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Toward fairer, quicker, cheaper litigation

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A UNIFIED THEORY OF CIVIL CASE MANAGEMENT[1]

BY CAROLYN B. KUHL & WILLIAM F. HIGHBERGER

In the year 2000, the California court system created a complex litigation pilot program at the trial court level with the goal of providing "exceptional judicial management" to complex cases.[2] In Los Angeles, the five judges assigned to the pilot program (including one of the authors) sat around the lunch table at one of their early weekly meetings. They asked themselves: "What are we trying to achieve through case management, and what does that tell us about how we should be spending our time on these cases?"

These questions began a discussion about the goals of case management and strategies to further those goals. The California Rules of Court governing complex litigation provided early guidance, directing that complex cases be managed "to [1] expedite the case, [2] keep costs reasonable, and [3] promote effective decision making by the court, the parties, and counsel."[3] Those directives became the primary goals of the pilot's complex case management efforts. Over the years, as the pilot judges managing complex cases gained experience, they collectively adopted strategies to achieve those goals — for example, promoting early resolution of core factual and legal issues and using active judicial management to try to avoid procedural disputes that did not reflect the merits of the case. A court-sponsored survey of 57 litigators active in the complex courts in 2007 revealed that 94 percent of respondents agreed the program was saving litigants both time to resolution and litigation expense.[4]

Fast forward to the aftermath of the Great Recession. Unprecedented cuts in the Los Angeles Superior Court's budget required a drastic restructuring of civil operations between 2010 and 2013.[5] Because the workload of every civil docket type had to be assessed and contracted to fewer courtrooms, this effort brought into sharp focus the challenges of high-volume civil dockets — small claims, debt collection, eviction, and limited jurisdiction cases (involving less than $25,000) — in which many litigants lack legal representation.[6] Court leadership faced some of the same fundamental questions that judges had asked at the outset of the complex litigation pilot program: What is essential to a fair dispute resolution process and how should each case type be managed to ensure that those fundamental goals are met?

The literature on case management generally has overlooked the commonality of procedural fairness as a goal across all civil cases. Here we propose a unified theory, inspired by procedural fairness aims, that (1) defines the goals of civil litigation; (2) suggests overall strategies to achieve those goals; and (3) applies these strategies to derive what we call "toolkits," or case management techniques for different civil litigation case types that share common characteristics. The end point is intended to be concrete and practical but tethered to the fundamental principles of a fair judicial system.

The proposals we make in this article are based on the work of the Conference of Chief Justices' Civil Justice Initiative[7] and on our own experience as judges and court administrators. By no means are our proposals intended as definitive; we only hope to begin the conversation. Importantly, many of the assertions we make, although based on decades of judicial experience, would benefit from empirical investigation to confirm their utility.

WHAT IS "CASE MANAGEMENT"?

Judicial vs. Administrative Case Management. Case management means different things to different judges. Ordinarily, judges tend to focus on *judicial* case management — which uses judicial intervention to direct case activity. We use a broader definition by including *administrative* case management — case management organized so that case activity is directed by uniform policies, rules, or processes that are independent of judicial discretion.

Some judges are of the view that they should not interfere with the adversary process in the name of case management. Judicial case management generally was distrusted by the framers of the Federal Rules of Civil Procedure.[8] Nevertheless, the federal rules as originally enacted included Rule 16, which gave judges discretion to engage with counsel to consider simplifying issues, amending pleadings, and obtaining admissions to avoid unnecessary proof.[9] Over the last 30 years, calls for increasing judicial control over the progress of litigation have come from legislative bodies,[10] court rules,[11] and the judiciary.[12]

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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.[13] Case management reform in the state courts has focused increasingly on administrative implementation of case management.[14] 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."[15]

Setting Deadlines Is Not Enough. Inherent in presiding over disputes as a neutral arbiter 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.[16]

From the outset of the federal rules, case management was embraced as a technique for "relieving the congested condition of trial calendars."[17] By the 1980s, however, Rule 16 counsel meetings and court reports 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."[18] The federal rules committee's primary solution was to require judges to set deadlines for motions, discovery, and trial.[19] Similarly, the federal courts' primary response to the Civil Justice Reform Act of 1990[20] was to encourage "setting early and firm trial dates and shorter discovery periods,"[21] which a RAND study found to reduce delay but to have "a limited role in reducing litigation costs."[22]

Setting deadlines is an incomplete approach to case management. Courts can and should also use case management to regulate parties' use of the rules of civil procedure. Rule 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."[23]

Moreover, done effectively, case management is the antidote to abusive litigation tactics. Dean Roscoe Pound sagely observed a century ago 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.[24] Contemporary surveys of lawyers and judges confirm that participants in litigation believe the process is more expensive than it should be.[25]

Case management practices developed for complex litigation also have been a guide for management of cases that are not complex.[26] The 2016 Conference of Chief Justices' recommendations take management-by-directing-case-activity to the level of cases with "uncomplicated facts and legal issues." They recommend 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.[27]

Finally, some neutral intervention in an otherwise wide-open litigation process has a benefit not just to the immediate litigants but to the broader public as well. Increasing numbers of civil litigants are not represented by counsel,[28] 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-representation is the only current option.[29]

In sum, case management is intentional intervention, by exercise of judicial discretion or by administrative direction, to shape case activity that otherwise would proceed according to each litigant's independent decisions about using the adversary tools of civil procedure.

GUIDING NEUTRAL PRINCIPLES FOR CIVIL CASE MANAGEMENT

Effective case management must be rooted in fundamental principles that can be applied fairly and consistently.[30] Rule 1, 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."[31] It has changed little since it was drafted in 1937.[32]

We define the ultimate goal of case management using the word "resolution" in lieu of "determination" and the word "fair" in place of "just."[33] "Determination" implies an outcome

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provided to combatants by a judge or jury. "Resolution," by contrast, encompasses 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.[34] Case management should guide both potential litigation pathways — consensual resolution as well as adjudication.

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.[35] But the rules of procedure address process, not merits, and the outcome will not be perceived as procedurally "fair" unless the parties feel they had an opportunity to be heard.[36] Case management should create an even playing field to evaluate substantive issues of law and disputed issues of fact.

We propose the following specific goals to provide clarity to the somewhat abstract ultimate goal of "fair dispute resolution":

GOALS:
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 facilitates 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 goals — expedition and reduction of transaction costs — are clearly expressed in Federal Rule of Civil Procedure 1. The goal of cost reduction is particularly important for the significant percentage of civil cases where lesser dollar amounts are at issue and many litigants are self-represented. Here, 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 goal — promoting effective decision-making — is directed to all participants in the litigation and addresses not only adjudication but also consensual resolution.[37] Case management should make fact-gathering effective not only to ensure a fair factual presentation 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.

The fourth goal — 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 outcomes. 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.

The final goal — to provide a process that is *perceived* as fair — is a kind of quality control for case management. Court users 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.

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 must consider *how* to reach the case management goals and how to address trade-offs between goals. For example, extreme expedition may increase litigation costs in some contexts,[38] and facilitating merit-based outcomes can unreasonably retard case resolution (for example, if a party is allowed unlimited "do overs" for a poorly prepared case). The following strategies seek to modulate case management efforts in conformity with all elements of fair dispute resolution and are intended to apply across diverse case types.

STRATEGIES:
- **Differential case management**
- **Active judicial management applied selectively**
- **Reducing uncertainty about core issues**
- **Prudent use of deadlines**
- **Transparency of purpose**
- **Uniform practices within a legal community**

Some strategies further all five of the above-mentioned goals, whereas some are useful even though they further only a subset of the goals. Regardless, these goals and strategies are "interlocking" and mutually reinforcing. The overall approach produces gains beyond the sum of the parts. The goals advanced by each strategy are noted below.

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Access to the court on an informal basis, such as through the informal discovery conference, can head off a mounting escalation of tit-for-tat adversarial practices that reflect procedural gamesmanship rather than the merits of the case.

Using differential case management, including triage of cases by readily determinable characteristics. (serves all five goals)

Of all the strategies, "case management differentiated by case characteristics" is perhaps most central. 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.

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 from the 1980s and 1990s,[39] and strongly reiterated in more recent civil justice reform efforts.[40] 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 disastrous results. In the limited jurisdiction cases (e.g., small-value personal injury and contract cases), more lawyer attention was demanded by the court than the typical case was worth.

A strategy 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.

Applying active judicial management only to case types that will benefit from such effort and only using calendar events that are likely to meaningfully advance the goals of case management. (serves goals 1–3)

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.

Courts' track records for effective case management have been mixed.[41] 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.

Giving priority to case activity that reduces uncertainty as to core issues of fact and law. (serves goals 1–4)

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. This strategy directly serves the case management goal of promoting effective decision-making for the parties and counsel, as well as the goal of reducing litigation costs insofar as it allows earlier evaluation and resolution of litigation.[42]

The emphasis on "core" issues is critical.[43] For example, early challenges, like those related to pleading, do not often meaningfully shift case evaluation even if successful. 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 regarding key admissibility and damages issues. Often these motions could be brought earlier in case development. Similarly, the goal of keeping litigation costs reasonable is best served by an early focus on factual questions that are central to the ultimate merits of the case in order to facilitate parties' case evaluation.

Our combined 40-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, the Federal Judicial Center has endorsed efforts to specify core discovery to be produced automatically by each side.[44]

Prioritizing core issues also requires focusing the parties at the outset on accomplishing defined tasks (*e.g.*, agreeing to produce certain categories of documents) rather than being satisfied with vague planning generalities (*e.g.*, written discovery followed by depositions with a cutoff date). When disputes arise, a court can direct the parties to concentrate specifically on 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

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of overlapping discovery requests and equally repetitive objections.

Access to the court on an informal basis, such as through the informal discovery conference (IDC), can head off a mounting escalation of tit-for-tat adversarial practices that reflect procedural gamesmanship rather than the merits of the case. An IDC requires parties to file a brief joint report on the nature of their discovery dispute and then attend (in person or remotely) a conference in which the court provides its tentative view on the dispute.[45] Experienced judges believe that such conferences often not only address the current dispute between counsel but also can "reset" expectations for the relationship between counsel so as to diminish future conflict.[46] A recent empirical study concludes that requiring parties to participate in an IDC before filing a discovery motion reduces the filing of such motions by 80 percent.[47]

Thus, the strategy of prioritizing case activity that reduces uncertainty as to core factual and legal issues encompasses judicial or administrative case management efforts that reduce procedural wrangling by focusing on substantive case development, including by exchanging information and clarifying legal principles.

Setting process and completion deadlines in a manner that furthers the case management goals. (serves goals 1, 2, and 4)

Most lawyers are working on multiple clients' problems concurrently, and time management is driven by which deadline is most imminent, so 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." The legislature has made a similar observation, and at times has directed the judiciary to expedite case resolution.[48] Empirical studies have also aided in this endeavor.[49]

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.[50] It may also 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 the judge's "time to resolution" statistics may suffer.

Ensuring transparency of purpose with parties and counsel. (serves goals 3 and 5)

Any attempt to affect how litigation is practiced should proceed with a high degree of peripheral vision to be sure that those involved understand and accept reasons for variations from familiar practices. The process of creating and implementing a toolkit for case management should involve stakeholders.[51] The California Complex Litigation Courts have benefitted greatly from encouraging lawyer feedback on the effectiveness of particular case management techniques. As the Conference of Chief Justices' recommends, in areas where litigants often are self-represented, the process of case management reform should involve litigants in addition to lawyers and judges.[52]

Implementing uniform case management practices across and within a legal community. (serves goals 2, 3, and 5)

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.[53] Lawyers, by contrast, detest "local, local rules," *i.e.*, "general orders" by which each judge individually sets events, timing, substance of required submissions at various stages of litigation, format of submissions, and so 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, lawyers 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 regardless of the judge they are assigned.

Of course, if case management practices were completely uniform, there ▶

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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.[54]

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TOOLKITS FOR CASE MANAGEMENT

We summarize below case management tactics, or toolkits, appropriate for four categories of cases. These categories are defined by characteristics of complexity,[55] considering applicable legal principles and the difficulty of gathering relevant facts.

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 National Center for State Courts' 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.[56] Ordinarily, plaintiffs in this category have available at the outset of the case all facts necessary to prove their claims, and the cases involve straightforward legal principles.

Expediting case resolution and keeping litigation costs reasonable are important to plaintiffs in these cases, but outcomes must also reflect the actual merits of the case despite the defendant's lack of representation. These cases often conclude with a default judgment.[57] Prescribed factual disclosures should be mandatory and automatic to reduce uncertainty as to core facts without requiring defendants to master the technical, procedural rules of discovery and attempt to ensure that default judgments are justified.[58]

Toolkit:

- Plaintiffs are required to provide specified documents and information at the outset of the litigation (with the complaint or as an initial disclosure).[59]
- The court assures that service on the defendant is effective.[60]
- Defendants (and plaintiffs) are provided with mandatory forms, links to self-help resources, and referrals for potential individualized legal advice or representation.[61]
- Court staff, with judicial oversight, audit compliance with disclosure requirements at the outset of the litigation or at least before entry of default.[62]
- Litigants have meaningful access to trial (*e.g.*, expedited jury trial).[63]

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, Fair Labor Standards Act)

These cases typically involve represented litigants[64] and 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. Cases are filed when a lawyer can afford to take on a plaintiff's case, and lesser litigation costs may make cases involving lesser sums financially viable.[65]

Courts here need to consider a "less is more" approach to expediting case resolution while keeping costs reasonable. Judges should employ primarily administrative case management techniques but only use judicial case management when the case will benefit from the effort.

Toolkit:

- Deadlines are set administratively without individualized judicial determination but are subject to modification by the judge on request of a party.[66]
- The court orders each side to answer form-discovery specific to the subject matter of the case, and further (nonduplicative) discovery may be propounded without court approval.[67]
- Judges are accessible as required by relatively greater complexity or to head off procedural gamesmanship.[68]
- Judges require informal discovery conferences to solve discovery disputes.
- Litigants have meaningful access to trial (*e.g.*, expedited jury trial).[69]

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Toolkit for cases of intermediate complexity (examples: contract, construction defect, violation of civil rights, employment discrimination, statutory violations)

This case category includes the middle ground between the simple, repetitive cases (discussed above) and complex litigation (addressed below). 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.[70]

The common goals and strategies should guide decision-making about where judicial intervention is most helpful, without needlessly increasing costs by multiplying case events. Empirical work confirms that discovery is the largest expense in pretrial litigation,[71] and courts should proactively set expectations for early exchange of core discovery.[72]

Toolkit:

- The court (through local rules) 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.
- Counsel are required to meet early 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.[73]
- For case types that ordinarily benefit from judicial case management, judges should require 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.[74]
- Judges set deadlines based on knowledge of the typical progression of similar cases and/or information provided by the parties.
- Judges work to head off procedural gamesmanship and promote productive litigation activity by requiring informal discovery conferences, and pre-motion conferences.[75]
- Parties have meaningful access to trial.

Toolkit for complex case management (examples: antitrust, securities, class actions, mass actions, insurance coverage with multiple policies over multiple time periods, environmental, patent)

These cases are typified by costly discovery and the need for a substantial number of decisions by the court before a jury trial can begin. A trial involving all parties may be literally impossible, yet the dollar amounts at issue may meaningfully affect the lives or corporate existence of parties.

Here, 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 that is 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. Judicial case management should: (1) be directed toward fair dispute resolution, ensuring that litigation activity moves expeditiously with reasonable expense; (2) restrain the judge from overreaching in case management, requiring that the judge create an "even playing field" so that substantive legal issues and disputed fact issues can be argued by both sides and ultimately determined by a neutral finder of fact. In addition, it is always important that the process be perceived as fair.

Toolkit:

- Judges select cases for complex case management early in the process.[76]
- Counsel engage in mandatory early meetings to discuss litigation planning, including agreed core discovery exchange and discussion of what information (*e.g.*, a legal ruling) is needed to evaluate case value.
- All litigation activity is stayed 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 while exploring settlement potential.[77]
- Parties devise a plan for litigation activity that will take place between each case management conference and set firm deadlines for those activities.
- Judges bifurcate issues for court or jury trial and, where appropriate, help organize bellwether trials.
- Legal issue management tools:
  - Judges encourage candid discussion among counsel and with the court to define legal issues to be resolved.[78]
  - A plan for fair, early presentation of legal issues to the court is devised (including by early motion in limine or motion to set a jury instruction), sometimes limiting discovery to the subject matter of a motion.

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  - A pre-motion conference with the court is required 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.[79]
  - Parties have opportunity for interlocutory review of issues central to the case, so long as early review is likely to facilitate cost-effective case resolution.[80]
- Fact issue management tools:
  - Parties produce agreed categories of discovery.
  - Parties consult on draft discovery, hopefully leading to stipulated discovery.
  - Parties fill out fact sheets approved in advance by the court.
  - Court orders staged discovery (sample or targeted discovery is produced initially).
  - Parties engage in early expert discovery.
  - Judges are accessible to head off procedural gamesmanship and promote productive litigation activity.
  - Judges require informal discovery conferences.

IMPLEMENTING A UNIFIED THEORY OF EFFECTIVE CASE MANAGEMENT

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 and individual) as well as litigants who currently are self-represented. Empirical researchers can assist in gathering information about the needs, motivations, and experiences of court users.

Empirical research is also crucial to determining what case management techniques work effectively to further particular goals.[81] If the academic community were 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. Our separately organized state and federal judicial systems can provide case management experiments to be studied.

For instance, a state rulemaking body might adopt a general rule articulating goals and strategies for case management and, in furtherance of that rule, initiate a process with bar leaders to devise, say, mandatory default discovery in one or more case types. The judiciary's administrative office could partner with an interested academic to measure the effects of the new rule, with success judged according to the articulated case management goals.

Important initiatives are underway to evaluate and recommend standard case management practices. The National Center for State Courts (NCSC) has led the way, conducting ongoing surveys on the effect of various case management improvement experiments in state courts. NCSC issued the National Open Court Data Standards[82] in April 2020 to encourage consistency of data across state courts. The UCLA-RAND Center for Law and Public Policy is currently working with the Florida courts to evaluate the utility of new case management orders issued by Florida District Courts in response to the COVID-19 pandemic. Most recently, the American Law Institute has approved a new project to draft Principles of Law for high-volume, high-stakes, low-dollar claims, which hopefully will define case management approaches that further just adjudication for the many self-represented litigants who use state courts.

Insofar as case management is left to judicial discretion, standardized approaches to judicial education on the topic should be developed. Although much effort has been focused on educating the judges who handle multi-district litigation (MDL) proceedings, there needs to be a broader effort to share principles, strategies, and toolkits with all judges handling civil assignments.

CONCLUSION

The unified theory of case management we propose is in many ways derivative of longstanding judicial experience. However, our proposed systematic approach also challenges the assumptions underlying traditional approaches that have been based on a largely unregulated process in which judges issue deadlines but otherwise allow 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 high importance to the

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parties and should also respond to the needs of complex litigation and all case types in between.

The great challenge 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 whether such implementation is possible, but we do know that, without a reproducible approach to civil case management, effective case management practices will continue to be applied episodically and without measurable benefits.

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1 A more expansive version of this article was first presented at a conference sponsored by the UCLA-RAND Center for Law and Public Policy in November 2021 and published by RAND as part of the conference proceedings. RAND Institute for Civil Justice, Rethinking Case Management and the Process of Civil Justice Reform 48–76 (2023), https://www.rand.org/pubs/conf_proceedings/CFA2386-1.html.

2 For more details about the program's genesis, see, Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 The Bus. Law. 151, 206–221 (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 MDL proceedings. Each of us has handled litigation involving more than 18,000 litigants.

3 Cal. R. Ct. 3.400.

4 Bryan Borys, Costs Savings in the Los Angeles Superior Court's Complex Litigation Program 4 (2007) (on file with co-authors).

5 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). PowerPoint presentations by Judge Carolyn B. Kuhl (Jan. 10, 2013 & Oct. 6, 2016) (on file with authors).

6 *See generally* Nat'l Ctr. for State Cts., The Landscape of Civil Litigation in State Courts, at iii–v (2015) [hereinafter Landscape of Civil Litigation]. The Pew Charitable Trs., How Debt Collectors Are Transforming the Business of State Courts 13–15 (2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf [hereinafter Pew Debt Collector Report].

7 Nat'l Ctr. for State Cts., Call to Action: Achieving Civil Justice for All (2016) [hereinafter Conference of Chief Justices (CCJ) Call to Action].

8 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, 975–76 (1987).

9 Fed. R. Civ. P. 16 (as adopted by Supreme Court in 1937).

10 Civil Justice Reform Act of 1990, 28 U.S.C. § 471. Cal. Gov't Code § 68607 (1990).

11 Fed. R. Civ. P. 16 (as amended in 1983). Cal R. Ct. 3.722 (2007).

12 *See, e.g.*, Chief Justice John G. Roberts Jr., 2015 Year-End Report on the Federal Judiciary 10–11; Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 Denv. U. L. Rev. 227, 231–32 (2010). Some academics and jurists have expressed sincere concerns about the effects of proactive case management. 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, 678–79, 721–22 (2010) (summarizing academic critiques of case management).

13 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).

14 CCJ Call to Action, *supra* note 7, at 12.

15 *Id.* at 16, Recommendation 1.1.

16 J.E.R. Stephens, *The Advocates of Greece and Rome*, 54 Albany L.J. 12, 13 (1896).

17 Fed. R. Civ. P. 16 advisory committee's note (1937).

18 *Id.* (advisory committee's note to 1983 amendment).

19 *Id.*

20 28 U.S.C. § 471 *et seq*. The Civil Justice Reform Act of 1990 was motivated both by a desire to ensure "deliberate and prompt disposition and adjudication of cases," and by a concern that "litigation transaction costs, in complex as well as in relatively routine cases, are high and are increasing." S.2027, 101st Cong. §§ 2(4)–(5) (as reported by S. Comm. On the Judiciary, Jun. 26, 1990).

21 The Civ. Just. Reform Act of 1990, Final Report Submitted by the Judicial Conference of the United States 3 (1997).

22 James S. Kakalik et al., RAND Corp., Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act 26 (1996).

23 Fed. R. Civ. P. 16(c)(2).

24 Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 Am. L. Rev. 729, 738 (1906).

25 For example, in 2008 the Institute for the Advancement of the American Legal System (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 (1,492 responding lawyers) and respondents averaged 38 years' experience in the practice of law. Inst. for the Advancement of the Am. Legal Sys., Interim Report & 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers 2 (2008). Eighty-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 4. A.B.A. Section of Litig., Member Survey on Civil Practice: Detailed Report (2009) https://www.uscourts.gov/sites/default/files/aba_section_of_litigation_survey_on_civil_practice_0.pdf.

26 David F. Herr, Annotated Manual For Complex Litigation, at iii (4th ed. 2021); 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 (2015). In California, case management practices to resolve discovery disputes that initially were used in the complex litigation pilot program eventually were specifically authorized by rules applicable to all civil cases. Cal. Code Civ. Proc. § 2016.080 (authorizing informal discovery conferences, now sunsetted).

27 CCJ Call to Action, *supra* note 7, 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).

28 *See, e.g.*, *id.* at 9–10; Pew Debt Collector Report, *supra* note 6, at 13–15.

29 Professor Stephen Yeazell's book has an excellent discussion of how the cost of litigation impacts the kinds of cases that are brought and not brought by lawyers and the classes of litigation that are handled by self-represented litigants for lack of affordable professional help. Stephen C. Yeazell, Lawsuits in a Market Economy 48–55 (2018).

30 Bone, *supra* note 12, at 1964 (urging 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.").

31 Fed. R. Civ. P. 1.

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32 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."

33 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).

34 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).

35 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).

36 "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." Ctr. for Ct. Innovations, Procedural Fairness in California: Initiatives, Challenges, and Recommendations 1 (2011).

37 Cal. R. Ct. 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."

38 See further discussion of this point in the discussion of "Setting process and completion deadlines," *infra*.

39 *See, e.g.*, Molly Selvin & Patricia A. Ebener, RAND Corp., Managing the Unmanageable: A History of Civil Delay in the Los Angeles Superior Court 118–19 (1984); Jud. Conf. of the U.S., The Civil Justice Reform Act of 1990, Final Report 27–28 (1997).

40 CCJ Call to Action, *supra* note 7, at 13; Brittany K.T. Kauffman & Natalie Anne Knowlton, Inst. for the Advancement of the Am. Legal Sys., Redefining Case Management 20 (2018).

41 *See* Rosenthal, *supra* note 12, at 227, 241 (many judges comply with Fed. R. Civ. P. 16 by having a "paper hearing" and limiting the Rule 16 order to setting required deadlines).

42 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 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).

43 *Id.*

44 Federal Judicial Center website, referencing the Initial Discovery Protocols developed by the Institute for the Advancement of the American Legal System (IAALS) for "Employment Cases Alleging Adverse Action" and "Fair Labor Standards Acts Cases not pleaded as Collective Actions." (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.).

45 Cal. Civ. Proc. Code § 2016.080. *See* authorities cited *supra* note 26. 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).

46 *See* CCJ Call to Action, *supra* note 7, 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).

47 Eric Helland & Minjae Yun, Summary of More Talk, Less Conflict: Evidence from Requiring Informal Discovery Conferences, included in Rethinking Case Management and the Process of Civil Justice Reform, *supra* note 1.

48 *See* authorities cited *supra* note 11.

49 A notable example of an empirical study of how proactive case management with added staff resources might favorably impact disposition times as compared to a control group of cases in the same jurisdiction following preexisting 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, Nat'l Ctr. for State Cts., Evaluation of the Civil Justice Initiative Pilot Project (2019).

50 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 22, at xxiii-xxiv.

51 CCJ Call to Action, *supra* note 7, at 40. When IAALS sponsored the development of proposed required common discovery in federal Fair Labor Standards Act and Federal Employee Liability 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 Initial Discovery Protocols, *supra* note 44, at Introduction.

52 CCJ Call to Action, *supra* note 7, at 37–38.

53 *See generally* Hon. Jennifer D. Bailey, *Why Don't Judges Case Manage?*, 73 U. Mia L. Rev. 1071 (2019).

54 Rethinking Case Management and the Process of Civil Justice Reform, *supra* note 1, at 41–42 (comments by Hon. David F. Levi).

55 Bone, *supra* note 12, 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.

56 Landscape of Civil Litigation, *supra* note 6, at 31–33.

57 *See* Pew Debt Collector Report, *supra* note 6, at 16 (citing examples of localities where between 70 to 80 percent of debt collection cases ended in default).

58 Bone, *supra* note 12, at 1964 (urging 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).

59 *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).

60 *See* Pew Debt Collector Report, *supra* note 6, at 16 (discussing concerns regarding whether defendants in debt collection cases actually receive notice of having been sued). In California, in unlawful detainer (eviction) cases, a prejudgment claim of right to possession must be served by a marshal, sheriff, or registered process server. Cal. Civ. Proc. Code § 415.46(b).

61 *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).

62 CCJ Call to Action, *supra* note 7, at 21, Recommendation 4.1.

63 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., Nat'l Ctr. for State Cts., 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).

64 Landscape of Civil Litigation, *supra* note 6.

65 Professor Yeazell 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. Yeazell, Lawsuits in a Market Economy, *supra* note 29, at 102–03.

66 *See* CCJ Call to Action, *supra* note 7, at 21–22, Recommendation 4.2.

67 *See* Hamblin & Hannaford-Agor, *supra* note 49, where Initial 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.

68 *See* CCJ Call to Action, *supra* note 7, at 21, Recommendation 4.1 ("the process should be flexible and allow court involvement, including judges, as necessary").

69 *Id.*

70 *See* Carolyn B. Kuhl, Ass'n of Bus. Trial Lawyers of L.A., Winning Through Cooperation 24 (2019) (arguing that the theories of Professor Robert Axelrod in his seminal work *The Evolution of Cooperation* "are consistent with the observation that, in litigation specialties (for example, construction defect) or other close-knit practice groups, lawyers tend to find

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ways to cooperate on procedural aspects of a case").

71 Nicholas M. Pace & Laura Zakaras, RAND Corp., Where The Money Goes: Understanding Litigation Expenditures for Producing Electronic Discovery (2012).

72 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. 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." Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment.

73 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.

74 CCJ Call to Action, *supra* note 7, 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").

75 Rosenthal, *supra* note 12, at 227, 242–43.

76 *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 7, at 23, Recommendation 5.

77 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.

78 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.

79 *See* Rosenthal, *supra* note 12.

80 Cal. Civ. Proc. Code § 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."

81 *See* Hamblin & Hannaford-Agor, *supra* note 49 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.

82 *See* Nat'l Ctr. for State Cts., National Open Court Data Standards, https://www.ncsc.org/consulting-and-research/areas-of-expertise/data/national-open-court-data-standards-nods (last visited Jan. 23, 2023).

cases had shorter disposition times than non-pilot cases, controlling for case type, district, and the effects of the coronavirus pandemic," and that the pilot was rated "most positively in terms of providing the parties with information earlier in the case."[13] Like the employment-litigation pilot referenced above, the MIDP offers an opportunity to use local experimentation as a vehicle for assessing what may work on a larger scale. In addition, at its October 2022 meeting, the Civil Rules Committee advanced to the Standing Committee a recommendation that potential amendments to Rules 16 and 26 concerning privilege logs be approved for publication and public comment. In June 2023, the Civil Rules Committee also will ask the Standing Committee to approve for publication a proposed Rule 16.1 to address issues relating to multidistrict litigation.

Through all of these changes, debate over the proper role of the judge continues. Two generations of lawyers, judges, and rule-makers have taken turns reworking practice and procedure to meet the latest perceived challenge of ever-evolving dockets, including but not limited to changes in pleading standards, privilege logs, e-discovery and proportionality, the rise and relative fall of class actions, and the explosion of multi-district litigation. In this volume, Judges Kuhl and Highberger have brought their decades of experience managing complex cases in the nation's single-largest unified court system to bear in a significant contribution to the discussion. The judicial role in the largest case agglomerations in both state and federal court is too substantial to be described by any other term than "managerial." Yet those who wish to resist that designation can fairly point out that the traditional roles of judges to ensure a fair process for all litigants, including the availability of trial by jury, and to produce deliberate and well-reasoned rulings remain and must be accommodated within the realm of case management.

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1 Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).

2 *Id.* at 445.

3 *Id.* at 378.

4 Brooke D. Coleman, Am. Const. Soc'y, Federal Civil Rulemaking, Discovery Reform, and the Promise of Pilot Projects 2 (2018) https://www.acslaw.org/wp-content/uploads/2018/07/Pilot-Projects.pdf.

5 *Id.* at 7.

6 Emery G. Lee III & Jason A. Cantone, *Pilot Project on Discovery Protocols for Employment Cases Alleging Adverse Action*, 100 Judicature 1, 6 (2016).

7 *Id.*

8 *Id.*

9 *See, e.g.*, D. Or. R. 26.7.

10 Fed. R. Civ. P. 26(b)(1).

11 Fed. R. Civ. P. 1.

12 *Mandatory Initial Discovery Pilot Project Model Standing Order*, Fed. Jud. Ctr. (Nov. 15, 2021), https://www.fjc.gov/content/320224/midpp-standing-order.

13 Emery G. Lee Iii & Jason A. Cantone, Mandatory Initial Discovery Pilot (MIDP) Final Report Prepared for the Judicial Conference Advisory Committee on Civil Rules 3 (2022).

14 U.S. Cts., Advisory Committee on Civil Rules – October 2022 172–92.

15 Carolyn B. Kuhl & William F. Highberger, *Fairer, Quicker, Cheaper: A Systematic Approach to Civil Case Management*, 107 Judicature 1 (2023).