these are relatively straightforward from the outset, the MIDP can hardly be expected to focus discovery appreciably.

These preliminary survey results suggest that concerns that the MIDP will result in disclosure of information that would not otherwise come to light in the discovery process have been overstated. Majorities of respondents in both districts, and majorities of plaintiff and defendant attorneys, disagreed or strongly disagreed that such disclosure was an effect of the pilot.

In general, and consistent with some of the open-ended responses reproduced in the Appendix, plaintiff attorneys tended to evaluate the effects of the MIDP more positively and defendant attorneys more negatively. Plaintiff attorneys, for example, were more likely to assess the MIDP positively in its effects on the timing and effectiveness of settlement negotiations than were defendant attorneys. Similarly, plaintiff attorneys were more likely to agree that the MIDP reduced time to disposition in the closed case; defendant attorneys were more likely to disagree. Although, as shown in the Appendix, some plaintiff attorneys expressed negative views of the MIDP. The overall tendency of plaintiff attorneys to rate the MIDP positively makes sense in light of the observation that plaintiff attorneys are, broadly speaking, more likely to represent requesting parties in the discovery process and defendant attorneys producing parties. The bulk of discovery materials, and most deponents, are likely to be on the defendant side of most cases. Expanded disclosure requirements should, all things considered, benefit the requesting side more than the producing side. Some survey respondents also pointed out that, in terms of the timing of the MIDP obligations, plaintiff attorneys know what their claims will be and thus can make use of the pre-filing period to prepare disclosure materials, unlike defendants whose disclosure obligations are substantially based on plaintiffs' claims.

Appendix A. Participant Information

Name	Title	Organization	Email
James M. Anderson	Director, Justice Policy Program; Director, Institute for Civil Justice	RAND Corporation	janderso@rand.org
Jennifer D. Bailey	Administrative Judge, Circuit Civil Division	Eleventh Judicial Circuit	
Thomas A. Balmer	Justice	Oregon Supreme Court	
David G. Campbell	Senior United States District Judge	District of Arizona	
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Robert M. Dow, Jr.	Chair; Judge	Federal Civil Rules Committee; U.S. District Court for the Northern District of Illinois	
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Joshua P. Groban	Associate Justice	California Supreme Court	
Nathan Hecht	Chief Justice	Texas Supreme Court	
Eric Helland	Adjunct Economist; William F. Podlich Professor of Economics and George R. Roberts Fellow	RAND Corporation; Claremont McKenna College	eric.helland@ claremontmckenna.edu
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Constandinos “Deno” Himonas	Justice	Utah Supreme Court	
Carolyn Kuhl	Judge	Superior Court of the State of California for the County of Los Angeles	
Emery G. Lee	Senior Research Associate Research Division	Federal Judicial Center	elee@fjc.gov
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Rebecca “Becky” Sandefur	Professor, School of Social and Family Dynamics	Arizona State University	Rebecca.Sandefur@asu.edu
Richard Sander	Dukeminier Distinguished Professor of Law	UCLA School of Law	sander@law.ucla.edu
James Sandman	President Emeritus	Legal Services Corporation	james.j.sandman@gmail.com
Stephen C. Yeazell	David G. Price and Dallas P. Price Distinguished Professor of Law Emeritus	UCLA School of Law	yeazell@law.ucla.edu
Melanie Zaber	Associate Economist; Codirector of the Middle-Class Pathways Center	RAND Corporation	mzaber@rand.org

Appendix B. Conference Agenda

UCLA LAW | RAND CENTER FOR LAW & PUBLIC POLICY

A JOINT CENTER OF UCLA LAW AND RAND

RETHINKING CIVIL CASE MANAGEMENT
Shutters on the Beach | Santa Monica, CA
November 12, 2021

The World Justice Project ranks the United States 108th out of 128 countries in "access and affordability" of civil justice. Surveys of lawyers and judges conclude that litigation is more expensive than it should be, and by objective measures it is far more expensive than it was 50 years ago. At the same time, existing federal and state rules of civil procedure are designed to ensure evenhanded fairness and due process by allowing each party an opportunity to obtain parity of information and adjudication of disputed legal and factual issues. This conference will explore whether a more systematic approach to case management, guided by empirical research, can close the gap between theoretical fairness and practical access.

Improving civil case management seems more likely to happen if we can develop ongoing mechanisms of cooperation among judges, court administrators, and empirical academics. Prudent and successful reform also would seem to require: (1) general agreement on objectives and boundaries for case management including conserving scarce judicial resources; (2) specific, testable experiments that measure the effectiveness of case management techniques against agreed objectives; (3) scholarly engagement and partnerships between the academy and the judiciary to evaluate the experiments; and (4) a shared community of interest in fostering the process, generating new ideas, and disseminating the word on successful reforms.

Two concrete examples of innovative, data-driven approaches to evaluation of case management techniques will be presented at the conference. Scholars at RAND and UCLA have been working with judges of the Los Angeles Superior Court (1) to determine the effects of a new California requirement that counsel "meet and confer" prior to filing an initial pleading challenge, and (2) to measure whether use of informal discovery conferences reduces the number of discovery motions filed. Through this conference, we hope to learn about similar efforts elsewhere in federal and state courts and opportunities for other collaborations.

The conference will feature five panels as described below. We hope to stimulate discussions that assess where consensus exists and what concrete steps forward are workable and desirable. The panels will begin with short presentations (with the research circulated in advance to maximize time devoted to discussion), comments on the presentations, and conversation aimed at clarifying ideas, identifying problems to explore, and assessing the potential for collaborative next steps. Each panel will include discussants from the federal courts, the state courts, and academia.

Coming out of the conference, we expect to publish conference proceedings (one willing publisher is already interested), and we hope to have a tentative framework for future work leading to a follow-up conference in late 2022.

CONTINENTAL BREAKFAST
8:00 to 8:30 a.m.

PANEL 1: IDENTIFYING OUTCOMES WE ARE TRYING TO ACHIEVE & A UNIFIED THEORY OF CASE MANAGEMENT
8:30 to 9:45 a.m.
For most judges, case management is an art that is learned by imitation. However, it may be possible to systematize case management with agreed goals, implemented through defined strategies, which translate into "toolkits" addressing civil litigation across a spectrum of complexity. This panel will consider whether a unified theory of case management could provide a foundation for more effective implementation of case management practices and encourage empirical study.

Defining the goals of case management is important to guide judges and administrators. It also is a prerequisite to empirical studies that seek to measure whether case management is effective. Are there other goals we should be considering? How do we tell whether reforms are having the desired ultimate effects?

Moderator:	**Judge Carolyn B. Kuhl,** Complex Civil Litigation Program, Superior Court of the State of California, County of Los Angeles; Board of Advisors, RAND Institute for Civil Justice
Presenter:	**Judge William F. Highberger,** Complex Civil Litigation Program, Superior Court of the State of California, County of Los Angeles
Federal Court:	**Judge Robert M. Dow, Jr.,** Northern District of Illinois; Chair, Federal Rules Advisory Committee on Civil Rules
State Court:	**Justice Thomas A. Balmer,** Oregon Supreme Court; former Chair, Civil Justice Improvements Committee, Conference of Chief Justices
Academic:	**Professor Stephen C. Yeazell**, UCLA School of Law

BREAK
9:45 to 10:00 a.m.

PANEL 2: EXPERIMENTS IN MEASURING THE EFFECTIVENESS OF CASE MANAGEMENT TECHNIQUES
10:00 to 11:15 a.m.
Judges believe that the case management approach they use is effective. But is it? This panel describes studies of specific case management techniques drawn from experiments in federal and state courts. The panel also will address issues associated with collecting and interpreting data from court dockets.

Moderator:	**James M. Anderson**, Director, RAND Institute for Civil Justice
Presenter:	**Professor Eric Helland**, Claremont McKenna College; Senior Economist, RAND Institute for Civil Justice
Presenter:	**Professor Richard H. Sander**, UCLA School of Law
Presenter:	**Emery G. Lee III**, Senior Researcher, Federal Judicial Center
Federal Court:	**Judge David G. Campbell**, District of Arizona; former Chair, U.S. Committee on Rules of Practice and Procedure
State Court:	**Judge Jennifer D. Bailey**, Administrative Judge, Circuit Civil Division, Miami-Dade, Florida

BREAK
11:15 to 11:30 a.m.

PANEL 3: CAN CASE MANAGEMENT HELP LITIGANTS WHO CURRENTLY ARE WITHOUT REPRESENTATION?
11:30 a.m. to 12:45 p.m.
Self-represented (*pro se*) litigants are expected to use rules of pleading and discovery designed by and for lawyers. This panel will examine evidence of litigation outcomes for self-represented litigants in bankruptcy and divorce cases. The panel also will consider whether streamlined case management approaches can "even the playing field" for self-represented litigants in cases that ordinarily present straightforward, repetitive issues of fact and law, such as debt collection and eviction cases.

Moderator:	**Professor David Marcus**, Vice-Dean for Curricular and Academic Affairs, UCLA Law School
Presenter:	**Melanie Zaber**, Economist and Co-Director, Middle-Class Pathways Center, RAND Corporation
Federal Court:	**Judge Consuelo B. Marshall**, Central District of California; Board of Advisors, RAND Institute for Civil Justice
State Court:	**Justice Constandinos Himonas**, Utah Supreme Court
Attorney:	**James J. Sandman,** President Emeritus, Legal Services Corporation
Academic:	**Professor Rebecca Sandefur**, University of Illinois; Faculty Fellow, American Bar Foundation

LUNCH BREAK
12:45 to 1:15 p.m.

PANEL 4: WHAT OUTCOMES CAN WE MEASURE?
1:15 to 2:30 p.m.
Given the goals of case management, how do we tell whether reforms are having the desired ultimate outcomes? For example, regarding costs: surveys of judges and lawyers conclude that litigation is more expensive than it should be. Yet some empirical studies of litigation costs have been inconclusive or have concluded that litigation expense is reasonable and proportionate.

Moderator:	**Professor Eric Helland**
Reporter:	**Professor Richard H. Sander**
Academic:	**Jonah B. Gelbach,** Visiting Professor of Law, NYU; Professor of Law, Berkeley Law
Academic:	**Nicholas M. Pace**, Senior Social Scientist, RAND Corporation
Academic:	**Renee Danser**, Associate Director, Access to Justice Lab, Harvard Law School
Federal Court:	**Judge Yvonne Gonzalez Rogers**, Northern District of California
State Court:	**Justice Joshua P. Groban**, California Supreme Court

BREAK
2:30 to 2:40 p.m.

PANEL 5: PATHS FORWARD
2:40 to 3:55 p.m.
Case management has been a topic of judicial education for decades, yet use of innovative case management techniques is, at best, uneven in both federal and state courts, and there is considerable skepticism in academia about the overall enterprise. What is a productive strategy going forward? (1) Can we define a cluster of experiments to evaluate the value of particular case management techniques? (2) How can academics, judges, and court systems work together to structure these experiments, generate relevant data, and facilitate careful analysis? (3) How should the results of such work be disseminated, and positive steps built upon and extended?

Moderators:	**Judge Carolyn B. Kuhl** and **Jamie Morikawa,** Associate Director, RAND Institute for Civil Justice
Reporter:	**Judge William F. Highberger**
State Court:	**Chief Justice Nathan L. Hecht**, Supreme Court of Texas; Immediate Past President, Conference of Chief Justices
State Court:	**Mary C. McQueen**, President, National Center for State Courts
Academic:	**Professor Deborah R. Hensler**, Stanford Law School
Academic:	**Professor Richard L. Marcus**, Hastings College of Law; Associate Reporter, Federal Rules Advisory Committee on Civil Rules
Federal Court:	**Judge David Levi**, President, American Law Institute; Director, Bolch Institute for Judicial Studies

CLOSING REMARKS
3:55 to 4:00 p.m.
TBD

COCKTAIL RECEPTION—BEACHSIDE, SHUTTERS ON THE BEACH
4:00 to 5:30 p.m.

Appendix C. Participant Bios

These bios were distributed to the conference participants and have been reformatted but not edited.

UCLA LAW | RAND CENTER FOR LAW & PUBLIC POLICY

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RETHINKING CIVIL CASE MANAGEMENT
November 12, 2021

PARTICIPANT BIOS

James M. Anderson is Director of the Institute for Civil Justice and the Justice Policy Program at RAND. He conducts empirical research on a wide variety of policy issues and has served as principal investigator on a variety of projects, ranging from the policy implications of autonomous vehicle technology to understanding the effects of indigent defense systems. He has been funded by the National Institute of Justice, the National Institutes of Health, the Bureau of Justice Statistics, the Commonwealth of Pennsylvania, the Institute for Civil Justice, the Robert Wood Johnson Foundation, the Department of Defense, and the National Science Foundation. His work has appeared in the *Harvard Law Review*, the *Yale Law Journal*, the *Stanford Law Review*, the *University of Pennsylvania Law Review*, the *Journal of Law and Economics*, the Oxford University Press, and in numerous RAND publications. In addition to leading research, he has served as a member of RAND's Institutional Review Board to review research for human subjects protection issues. He is also a member of the American Law Institute. Before joining RAND, he clerked for the Honorable Morton Greenberg of the United States Court of Appeals for the Third Circuit and practiced law for 10 years as an assistant federal public defender representing death-sentenced prisoners. He received a J.D. from Yale Law School and a B.A. in ethics, politics, and economics from Yale University.

Judge Jennifer D. Bailey has been a circuit court judge in Miami, Florida—the fourth largest state court jurisdiction in the country—for 29 years. She is the Administrative Judge for the 25-judge Circuit Civil Division and handles a docket of Complex Business Litigation cases. She has previously served in the Family and Criminal Divisions. During the pandemic, she

served as leader of the Pandemic Digital Workgroup setting up Virtual Courtrooms for Miami's state courts and on the Conference of Chief Justices/Conference of State Court Administrators' Pandemic Rapid Response Team Civil Courts and Technology subcommittees. She is currently leading the post-Covid reopening of live court in the circuit civil division.

Judge Bailey serves on the Board of Directors of the National Center for State Courts and on the Board of Advisors for the Institute for the Advancement of the American Legal System (IAALS) and the NCSC Institute for Court Management. She is an executive committee member of the Florida Commission on Trial Court Performance and Accountability where she chaired the Data Quality Workgroup. She serves on the Court Statistics and Workload Committee of Florida's Judicial Management Council.

Bailey earned her L.L.M. in Judicial Studies at Duke University Law School in 2018, where she wrote her thesis on "Why Don't Judges Case Manage." From 2013–2016, Bailey chaired the Court Operations subcommittee of the Civil Justice Initiative, a task force created by the Conference of Chief Justices to evaluate and recommend best practices to reduce cost and delay in state civil courts. She chaired the Florida Supreme Court Residential Mortgage Foreclosure Task Force in 2009 and led her circuit's recovery from the foreclosure crisis. She served as Dean of the Florida College of Advanced Judicial Studies, as Chair of the Florida Bar Civil Procedure Rules Committee and on the Florida Supreme Court Civil Jury Instruction and Business/Contracts Jury Instruction Committees. She is focused on how to innovate in courts, including recently in court technology, data quality, and case management and the future of courts.

Judge Bailey teaches across the country on digital and remote courts, innovation, and access to justice and trials during the pandemic. She is an adjunct professor at the University of Miami School of Law, teaching a class on "Reimagining Courts," and has taught as faculty/presenter for NCSC, CCJ, COSCA, NACOM, Florida New Judge's College, the Florida College of Advanced Judicial Studies and Conference of Circuit Court Judges as well as bar organizations and state judiciaries across the country. She graduated *magna cum laude* from the Peabody School of Journalism at the University of Georgia followed by law school (B.A., 1980, J.D. 1983) and holds an L.L.M from Duke University Law School (2018).

Bailey has received multiple awards for her service, including the 2021 Florida Justice Association's Krupnick Award for Perseverance, the 2019 Miami Dade Justice Association's Manny Crespo Award, the 2015 Florida Jurist of the Year from the Florida chapter of the American Board of Trial Advocates and the Equal Justice Judicial Leadership Award from Legal Services of Greater Miami in 2011 and the 2013 Sabadell Community Service Award.

Thomas A. Balmer has been a justice on the Oregon Supreme Court since his appointment in 2001. He served as Oregon's Chief Justice from 2012 to 2018. Prior to his appointment to the court, he was in private practice in Portland from 1982–1993 and 1997–2001 and served as Deputy Attorney General of Oregon (1993–1997). Earlier in his career, he was as a Trial

Attorney with the Antitrust Division of the U.S. Dept. of Justice (1979–80) and practiced with firms in Boston and Washington, D.C. As a lawyer in private practice, Justice Balmer represented individuals and businesses in a variety of civil disputes, including antitrust, intellectual property, employment, energy and other commercial cases. As Deputy Attorney General, he advised the Attorney General, the Governor, and other officials on constitutional, election, and administrative law matters, and represented the state in trial and appellate courts, including argument before the U.S. Supreme Court.

As Chief Justice, Balmer chaired the Conference of Chief Justices' Civil Justice Improvements Committee, which, assisted by the National Center for State Courts (NCSC) and the Institute for the Advancement of the American Legal System (IAALS), conducted an in-depth study of civil justice in state courts. The Committee's report, *Call to Action: Achieving Civil Justice for All* (2016), made dozens of recommendations to reduce cost and delay, increase procedural fairness, and achieve fairer and more just results in civil cases. On-going follow-up work by NCSC and IAALS has provided state courts with implementation strategies and tools that have been used across the country to improve the civil justice process.

Justice Balmer is a graduate of Oberlin College and the University of Chicago Law School.

David Campbell is a Senior United States District Judge for the District of Arizona, having served on the Court since 2003. He currently serves on the U.S. Courts' Committee on International Judicial Relations. He previously chaired the U.S. Committee on Rules of Practice and Procedure, which oversees the work of the five Advisory Committees on the Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure and the Federal Rules of Evidence. He chaired the Advisory Committee on the Federal Rules of Civil Procedure from 2011 to 2015, and served as a member of the committee from 2005 to 2011. Judge Campbell is a member of the American Law Institute, a Fellow of the American Bar Foundation, and a Board member of the Judicial College of Arizona. He has worked with courts in Botswana, Namibia, South Africa, and Turkey on judicial case management and related topics, and has taught civil procedure and constitutional law at the Arizona State and Brigham Young University Law Schools. Following his graduation from the University of Utah Law School, he served as a law clerk for Justice William H. Rehnquist of the United States Supreme Court and Judge J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit. Judge Campbell worked as a commercial litigator with the Phoenix, Arizona law firm of Osborn Maledon before becoming a judge.

Drawing on her knowledge of justice system operations and the pressures on the justice system, **Renee Danser** joined the Access to Justice Lab at Harvard Law School to incorporate rigorous research into improving access to justice. Ms. Danser believes that for our research to be impactful, we must recognize the strengths and weaknesses of the communities reviewing and incorporating it. Using her court management and non-profit leadership experience, Ms. Danser encourages courts and the justice community to think about their needs and the needs of their

users and how to successfully balance those interests. Reach Ms. Danser at rdanser@law.harvard.edu.

Robert M. Dow, Jr. has served as a United States District Judge for the Northern District of Illinois since December 2007. On October 1, 2020, he began a three-year term as Chair of the Advisory Committee on Civil Rules. Judge Dow has been a member of that Committee since 2013 and has chaired its Rule 23 and MDL Rules Subcommittees. From 2010 to 2013 he served as a member of the Advisory Committee on Appellate Rules and from 2012 to 2018 he was Chair of the Advisory Committee on Circuit Rules for the Seventh Circuit. He has sat by designation on the United States Courts of Appeals for the Sixth and Seventh Circuits and is a member of the American Law Institute. He teaches complex litigation as an Adjunct Professor at Northwestern University Law School. Prior to his judicial service, Dow was a partner at the Chicago law firm of Mayer Brown LLP, where he was a member of the firm's Litigation, Telecommunications, and Supreme Court and Appellate Litigation practice groups. Judge Dow received a B.A. (1987) from Yale University, M. Phil. (1990) and D. Phil. (1997) degrees in International Relations from the University of Oxford, which he attended on a Rhodes Scholarship, and a J.D. (1993) from Harvard Law School. Immediately after law school, he served as a law clerk to Judge Joel M. Flaum of the United States Court of Appeals for the Seventh Circuit.

Jonah B. Gelbach is Visiting Professor of Law at NYU, and Professor of Law, Berkeley Law. His teaching and scholarship focuses on civil procedure, evidence, statutory interpretation, law and economics, event study methodology, securities litigation, the economics of crime, applied statistical methodology, evaluation of public assistance programs, and general applied microeconomics. He has taught at the J.D., Ph.D., masters, and undergraduate levels and published in top law and economics journals, including the *American Economic Review*, *Stanford Law Review*, and the *Yale Law Journal*.

Gelbach is a former member of the Board of Directors of the American Law and Economics Association and has served on the editorial board for the Journal of Law, Economics, and Organization. He has been a referee for countless economics journals and many law reviews. He served as an informal *pro bono* consultant on the design of the juror selection system for the U.S. District Court for the Eastern District of Pennsylvania. He also served as an independent consultant to the Administrative Conference of the United States, for which he co-authored a study of disability appeals to the federal district courts.

Gelbach is visiting from Berkeley Law, where he has been Professor of Law since 2019. He previously held tenured appointments in law at Penn Law and in economics at the University of Arizona's Eller College of Management and at the University of Maryland at College Park.

Joshua P. Groban, Associate Justice of the Supreme Court of California began serving on the California Supreme Court in January 2019. Previously he was the Senior Advisor to Governor Jerry Brown and advised the governor on judicial appointments, legal policy and legislative issues. Justice Groban advised the governor on the appointment of over 600 judges, or roughly one out of every three judges in the state. He received numerous awards from bar groups and other legal organizations for his work on judicial appointments. He also served on a local school board, participated in mentor programs for college and law students, and frequently lectured on judicial appointments. Justice Groban has also taught State Appellate Practice at the UCLA School of Law.

Justice Groban had previously been in private practice, where he specialized in complex civil litigation, with a focus on antitrust, internal investigations, and intellectual property.

Justice Groban grew up in San Diego, where he attended public schools. He received his bachelor's degree with honors and distinction from Stanford University. He received his J.D. from Harvard Law School, where he graduated *cum laude*. Following graduation, he clerked for the Honorable William C. Conner in the Southern District of New York.

Nathan L. Hecht is the 27th Chief Justice of the Supreme Court of Texas. He has been elected to the Court seven times, first in 1988 as a Justice, and in 2014 and 2020 as Chief Justice. He is the longest-serving Member of the Court in Texas history and the longest-tenured Texas judge in active service. Throughout his service on the Court, he has overseen revisions to the rules of administration, practice, and procedure in Texas courts, and was appointed by the Chief Justice of the United States to the federal Advisory Committee on Civil Rules. He is also active in the Court's efforts to assure that Texans living below the poverty level, as well as others with limited means, have access to basic civil legal services.

Chief Justice Hecht was appointed to the district court in 1981 and was elected to the court of appeals in 1986. Before taking the bench, he was a partner in the Locke firm in Dallas. He holds a B.A. degree with honors in philosophy from Yale University, and a J.D. degree cum laude from the SMU School of Law, where he was a Hatton W. Sumners Scholar. He clerked for Judge Roger Robb on the U.S. Court of Appeals for the District of Columbia Circuit and was a Lieutenant in the U.S. Navy Reserve Judge Advocate General Corps. He is the Immediate Past President of the national Conference of Chief Justices, a Member of the American Academy of Arts and Sciences, a Life Member of the American Law Institute and a member of Council, and a member of the Texas Philosophical Society.

He won re-election in November 2020 to a term that ends December 31, 2026.

Eric Helland is the William F. Podlich Professor of Economics and George R. Roberts Fellow at Claremont McKenna College, and a senior economist at RAND's Institute for Civil Justice. He is the author of over 50 books and articles on law and economics topics ranging from bounty hunters to judicial elections. His current research focuses on pharmaceutical and patent

litigation, the judiciary, and mass litigation. In 2002–2003, he was a visiting fellow at the Stigler Center for the Study of the Economy and the State at the University of Chicago Graduate School of Business. In 2003–2004, he served as a senior economist on President George W. Bush's Council of Economic Advisers. In 2008, he was a visiting professor of law at the University of California, Los Angeles and in 2011–12, a visiting scholar at the Schaeffer Center for Health Policy and Economics at USC. He is the past co-president of the Society for Empirical Legal Studies 2018-2020. He has taught empirical methods and law and economics at the Antonin Scalia Law School at George Mason University, the Claremont Graduate University, and The Buchmann Faculty of Law at Tel Aviv University. He is a co-editor of the *International Review of Law and Economics*. He is currently a member of the California Bar Associations Closing the Justice Gap Working Group. He holds a B.A. in economics with honors, minor in Mathematics (University of Missouri-Columbia), and an M.A. and Ph.D. in economics from Washington University in St. Louis.

His articles have appeared in scholarly publications such as the *Stanford Law Review*; the *Georgetown Law Review*, *Journal of Empirical Legal Studies*; *Journal of Legal Studies*; *American Law and Economics Review*, *Journal of Law, Economics and Organization*; *Journal of Law and Review of Economics and Statistics*.

Deborah R. Hensler is the Judge John W. Ford Professor of Dispute Resolution at Stanford Law School, where she teaches courses on complex and transnational litigation, arbitration law and policy, the legal profession, and empirical research methods.

Deborah's empirical research on dispute resolution, complex litigation, class actions, and mass claims has won international recognition. A political scientist and public policy analyst who was the director of the RAND's Institute for Civil Justice before joining the Stanford Law School faculty, she has testified before state and federal legislatures in the United States on issues ranging from alternative dispute resolution to asbestos litigation and mass torts and consulted with judges and lawyers within and outside of the United States on the design of class action regimes. Professor Hensler is the organizer of the Stanford Globalization of Class Actions Exchange (globalclassactions.stanford.edu), which is spearheading international collaborative research on class actions and group litigation procedures by scholars in Asia, Europe, Latin and North America, and the Middle East. Noted for her decades-long scholarship on asbestos litigation and class actions in the United States, her research and publications have described and interpreted the trajectory of mass claims world-wide. She is the lead author of *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND, 2000), co-editor of *The Globalization of Class Actions* (Sage, 2009), and co-editor and lead author of *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Elgar, 2016).

At Stanford, Prof. Hensler teaches seminars on complex litigation, transnational litigation, arbitration law and policy, the legal profession, and research design for empirical legal studies. With Dean Emeritus Paul Brest, she co-founded the law school's Policy Laboratory and helped

shepherd it in its early years. She has taught graduate level courses at Universidade Catolica de Lisboa, Hong Kong University, the University of Melbourne (Australia), Paris Dauphine University and guest lectured at Tilburg University (Netherlands), Katholieke Universiteit Leuven (Belgium), Nagoya University (Japan), and Universidad Torcuato di Tella (Buenos Aires).

Professor Hensler is a fellow of the American Academy of Arts and Sciences and the American Academy of Political and Social Science and was awarded a personal chair in empirical studies of mass claims resolution by Tilburg University (Netherlands). In 2014, she was awarded an honorary doctorate in law by Leuphana University (Germany). She serves on the RAND Institute for Civil Justice Board of Advisors and on the advisory board of the Civil Justice Research Institute, a joint project of the University of California, Irvine, and the University of California Berkeley Law School. In 2018, she served on the Academic Expert Panel for the Litigation Funding Inquiry of the Australian Law Reform Commission.

Judge William F. Highberger has been assigned to the Los Angeles Superior Court Complex Civil Litigation Program since March 2008. His docket primarily consists of class actions, complex civil cases, Judicial Council Coordinated Proceedings involving multiple tort claims, insurance coverage disputes, and construction defect litigation. Before sitting in the Complex Civil Litigation assignment, he was assigned to a "fast track," general-jurisdiction civil calendar in the main civil courthouse in downtown Los Angeles for seven years handling personal injury, employment-discrimination, contract disputes and all other types of civil suits.

While handling various mass-tort cases, he has held joint court sessions with the United States District Judge handling the counterpart MDL case involving *In re Incretin Mimetics.* Judge Highberger has worked in cooperation with the Court of Common Pleas Judge in Philadelphia to facilitate the handling of overlapping mass-tort claims involving the prescription drug Risperdal.® Over 18,000 separate plaintiffs from all 50 states, represented by over 80 different plaintiff firms, have filed individual claims in California JCCP4775 *Risperdal and Invega Product Liability Cases.*

He is a Fellow of the College of Labor And Employment Lawyers, a Member of the American Law Institute and an Adviser to the ALI's projects to draft *Restatement Of The Law, Employment Law* and *Restatement Of The Law, Liability Insurance*. He is a Member of the American College of Business Court Judges. Before his appointment to the court in September 1998, he was a partner in the labor and employment practice of Gibson, Dunn & Crutcher LLP in Los Angeles, CA and Washington, DC. He is a 1975 graduate of Columbia Law School, where he was an Editor of the *Columbia Law Review* and a James Kent Scholar.

Deno Himonas is a Justice of the Utah Supreme Court. Prior to his appointment to the Utah high court, he served as a trial court judge for many years. Justice Himonas earned a B.A. in economics from the University of Utah and a J.D. from the University of Chicago.

Justice Himonas is deeply involved in access to justice issues. He publishes on and can often be found speaking to local, national, and international audiences on the topic. At present, he is deeply involved in efforts to reimagine the regulation of the practice of law in order to make it more affordable and more accessible to all.

Justice Himonas has taught as an adjunct professor at the University of Utah S.J. Quinney College of Law and guest lectured at numerous law schools. He has been honored by the S.J. Quinney College of Law as an Honorary Alumnus of the Year and he is a recipient of the Rebuilding Justice Award from the Institute for the Advancement of the American Legal System and the Judicial Excellence Award from the Utah State Bar. Most recently, the American Bar Association has honored Justice Himonas as a "Legal Rebel."

Carolyn B. Kuhl has served on the Superior Court of the State of California since 1995. She has served in the Court's Complex Civil Litigation Program, for more than 10 years. She served from 2013 through 2016 as Presiding and Assistant Presiding Judge of the Los Angeles Superior Court. Before holding those positions, she served as the Supervising Judge of the Civil Departments of the Los Angeles Superior Court, a position she also held from 2003 through 2004.

Judge Kuhl was a member of the Judicial Council from 2006 through 2009. She was a member of the statewide Advisory Committee on Civil Jury Instructions from 2001 through 2003. She has served on the Judicial Council Trial Court Presiding Judges Advisory Committee and on the Commission on the Future of California's Court System, appointed by the Chief Justice of California.

Judge Kuhl has a part-time appointment as a Lecturer in Law at UCLA Law School. She teaches frequently in judicial education programs, including in the Bolch Judicial Studies Institute Master's Program. She has developed a curriculum to train judges in complex litigation case management.

Judge Kuhl is a member of the American Law Institute and serves on the Executive Committee and on the Council of the Institute. She was appointed by the Chief Justice of the United States Supreme Court to serve on the federal Committee on Rules of Practice and Procedure. She serves on the Board of Advisors for the Institute for Civil Justice of the RAND Corporation and on the Council of American Bar Association Center for Innovation.

Prior to taking the bench, Judge Kuhl was a partner in the law firm of Munger, Tolles & Olson. From 1981 through 1986, she served in the United States Department of Justice as Special Assistant to the Attorney General, Deputy Assistant Attorney General (Civil Division), and Principal Deputy Solicitor General, preparing and arguing cases before the United States Supreme Court. She was a law clerk to the Honorable Anthony M. Kennedy when he sat as a Judge of the United States Court of Appeals for the Ninth Circuit. Judge Kuhl graduated with distinction from Duke Law School, was an editor of the Duke Law Journal, and received an A.B. degree, *cum laude*, from Princeton University.

Emery G. Lee III, a senior research associate at the Federal Judicial Center since 2006, has served as FJC liaison to the Judicial Conference Advisory Committee on Civil Rules since 2010. In that capacity, he has conducted research on discovery and disclosure under the federal rules, aggregate litigation, and other topics. Lee earned his Ph.D. in political science from Vanderbilt (1996) and his J.D. from Case Western Reserve (2001). In 2001-2002, he served as a judicial law clerk for the Honorable Karen Nelson Moore, United States Court of Appeals for the Sixth Circuit.

David F. Levi is the Levi Family Professor of Law and Judicial Studies and Director of the Bolch Judicial Institute. Levi was previously the James B. Duke and Benjamin N. Duke Dean of the School of Law. The 14th dean of Duke Law School, he served from 2007 to 2018. Prior to his appointment, he was the Chief United States District Judge for the Eastern District of California with chambers in Sacramento. He was appointed United States Attorney by President Ronald Reagan in 1986 and a United States district judge by President George H. W. Bush in 1990.

A native of Chicago, Levi earned his A.B. in history and literature, *magna cum laude*, from Harvard College. He entered Harvard's graduate program in history, specializing in English legal history and serving as a teaching fellow in English history and literature. He graduated Order of the Coif in 1980 from Stanford Law School, where he was also president of the *Stanford Law Review*. Following graduation, he was a law clerk to Judge Ben C. Duniway of the U.S. Court of Appeals for the Ninth Circuit, and then to Justice Lewis F. Powell, Jr., of the U.S. Supreme Court.

Levi has served as chair of two Judicial Conference committees by appointment of the Chief Justice. He was chair of the Civil Rules Advisory Committee (2000–2003) and chair of the Standing Committee on the Rules of Practice and Procedure (2003–2007); he was reappointed to serve as a member of that committee (2009–2015). He was the first president and a founder of the Milton L. Schwartz American Inn of Court, now the Schwartz-Levi American Inn of Court, at the King Hall School of Law, University of California at Davis. He was chair of the Ninth Circuit Task Force on Race, Religious and Ethnic Fairness and was an author of the report of the Task Force. He was president of the Ninth Circuit District Judges Association (2003–2005).

In 2007, Levi was elected a fellow of the American Academy of Arts and Sciences. From 2010 to 2013, he served on the board of directors of Equal Justice Works. In 2014, he was appointed chair of the American Bar Association's Standing Committee on the American Judicial System, and in 2015, he was named co-chair of the North Carolina Commission on the Administration of Law and Justice. He became president of the American Law Institute (ALI) in 2017 after serving as a member of the ALI Council and an advisor to the ALI's Federal Judicial Code Revision and Aggregate Litigation projects.

Levi is the co-author of *Federal Trial Objections* (James Publishing 2002). At Duke Law, he has taught courses on judicial behavior, ethics, and legal history.

David Marcus is Vice Dean for Curricular and Academic Affairs and Professor of Law at UCLA School of Law. He was previously Professor of Law at the University of Arizona James E. Rogers College of Law, where he was elected "Professor of the Year" by the student body in 2009, 2012, 2017, and 2018. His research focuses on civil procedure, administrative law, federal courts, complex litigation, and legal history.

Marcus received his B.A. from Harvard University and studied at the University of Cambridge before earning his J.D. from Yale Law School. After law school, he clerked for the Honorable Allyne R. Ross of the Eastern District of New York in Brooklyn, as well as the Honorable William Fletcher of the Ninth Circuit Court of Appeals in San Francisco. He also represented plaintiffs in class actions at Lieff, Cabraser, Heimann & Bernstein.

Marcus's publications have appeared or are forthcoming in the *Stanford Law Review*, the *Journal of Law, Economics, and Organization*, the *Texas Law Review*, the *University of Pennsylvania Law Review*, and the *Georgetown Law Journal*, among others.

Richard Marcus has since the 1990s, held the Coil Chair in Litigation at UC Hastings, where he teaches courses in Civil Procedure, Complex Litigation, and Evidence. Before entering the academy in 1981, he was a partner in a San Francisco law firm, specializing in civil litigation.

Prof. Marcus is the lead author of casebooks on Civil Procedure and Complex Litigation (now in their 7th editions), and of four volumes in the Federal Practice and Procedure treatise (commonly known as Wright & Miller). Since 1996, he has served as Associate Reporter of the Advisory Committee on Civil Rules, and had a major hand in the drafting of rule amendment during the last quarter century regarding both discovery and class actions—both of which rely on judicial oversight.

Prof. Marcus also has for more than 20 years been active in the International Association of Procedural Law, and currently serves as Vice President-North America of this organization. He is also the coordinator of the segment of the Civil Procedure Law and Justice Project, organized by the Max Planck Institute of Luxembourg, focusing on access to evidence—what we in America would call discovery.

Consuelo B. Marshall is a Senior District Judge of the United States District Court for the Central District of California. She began her legal career as a Deputy City Attorney in Los Angeles. She was the first woman hired as a lawyer by the Los Angeles City Attorney's office. She later entered private practice at the law firm of Cochran & Atkins. She left private practice for the bench, serving as a Los Angeles Superior Court Commissioner, Inglewood Municipal Court Judge, and Los Angeles Superior Court Judge.

Judge Marshall was appointed to the United States District Court for the Central District of California in 1980 by President Jimmy Carter. She became the seventh woman of color to serve as an Article III judge in the country. In 2001, she became the first woman to serve as Chief Judge of the Central District of California. Throughout her judicial career, she has been an inspiration and mentor to hundreds of lawyers and judges who have followed her into the legal profession.

Judge Marshall has received many awards, including the Criminal Bar Association Judicial Excellence Award, induction into the Langston Bar Association Hall of Fame and the City of Los Angeles Hall of Fame, Los Angeles Country Bar Association Criminal Justice Section Career Achievement Award, Los Angeles County Bar Association Outstanding Jurist Award, California Women Lawyers' Joan Dempsey Klein Distinguished Jurist Award, and the American Bar Association Margaret Brent Award.

Judge Marshall has long been active in the legal community—locally, nationally, and internationally—chairing and participating in committees and boards for the Ninth Circuit, the Federal Bar Association, and the Association of Business Trial Lawyers. She has been a faculty member for The Rutter Group and the Trial Advocacy Workshop at Harvard Law School. She has lectured in Nigeria, Ghana, Zimbabwe, Yugoslavia, Italy, and Greece. Judge Marshall has also been active in the local non-legal community, serving on the Board of Directors for the Weingart Center, a non-profit facility for the homeless, and the Legal Aid Foundation of Los Angeles. She is a former member of the Board of Directors of Equal Justice Works. Judge Marshall chaired the Ninth Circuit Pacific Islands Committee from 2006–2017. This committee oversees judicial training for the Pacific Islands of Guam, Saipan, Palau, American Samoa, the Federated States of Micronesia, and the Republic of the Marshall Islands. Judge Marshall serves on the Ninth Circuit Fairness Committee and participates in the Court's community outreach programs: Just the Beginning Summer Institute for high school students, Teacher's Institute, and the American Bar Association's Judicial Internship Opportunity Program. She attended Howard University Law School where (as one of three women) she graduated third in her class and was an editor of the *Howard Law Journal*.

Mary C. McQueen has served as president of the National Center for State Courts (NCSC) since August 2004. Previously McQueen served as Washington State court administrator from 1987–2004 and director of Judicial Services for the Washington State Office of the Administrator for the Courts, 1979–1987, president of the Conference of State Court Administrators in 1995–96, and chair of the Lawyer's Committee of the American Bar Association/Judicial Division. She is a member of the Washington and U.S. Supreme Court Bars.

She has received the American Judicature Society's Herbert Harley Award and the NCSC Innovation in Jury Management Award. She also received the John Marshall Award in 2014, presented by the American Bar Association Judicial Division in recognition of her lifetime contributions to the improvement of the administration of justice, judicial independence, justice

reform and public awareness. Recently, McQueen received the ABA Judicial Division's Lawyers Conference 2016 Robert B. Yegge Award for Outstanding Contribution in the Field of Judicial Administration.

McQueen has served on numerous ABA Committees and Task Forces including the Standing Committee on State and Federal Courts, the Commission on the Future of Legal Services and the newly created ABA Center for Innovation. In her capacity as President of NCSC, McQueen coordinates major national initiatives for the Conference of Chief Justices (CCJ) including the review of model rules and polices on admission to the bar, legal education requirements and professional ethics for lawyers and judges. President McQueen serves as Secretary General of the International Organization on Judicial Training (IOJT) consisting of 80 country members. She holds a Bachelor of Arts degree from the University of Georgia and a juris doctorate from Seattle University Law School.

Jamie Morikawa is Associate Director of the RAND Institute for Civil Justice (ICJ) and the Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation, through which she is responsible for helping manage strategic direction and research portfolios. She also builds and maintains relationships with advisory board members, donors, and the private sector. She previously served as acting director of the ICJ, participating in management for ICJ and its related centers, including the Center for Corporate Ethics and Governance and the Center for Health and Safety in the Workplace.

Prior to joining RAND, Morikawa practiced entertainment litigation for three years, worked as Assistant Director of the UCLA School of Law's Office of Career Services, and played a significant role in helping to establish the UCLA Center for the Liberal Arts and Free Institutions.

Morikawa received her B.A. from the University of California, Los Angeles, and her J.D. from UCLA School of Law.

Nicholas M. Pace (J.D.) is a senior social scientist at the RAND Corporation. He has contributed his expertise in justice system organization-related research methodologies to numerous projects involving the law, the courts, and judicial decisionmaking, often involving large scale, groundbreaking qualitative and quantitative data collections. He recently led studies that have included an examination of the process by which petitions for Presidential pardons are evaluated by the Department of Justice, the setting of maximum caseload limits for publicly-funded defense counsel in state courts, an analysis of attorney time expenditures for Federal public defenders, and an examination of issues related to the use of alternative compensation systems following a catastrophe. Other work has included exploring ways to reduce costs associated with pretrial discovery of digital information, helping to conduct a national survey of organizations providing services to victims of crime, describing the dynamics of class action

litigation, describing transparency issues related to class action settlements, examining the impact of statutory reforms on costs and outcomes in medical malpractice cases, and leading a comprehensive study of the workers' compensation courts in California. He has also helped to accomplish an in-depth evaluation of the Civil Justice Reform Act of 1990 and its effects on judicial case management, cost, and delay in Federal district courts; analyzed jury verdict outcomes; and helped develop national standards related to the electronic filing of pleadings and other legal documents in courts of law. Currently he is leading work related to setting caseload limits for public defenders in additional state courts, a national survey of corporate counsel regarding the use of business-to-business arbitration agreements, liability issues arising from COVID-19 vaccinations, the impact of the COVID-19 pandemic on the civil justice system, and a major survey of adult Americans to better understand how the civil justice system is utilized in the immediate aftermath of injuries and illnesses.

Judge Yvonne Gonzalez Rogers received her J.D. from the University of Texas, Austin but completed her final year of classes at the University of California, Berkeley School of Law after graduating cum laude from Princeton University. Judge Gonzalez Rogers spent her legal career litigating with Cooley LLP in San Francisco as an associate, equity partner, and special counsel in the litigation department specializing in business and real estate litigation. In 2003, she re-focused on raising her three children and volunteering in Alameda County raising funds for a local school district, conducting investigations of local governmental agencies through the Civil Grand Jury, and serving as a pro tem judge.

In 2008, Governor Arnold Schwarzenegger appointed her to fill a vacancy as a Superior Court Judge for the State of California in Alameda County. In 2010, she was elected as the first state court judge to the Council of the American Law Institute. She has worked on projects related to Privacy, Employment, Unjust Enrichment, and Copyright. She also chaired the Membership Committee for six years.

On November 21, 2011, Judge Yvonne Gonzalez Rogers received her commission from President Barack Obama to serve as a United States District Court Judge for the Northern District of California. She is the first woman of Mexican-American heritage to occupy that role. Currently, she also serves on the Board of the Northern District Chapter of the Association of Business Trial Lawyers and is an officer for the 9th Circuit District Judges Association. She currently chairs the Northern District's Committee charged with administering the Criminal Justice Act as it relates to indigent defense and has sat by designation on the Ninth Circuit Court of Appeals.

In her capacity as both a state and federal judge, she has presided over thousands of civil and criminal cases and over 60 trials, including four class actions. Interestingly, she recently presided over the heavily publicized *Epic Games v. Apple* antitrust trial. In her role as managing civil trials, Judge Gonzalez Rogers has always experimented with protocols to make civil litigation more efficient, including with respect to discovery and motion practice.

Rebecca L. Sandefur investigates access to civil justice from every angle – from how legal services are delivered and consumed, to how civil legal aid is organized around the nation, to the role of pro bono, to the relative efficacy of lawyers, nonlawyers and digital tools as advisers and representatives, to how ordinary people think about their justice problems and try to resolve them. In addition to her appointment at ASU, Sandefur is Faculty Fellow at the American Bar Foundation, where she founded and leads the Access to Justice Research Initiative.

Her public service includes her appointment by the Supreme Court of Utah to the state's Office of Legal Services Innovation, her role as Co-Vice Chair of California's Closing the Justice Gap Working Group, and her appointment by the Supreme Court of Arizona to the Arizona Commission on Access to Justice. In 2013, Sandefur was The Hague Visiting Chair in the Rule of Law. In 2015, she was named Champion of Justice by the National Center for Access to Justice. In 2018, she was named a MacArthur Fellow for her work on inequality and access to justice. In 2020, she received the National Center for State Court's Warren E. Burger Award, recognizing "professional expertise, leadership, integrity, creativity, innovativeness, and sound judgment." She is currently Editor of *Law & Society Review*.

Richard Sander is an economist and the Dukeminier Distinguished Professor of Law at UCLA. He is also director of the UCLA-RAND Center for Law & Policy. Much of his work examines the effectiveness of policies aimed at reducing racial inequality. He is the co-author, with Stuart Taylor, Jr., of *Mismatch* (2012), and the lead author of *Moving Toward Integration: The Past and Future of Fair Housing* (2018). He also studies legal education and the dynamics of the market for lawyers and legal services. Since 2019, he has been working with Carolyn Kuhl, Eric Helland, and a team of student researchers to study civil litigation in Los Angeles County.

James J. Sandman is Distinguished Lecturer and Senior Consultant to the Future of the Profession Initiative at the University of Pennsylvania Carey Law School. He is also President Emeritus of the Legal Services Corporation, the United States' largest funder of civil legal aid programs. Jim was President of LSC from 2011 to 2020.

Jim practiced for 30 years with Arnold & Porter and was the firm's Managing Partner for a decade. He has served as General Counsel of the District of Columbia Public Schools and is a past President of the 110,000-member District of Columbia Bar.

Jim was Chair of the American Bar Association's Task Force on Legal Issues Arising from the Coronavirus (COVID-19) Pandemic (2020–21). He is Vice Chair of the District of Columbia Access to Justice Commission and a member of the American Law Institute, the American Academy of Arts and Sciences, the California State Bar's Closing the Justice Gap Working Group, the District of Columbia Bar Pro Bono Committee, and the advisory board of the Institute

for the Advancement of the American Legal System. He serves on the boards of the Pro Bono Institute and Albany Law School, among other organizations.

Jim is a *summa cum laude* graduate of Boston College and a *cum laude* graduate of the University of Pennsylvania Law School, where he was elected to the Order of the Coif and was Executive Editor of the *University of Pennsylvania Law Review*. He began his legal career as a law clerk to Judge Max Rosenn of the United States Court of Appeals for the Third Circuit.

Stephen C. Yeazell, David G. Price and Dallas P. Price Distinguished Professor of Law Emeritus, writes about the history, theory, and dynamics of modern civil litigation. His courses correspond to these interests. He has received the campus's highest awards for his teaching (the University's Distinguished Teaching Award), his research (the UCLA Faculty Research Lectureship), and his service (the Carole E. Goldberg award for distinguished service by an emeritus professor). He was also the first recipient of the School of Law's Rutter Award for Excellence in Teaching. He has served as Associate Dean of the School of Law, as Chair of the UCLA Academic Senate, and as Interim Dean of the School of Law. He is a Fellow of the American Academy of Arts & Sciences.

Before studying law, Professor Yeazell did graduate work in English literature and taught English and history in junior high schools in New York City, an experience, he reports, that has made him appreciate the relative calm of even the feistiest law school class. After law school, he clerked for Justice Mathew Tobriner of the California Supreme Court.

Professor Yeazell's books include *From Medieval Group Litigation to the Modern Class Action* (1987); *Contemporary Civil Litigation* (2009); *Civil Procedure* (10th ed., 2018, with Joanna Schwartz); and *Lawsuits in a Market Economy: The Evolution of Civil Litigation* (U.Chicago Press, 2018).

Melanie Zaber (she/her) is a full economist and codirector of the Middle-Class Pathways Center at the RAND Corporation. She has diverse research interests spanning workforce development, postsecondary education, gender equity, and access to civil justice. Her research has examined access to legal services (divorce, bankruptcy), analyzed workforce pipelines (principals, military linguists, building tradespeople), and explored postsecondary finance (market power, state grant aid, student debt). Current projects include an exploration of the persistence of women in STEM careers and an analysis of the longer-term education and career outcomes of participants in a high school youth development program. She received her Ph.D. in economics and public policy from Carnegie Mellon University.

Abbreviations

CJRA	Civil Justice Reform Act of 1990
IDC	informal discovery conference
LSC	Legal Services Corporation
MIDP	Mandatory Initial Discovery Pilot
NCSC	National Center for State Courts
RCT	randomized control trial
UCLA	University of California, Los Angeles