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Why Don't Judges Case Manage?

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Why Don't Judges Case Manage?

HON. JENNIFER D. BAILEY*

The problems of cost and delay experienced by parties seeking civil justice have been the subject of complaints for nearly one hundred years, going back to the days of Roscoe Pound.¹ In the past few years, court leadership across the country has emphasized judicial case management as a significant tool for delivery of cost-effective, fair, and timely civil justice. The declining civil caseload has brought new urgency to these problems as evidence grows that litigants are deserting the civil justice system. Calls for case management to contain cost and delay have come from the Chief Justice of the United States, the Conference of Chief Justices, state bar and Supreme Court commissions, and the American Bar Association. The continuing demand for case management in virtually every lawyer survey, state bar commission, task force, and civil justice report over recent years evidences that judicial case management is not occurring on a day-to-day basis in today's civil courtrooms. Notwithstanding broad calls for judicial case management, most judges still don't case manage—if they did, calls for case management would not be persistent and relentless.

If court leaders are going to rely on civil case management as a critical tool in improving civil justice, it is critical to understand how judges in everyday courtrooms view civil case management and how to best encourage its utilization.

* Administrative Judge, Circuit Civil Division, Eleventh Judicial Circuit, Miami, Florida. This Article represents thesis work completed in Duke University Law School's LL.M. in Judicial Studies program. Thanks to Duke for the opportunity to participate in the program, Dean David F. Levi, Professor Jack Knight, and the Honorable Lee H. Rosenthal for their guidance and advice, and to Yanitza Madrigal for her excellent research/technical assistance.

¹ See Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 537–38 (2006) [hereinafter Tidmarsh, *Pound's Century*] (discussing Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. A.B.A. 395 (1906), reprinted in 35 F.R.D. 273 (1964)).

This thesis reports the results of an empirical investigation by survey into judicial attitudes among Florida circuit civil trial judges regarding utilization of case management in the handling of civil disputes in courts of general jurisdiction.² The results of surveying Florida circuit judges demonstrate that the lack of widespread civil case management is less a deliberate choice due to resistance or philosophical objection than it is a product of the lack of a definition of what “civil case management” means and the scope of that task, a perceived lack of time and support, and a failure to incentivize its adoption through data sharing and performance measures. Through this research, I hope to provide one state’s perspective on this challenge to provide guidance to my state and others in implementing this cultural shift across civil justice.

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² See FLA. STAT. § 34.01(1)(c) (2018) (granting the Florida county courts jurisdiction over civil disputes not exceeding a sum of \$15,000 in value).

INTRODUCTION

Courts acknowledge the existence of profound challenges of cost and delay to civil justice today. There is mounting evidence that state civil courts are losing their relevance as a meaningful forum to resolve disputes. The civil caseload in state courts have been in a steady decline for at least ten years.³ Over the ten-year period between 2006 and 2015 state civil caseloads declined a total of eleven percent (11%).⁴ Since 2009, when caseloads peaked due to the influx in foreclosure and collection cases resulting from the great recession, civil caseloads have declined by twenty-one percent (21%).⁵ In comparison, the Federal court civil caseload remained relatively stagnant over the span of twenty-seven years, increasing about nine percent (9%) between 1986 and 2013.⁶

Concerns about the increasing costs of discovery and the exploitation of flaws in the civil process as a means to extract strategic benefit in litigation are manifest.⁷ Complaints about cost and delay are universal.⁸ Parties and courts alike decry abusive tactics and lack

³ See RICHARD Y. SCHAUFFLER ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURTS CASELOADS 1, 4 (2016), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC%202015.ashx> [hereinafter EXAMINING THE WORK].

⁴ *Id.* (defining civil caseloads to include case types such as tort, contract, real property, mental health, and small claims).

⁵ *Id.* (stating that 2009 saw 19.5 million incoming civil cases and that the average drop from year-to-year was 3.5%).

⁶ Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1186 (2015).

⁷ See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 772 (2010); Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENVER U. L. REV. 227, 242 (2009) [hereinafter Rosenthal, *Defining the Problem*]; CORINA GERETY & BRITTANY KAUFFMAN, INST. FOR THE ADV. OF THE AM. LEGAL SYS., SUMMARY OF EMPIRICAL RESEARCH ON THE CIVIL JUSTICE PROCESS: 2008–2013, at 26 (2014); Jay Tidmarsh, *Resolving Cases "On the Merits,"* 87 DENV. U. L. REV. 407, 412 (2009) [hereinafter Tidmarsh, *Resolving Cases*].

⁸ See Tidmarsh, *Pound's Century*, *supra* note 1, at 552; Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1813 (2014) [hereinafter Resnik, *Privatization of Process*]; Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1501 (2016).

of management that distorts the value of a case, usually either by consequence of cost (mostly discovery) to the defendant or delay to the plaintiff.⁹ The cost of the litigation process, as opposed to the merits of the case, has come to define the value of cases.¹⁰ As one commentator has vividly stated, “[n]ourishing the fiction that justice is a pearl beyond price has its own price.”¹¹

The perception that courts cannot cost-effectively deliver timely results has also caused people with modest cases to simply surrender their rights or disputes because of the burden going to court represents.¹² The perception is that it is simply not worth it.¹³ The 2015

⁹ See Steven S. Gensler & Lee H. Rosenthal, *Four Years After Duke: Where Do We Stand on Calibrating the Pretrial Process?*, 18 LEWIS & CLARK L. REV. 643, 646 (2014) [hereinafter Gensler & Rosenthal, *Four Years After Duke*]; GERTY & KAUFFMAN, *supra* note 7, at 26 (“Attorneys . . . have expressed that in some circumstances targeted and tailored discovery can lead to a more efficient (i.e., less costly) resolution than little or no discovery, and cost-conscious lawyers are aware when the cost of obtaining marginal information will exceed the benefit.”).

¹⁰ See Richard A. Nagareda, *1938 All Over Again? Pretrial As Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 655–56 (2011) (stating that the “settlement value” of a case “depends largely upon” the costs associated with the discovery process).

¹¹ E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 321 (1986).

¹² John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 551 (2012) (“Discovery is costly, so costly that the prospect of having to bear those costs can dissuade a potential litigant from advancing a meritorious claim or defense.”). Cf. REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 15 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf (“58% of those surveyed agreed with the statement that ‘lawyers are not affordable for people on low incomes.’”); Freer, *supra* note 8, at 1501 (“[D]issatisfaction with the delay and expense of litigation led many to extoll the virtue of less formalized process.”).

¹³ Langbein, *supra* note 12, at 551–52; Memorandum from GBA Strategies to Nat’l Ctr. for State Courts, *Analysis of National Survey of Registered Voters 1* (Nov. 17, 2015), https://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Survey%20Analysis.ashx [hereinafter Memorandum from GBA Strategies] (“[P]ersistent concerns about customer service, inefficiency, and bias are undermining the public’s confidence in the courts and leading them to look for alternative means of resolving disputes or addressing problems that would have previously led them into the court system.”);

State of the State Courts survey conducted for the National Center for State Courts found that fifty-four percent (54%) of those interviewed believed that the court system is “inefficient, intimidating, and expensive.”¹⁴ The public perceives that “attorneys are getting rich by running the meter” as opposed to resolving disputes swiftly and cost-effectively.¹⁵

Many parties have turned to alternatives such as arbitration, private judges, or mediation.¹⁶ The 2015 State of the Court Survey also found that fifty-four percent (54%) of the surveyed public believe that “[a]lternative ways to resolve disputes, like mediation, are faster, cheaper, and more responsive to the needs of the people they serve than the court system.”¹⁷ Globalization and alternative methods of dispute resolution are marginalizing the American litigation system.¹⁸ The United States Supreme Court has elected to treat private arbitration and public adjudication as mechanisms of “equal dignity.”¹⁹ Courts now face competition as a forum for dispute resolution and are losing out.²⁰ As far back as 1995, the Federal Judicial Conference *Long Range Plan* warned of the possible results:

Those civil litigants who can afford it will opt out of the court system entirely for private dispute resolution providers. . . . [J]udges are able to spend fewer of their working hours in civil trials than ever before, and the future may make the civil jury trial—and perhaps the civil bench trial as well—a creature of the past. . . . [C]ourts, rather than being forums where

Cf. GERETY & KAUFFMAN, *supra* note 7, at 26 (“[C]ost-conscious lawyers are aware when the cost of obtaining marginal information will exceed the benefit.”).

¹⁴ Memorandum from GBA Strategies, *supra* note 13, at 2.

¹⁵ Freer, *supra* note 8, at 1514.

¹⁶ Nagareda, *supra* note 10, at 692; Memorandum from GBA Strategies, *supra* note 13, at 2–3.

¹⁷ Memorandum from GBA Strategies, *supra* note 13, at 3.

¹⁸ Tidmarsh, *Pound’s Century*, *supra* note 1, at 540.

¹⁹ Freer, *supra* note 8, at 1492 (“In approving this expansion [of the Federal Arbitration Act], the [Supreme] Court increasingly makes clear that it sees nothing special about court litigation—that it an arbitration are mechanisms of equal dignity.”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631, 1636–39 (2005).

²⁰ Memorandum from GBA Strategies, *supra* note 13, at 2–3; Freer, *supra* note 8, at 1501.

the weak and the few have recognized rights that the strong and the many must regard, could become an arena for second-class justice.²¹

As noted by United States District Court Judge Lee Rosenthal in an article penned with Professor Steven Gensler,

[T]here seems to be a growing sense of shared conviction that without effective judicial case management, the age-old problems of cost and delay will so frustrate lawyers and litigants that they will continue to leave the judicial system with fewer and fewer cases tried, or they will simply avoid the system altogether.²²

At a time when technology and transparency is changing every aspect of life, the courts seem creaky, flawed, and vaguely irrelevant in the immediacy of information available in modern life. A 2014 National Center for State Courts survey conducted by Accenture found that, of those citizens surveyed, seventy-four percent (74%) believed that the “[j]ustice system needs to improve . . . [s]peed and efficiency” and fifty-two percent believed that the “[j]ustice system needs to improve . . . [c]ost.”²³ As a solution to these problems, sixty-three percent (63%) believed digital technology could “speed up outcomes,” sixty-two percent (62%) believed digital technology could “reduce public costs,” and fifty-four percent (54%) believed digital technology could “reduce personal cost to individuals involved.”²⁴ The idea that courts deliver services and that litigants are “valued customers” is a new concept to many working in the court system, “but it captures the basic idea that people entering the court-

²¹ JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 19–20 (1995), http://www.uscourts.gov/sites/default/files/federalcourt-slongrangeplan_0.pdf.

²² Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 855 (2013) [hereinafter Gensler & Rosenthal, *The Reappearing Judge*].

²³ *Citizen Support for Digital Justice to Reduce Cost and Speed Up Outcomes*, ACCENTURE (2015) <https://www.accenture.com/nz-en/insight-2014-accenture-citizen-survey-digital-justice-infographic>.

²⁴ *Id.*

house react to both the services delivered and the manner of delivery.”²⁵ The idea that those customers can take their dispute resolution business elsewhere is even more startling to some.²⁶ “[S]tate courts find themselves in an unfamiliar position of facing competition for customers,”²⁷ while, at the same time, continuing to do business as usual as complaints of judicial disengagement “persist and abound.”²⁸

The decline in the civil court caseload has ramifications for democracy. As far back as 1997, sociologist Tom Tyler warned of a “public ‘crisis of confidence’ in the legal system.”²⁹ As summarized by the National Center for State Courts:

[I]t is through courts that those seeking justice can obtain it, regardless of wealth or power. Courts exist to assure that asymmetries of power do not dictate the outcome of disputes. . . . [I]n our common-law system, a public record of court decisions is essential for establishing and updating our legal system. When disputes are resolved in private venues, information is denied to the public and to those seeking to ensure appropriate regulation of social and economic life. . . . [T]he judiciary plays a key role in ensuring checks and balances on the power and actions of the executive and legislative branches.³⁰

The critical role of reliable court systems as a component of stable democracies is reflected in world economic reports, which include

²⁵ Brian Ostrom et al., *Creating a New Generation of Courts*, 47 CT. REV. 80, 80–81 (2011).

²⁶ NAT’L CTR. FOR ST. CTS. AND ST. JUST. INST., CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIG. IN ST. CTS., at iii (2013), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [hereinafter LANDSCAPE OF CIVIL LITIGATION].

²⁷ Memorandum from GBA Strategies, *supra* note 13, at 2.

²⁸ Rosenthal, *Defining the Problem*, *supra* note 7, at 238.

²⁹ Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 872 (1997).

³⁰ Richard Y. Schauffler, *The Rise and Fall of State Court Caseloads*, in TRENDS: UP CLOSE, at 2 (Nat’l Ctr. for State Courts, Trends in the State Courts April 2017), <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/2184/>.

the evaluations of the adequacy and availability of civil court resolutions in comparing national economies.³¹

The chief justices of state supreme courts recognized that re-establishing and maintaining the reputation of state courts as a legitimate forum, providing timely and affordable opportunities to resolve disputes, is essential. In 2013, the nation-wide Conference of Chief Justices created a committee to evaluate data, make recommendations, and develop guidelines “for the purpose of improving the civil justice system in state courts.”³² After two years of analyzing existing pilot projects, surveys, research, and empirical data, the Civil Justice Improvements Committee made thirteen comprehensive recommendations to the Conference of Chief Justices, which are memorialized in their Call to Action report (“CJI Report”),³³ and framed the problem in the following way:

Americans deserve a civil legal process that can fairly and promptly resolve disputes for everyone—rich or poor, individuals or businesses, in matters large or small. Yet our civil justice system often fails to meet this standard. Runaway costs, delays, and complexity are undermining public confidence and denying people the justice they seek. This has to change.³⁴

The CJI Report’s proposals lead off with the following recommendation (“Recommendation One”): “Courts must take responsibility for managing civil cases from time of filing to disposition.”³⁵ The American Bar Association’s House of Delegates adopted the

³¹ See, e.g., ECON. DEP’T, ORG. FOR ECON. CO-OPERATION AND DEV., POLICY NOTE NO. 18, WHAT MAKES CIVIL JUSTICE EFFECTIVE? 2 (2013), <https://www.oecd.org/eco/growth/Civil%20Justice%20Policy%20Note.pdf> [hereinafter WHAT MAKES CIVIL JUSTICE EFFECTIVE?] (“Well-functioning judiciaries guarantee security of property rights and enforcement of contracts. . . . [which] strengthens incentives to save and invest[.]”).

³² CIVIL JUSTICE IMPROVEMENTS COMM., CONFERENCE OF CHIEF JUSTICES, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 4–5 (2016), https://www.ncsc.org/~/_media/Microsites/Files/Civil-Justice/NCSC-CJI-Report-Web.ashx [hereinafter CJI REPORT].

³³ *Id.*

³⁴ *Id.* at 2.

³⁵ *Id.* at 16.

recommendations in the CJI Report in 2017, “urg[ing] all state courts to consider the Recommendations of [the CJI Report] as appropriate guidance in their endeavors to achieve demonstrable civil justice improvements with respect to the expenditure of time and costs to resolve civil cases,” which signals a strong endorsement of judicial case management.³⁶ The CJI Report’s Commentary on Recommendation One succinctly summarizes the problem:

Our civil justice system has historically expected litigants to drive the pace of civil litigation by requesting court involvement as issues arise. This often results in delay as litigants wait in line for attention from a passive court—be it for rulings on motions, a requested hearing, or even setting a trial date. The wait-for-a-problem paradigm effectively shields courts from responsibility for the pace of litigation. . . . The party-take-the-lead culture can encourage delay strategies by attorneys, whose own interests and the interests of their clients may favor delay rather than efficiency. In short, adversarial strategizing can undermine the achievement of fair, economical, and timely outcomes.³⁷

This initiative by state supreme court chief justices followed the 2010 Conference on Civil Litigation held by the Federal Civil Rules Advisory Committee at Duke University Law School (the “Duke Conference” or the “Duke Conference Report”).³⁸ Similar to the CJI Report, the Duke Conference Report also demanded strong case management: “There was nearly unanimous agreement that the disposition of civil actions could be improved, reducing cost and delay, by advancing cooperation among the parties, proportionality in the

³⁶ A.B.A. HOUSE OF DELEGATES, RESOLUTION 102, at 1 (Feb. 6, 2017).

³⁷ CJI REPORT, *supra* note 32, at 16.

³⁸ JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES AND THE COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 1 (2010), http://www.uscourts.gov/sites/default/files/report_to_the_chief_justice.pdf [hereinafter JUDICIAL CONFERENCE ADVISORY COMM.]; DUKE CONFERENCE SUBCOM., ADVISORY COMM. ON CIVIL RULES, REPORT OF THE DUKE CONFERENCE SUBCOMMITTEE 79 (2010), http://www.uscourts.gov/sites/default/files/fr_import/CV2014-04.pdf [hereinafter DUKE CONFERENCE REPORT].

use of available procedures, and early and active judicial case management.”³⁹ The Duke Conference Report referenced surveys and reports from the Federal Judicial Center (“FJC”), the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System, the American Bar Association section on litigation and the National Employment Lawyers association (“NELA”), along with perspectives from the Lawyers for Civil Justice, the Civil Justice Reform Group, and the U.S. Chamber Institute for Legal Reform.⁴⁰ As described by attendees, “Many users of the current scheme—whether speaking from the perspective of plaintiffs or defendants, business or public interest, government or private litigants—complained that a wide variety of cases took too long and cost too much to resolve.”⁴¹ The report identified that

judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of that case. The challenge is to achieve this on a consistent, institutional basis without interfering with the independence and creativity of each judge and district responding to the specific mix of cases and docket conditions, and without interfering with the effective handling of many cases under existing rules and practices.⁴²

Rather than initiating a complete overhaul of the current case management system, many users believe that the simplest solution would be to increase judicial engagement and intervention.⁴³ This reflects the common and strong belief that judicial management is the key stone to the reasonable needs of a case. The Duke conference remedy reflected a strong, shared belief that judicial management is essential to tailoring the pretrial process to the reasonable needs of the case.⁴⁴

³⁹ DUKE CONFERENCE REPORT, *supra* note 38, at 79.

⁴⁰ *Id.* at 79, 82–83, 115.

⁴¹ Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 645.

⁴² JUDICIAL CONFERENCE ADVISORY COMM., *supra* note 38, at 4.

⁴³ Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 645.

⁴⁴ *Id.*

The consensus on the need for court case management extends to every level of court. In his 2015 report on the State of the Judiciary, United States Supreme Court Chief Justice John Roberts extolled the virtues of civil case management in just, speedy, and inexpensive delivery of civil justice:

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 curtail dilatory tactics, gamesmanship, and procedural posturing.⁴⁵

Chief Justice Roberts continued that emphasis in his 2016 report:

As I explained in my 2015 Year-End Report, the Judicial Conference—the policy making body of the federal courts—has revised the Federal Rules of Civil Procedure to emphasize the judge’s role in early and effective case management. Those procedural reforms encourage district judges to meet promptly with the lawyers after the complaint is filed, confer about the needs of the case, develop a case management plan, and expedite resolution of pretrial discovery disputes. The reforms are beginning to have a positive effect because already extremely busy judges are willing to undertake more active engagement in managing their dockets, which

⁴⁵ C. J. JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FED. JUDICIARY 10–11 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [hereinafter 2015 YEAR-END REPORT].

will pay dividends down the road. A lumberjack saves time when he takes the time to sharpen his ax.⁴⁶

Since 2010, multiple state civil justice commissions and pilot projects across the country have called for active court case management as key to delivering better value in civil justice by reducing cost and delay.⁴⁷ These calls echo the calls of prior decades. The

⁴⁶ C.J. JOHN G. ROBERTS, JR., 2016 YEAR-END REPORT ON THE FED. JUDICIARY 6–7 (2016), <https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf> [hereinafter 2016 YEAR-END REPORT].

⁴⁷ See, e.g., TASK FORCE ON THE ESCALATING COSTS OF CIVIL LITIG., WASH. STATE BAR ASS'N, FINAL REPORT TO THE BOARD OF GOVERNORS 3 (2015), https://www.wsba.org/docs/default-source/legal-community/committees/eccl-task-force/reports/eccl-final-report-06152015.pdf?sfvrsn=3a993cfl_2; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, CIVIL CASE PROCESSING IN THE OREGON COURTS: AN ANALYSIS OF MULTNOMAH COUNTY 1–3 (2010), https://iaals.du.edu/sites/default/files/documents/publications/civil_case_processing_oregon_courts2010.pdf; COMM. ON CIVIL JUSTICE REFORM, ARIZ. SUPREME COURT, A CALL TO REFORM 1–3, 7–9 (2016), <http://www.azcourts.gov/Portals/74/CJRC/Master%20CJRC%20Final%20Report%20and%20Recommendations.pdf> [hereinafter ARIZ. CALL TO REFORM]; News Release, N.J. Courts, Supreme Court Committee on Expedited Civil Actions Releases Report (Apr. 15, 2014), <https://www.njcourts.gov/pressrel/2014/pr140415b.pdf>; IOWA CIVIL JUSTICE REFORM TASK FORCE, REFORMING THE IOWA CIVIL JUSTICE SYSTEM, at v–viii (2012), https://www.iowacourts.gov/media/cms/FINAL03_22_12_0E9941AE5D491.pdf; CONFERENCE OF CHIEF JUSTICES, NAT'L CTR. FOR STATE COURTS, CIVIL RE-ENGINEERING CONCEPT PAPER 2–4 (2014), <https://ccj.ncsc.org/~media/Microsites/Files/CCJ/Web%20Documents/Civil%20Justice%20Initiative/Connecticut%20Concept%20Paper%20Civil%20Re-engineering.ashx>; CIVIL JUSTICE INITIATIVE, NAT'L CTR. FOR STATE COURTS, NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES 1, 19–22 (2013), <https://www.ncsc.org/~media/Files/%E2%80%8CPDF/Topics/Civil%20Procedure/12022013-Civil-Justice-Initiative-New%E2%80%8C-Hampshire.ashx> [hereinafter NEW HAMPSHIRE: PAD PILOT RULES]; Nat'l Ctr. for State Courts, *Complex Litigation: Key Findings from the California Pilot Program*, CIVIL ACTION, Winter 2004, at 1–2 [hereinafter *Complex Litigation: Key Findings*]; JUDICIAL BRANCH STATE OF IDAHO, ADVANCING JUSTICE: PROMOTING FAIR AND TIMELY CASE RESOLUTION (2013), <http://idahodocs.contentdm.oclc.org/cdm/ref/collection/p16293coll3/id/251137>; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, STATEWIDE CASEFLOW MANAGEMENT PLAN FOR THE IDAHO DISTRICT COURTS 1 (2014), http://iaals.du.edu/sites/default/files/documents/publications/idaaho_state_wide_caseflow_management_plan.pdf; Andrew A. Powell, *It's Nothing Personal, It's Just Business: A Commentary on the South Carolina Business Court Pilot Program*, 61 S.C. L. REV. 823, 839–42 (2010); MINN. SUPREME COURT

judicial branch is confronting the truth that the “interests, values, and rights of all participants in the legal process are court responsibilities. . . . Fairness is desired by everyone, with court customers wanting this result through a process that is predictable, timely, and cost-effective.”⁴⁸

I. PRIOR SURVEYS AND EMPIRICAL RESEARCH

There have been multiple surveys over the past decade establishing strong support for civil court case management as a solution to the challenges plaguing the civil justice system.⁴⁹ In 2007, the American College of Trial Lawyers (the “ACTL”) and the Institute for the Advancement of the American Legal System (the “IAALS”) began a joint project “to examine the role of discovery in perceived problems in the United States civil justice system and to make recommendations for reform” in which they surveyed ACTL members

CIVIL JUSTICE REFORM TASK FORCE, FINAL REPORT OF THE CIVIL JUSTICE TASK FORCE 4–5 (2011), <https://www.leg.state.mn.us/docs/2012/other/120214.pdf>; JUDICIAL IMPROVEMENTS COMM. OF THE S. DIST. OF N.Y., REPORT OF THE JUDICIAL IMPROVEMENTS COMMITTEE: PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES, at ii (2011), http://www.uscourts.gov/sites/default/files/tab_vi_appendix_f_sdny_pilot_project_for_complex_litigation_0.pdf; Howard Berchtold et al., Bureau of Justice Assistance Criminal Courts Tech. Assistance Project, *Differentiated Cases Management Concept and Application to Civil Case Management*, NACM ANNUAL CONFERENCE (July 23, 2010), <https://nacmnet.org/sites/default/files/conferences/PastConferences/PastConferences/2010Annual/Civil%20DCM.pdf>; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, SURVEY OF THE ARIZONA BENCH & BAR: ON THE ARIZONA RULES OF CIVIL PROCEDURE 1 (2010), http://iaals.du.edu/sites/default/files/documents/publications/survey_arizona_bench_bar2010.pdf [hereinafter SURVEY OF THE ARIZONA BENCH]; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, SURVEY OF THE OREGON BENCH & BAR: ON THE OREGON RULES OF CIVIL PROCEDURE 1–2 (2010), http://iaals.du.edu/sites/default/files/documents/publications/survey_oregon_bench_bar2010.pdf; LEE SUSKIN, NAT’L CTR. FOR STATE COURTS, A CASE STUDY: REENGINEERING UTAH’S COURTS THROUGH THE LENS OF THE PRINCIPLES FOR JUDICIAL ADMINISTRATION, at i–ii (2012), http://iaals.du.edu/sites/default/files/documents/publications/survey_oregon_bench_bar2010.pdf.

⁴⁸ Ostrom et al., *supra* note 25, at 80.

⁴⁹ See generally EMERY G. LEE III & THOMAS E. WILLGING, ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL ADVISORY COMMITTEE ON CIVIL RULES (2010), <https://www.fjc.gov/sites/default/files/2012/CostCiv2.pdf>.

beginning in 2008.⁵⁰ The results of this survey identified the need for serious repair of the civil justice system, and called for judges to have a more proactive role in the direction, timing, and cost-containment of a case beginning at the outset of the case, from filing to trial, including designing the scope of discovery.⁵¹ The survey also identified rule enforcement as an issue.⁵²

In response to the problems the survey identified, the ACTL/IAALS survey recommended that judges hold prompt initial conferences after service of a complaint to effectively manage all of their cases.⁵³ The survey noted that “[e]arly judicial involvement is important because not all cases are the same and because different types of cases require different case management.”⁵⁴ Seventy-four percent (74%) of the respondents reported that early intervention by the judge helped narrow the issues in the case.⁵⁵ The survey called for courts to set realistic timetables for discovery and to establish trial dates at the first pretrial conference.⁵⁶ The report specifically discussed how continuing trial dates, or the failure to establish firm trial dates, increases the cost and delay of cases and, to fix this issue, called for courts to enforce firm trial dates.⁵⁷ The ABA Section on Litigation surveyed its members in Fall 2009.⁵⁸ The respondents to the ABA survey agreed that litigation was too expensive, costs would be reduced by expedited disposition, and judges help with

⁵⁰ AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 1–2 (2009), http://www.uscourts.gov/sites/default/files/final_report_on_the_joint_project_of_the_actl_task_force_on_discovery_and_the_iaals_1.pdf.

⁵¹ *Id.* at 2.

⁵² *Id.*

⁵³ *Id.* at 13.

⁵⁴ *Id.* at 19.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See id.* at 20.

⁵⁸ SPECIAL COMM. ON THE FUTURE OF CIVIL LITIG., AM. BAR ASS’N, CIVIL PROCEDURE IN THE 21ST CENTURY: SOME PROPOSALS (2010), http://www.uscourts.gov/sites/default/files/aba_litigation_section_civil_procedure_in_the_21st_century_0.pdf [hereinafter CIVIL PROCEDURE IN THE 21ST CENTURY].

narrowing issues and limiting discovery.⁵⁹ The ABA Section on Litigation also endorsed case management as a critical tool in reducing cost and delay.⁶⁰

In 2010, IAALS conducted another survey, this time to collect data from federal and state trial judges about the civil justice system.⁶¹ The majority of the participating judges acknowledged that civil justice takes too long.⁶² Seventy-five percent (75%) of state trial judges and eighty-eight percent (88%) of federal judges believed that early intervention by a judge helps to narrow issues.⁶³ Federal respondents felt that early Rule 16 pretrial conferences lead to faster case resolution and improved time management.⁶⁴ Seventy percent (70%) of responding state and federal judges believed that a case management order setting deadlines should be entered early in the case and control the litigation going forward. The respondent judges, both state and federal, overwhelmingly indicated that both the time required for discovery and requests for extensions and continuances by attorneys were significant causes for delay.⁶⁵ Interestingly, the state and federal judges were more reserved when asked to self-examine their own role in delay, with a much lower rate of

⁵⁹ *Id.* at 5.

⁶⁰ *See id.* at 4.

⁶¹ Corina Gerety, *Trial Bench Views: IAALS Report on Findings from a National Survey on Civil Procedure*, 32 PACE L. REV. 301, 301 (2012).

⁶² *Id.* at 303.

⁶³ *Id.* at 314.

⁶⁴ *Id.* at 302.

⁶⁵ *Id.* at 329 (displaying that eighty-two percent (82%) of state trial judges and eighty-four percent (84%) of federal trial judges indicated that the “time required to complete discovery” was a significant cause of delay, while eighty-three percent (83%) of state trial judges and eighty-five percent (85%) of federal trial judges indicated that “attorney requests for extensions and continuances” were a significant cause of delay).

judges indicating their belief that delayed rulings and court continuances were causes of significant delay.⁶⁶ At the same time, a majority of responding judges grant pleading extensions ninety percent (90%) of the time.⁶⁷

In 2009, the FJC conducted a survey of attorneys focused on the costs of litigation and discovery as well as the Federal Rules of Civil Procedure, amongst other topics.⁶⁸ The survey placed the attorneys into three groups: (1) those who primarily represented plaintiffs; (2) those who primarily represented defendants; and (3) those who represented both plaintiffs and defendants equally.⁶⁹ The survey asked two complementary questions: (1) should the Rules be amended to encourage judicial case management and (2) should the Rules be amended to discourage judicial case management?⁷⁰ To the first question, approximately forty-three percent (43%) of the respondents who represented both plaintiffs and defendants equally agreed or strongly agreed, thirty percent (30%) felt neutral, and only twenty-six percent (26%) disagreed or strongly disagreed.⁷¹ However, to the second question, only eleven percent (11%) of the respondents who represented both plaintiffs and defendants equally agreed or strongly agreed, thirty-two percent (32%) felt neutral, and,

⁶⁶ *Id.* (displaying that only sixty-five percent (65%) of state trial judges and seventy-five percent (75%) of federal trial judges indicated that “[d]elayed rulings on pending motions” were a significant cause of delay, while only sixty-seven percent (67%) of state trial judges and sixty-five percent (65%) of federal trial judges indicated that “[c]ourt continuances of scheduled events” were a significant cause of delay).

⁶⁷ *Id.* at 330.

⁶⁸ EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1 (2009), <https://www.fjc.gov/sites/default/files/materials/08/CivilRulesSurvey2009.pdf>.

⁶⁹ *Id.* at 2.

⁷⁰ *Id.* at 66–67.

⁷¹ *Id.* Of the respondents who represented primarily plaintiffs, approximately thirty-three percent (33%) agreed or strongly agreed, twenty-nine percent (29%) felt neutral, and thirty-five percent (35%) disagreed or strongly disagreed. *Id.* Of the respondents who represented primarily defendants, approximately thirty-four percent (34%) agreed or strongly agreed, thirty-four percent (34%) felt neutral, and thirty percent (30%) disagreed or strongly disagreed. *Id.*

most interestingly, fifty-three percent (53%) disagreed or strongly disagreed.⁷²

Notwithstanding the broad enthusiasm for judicial case management and the resulting rule changes to encourage it, there remains a dearth of data on case management's effectiveness.⁷³ Important topics, such as whether case management delivers better value in terms of cost and timely resolution of issues, and what tools and resources judges need to case manage effectively have not been the subjects of objective measurement.⁷⁴ Most of the measurement data that does exist comes from state pilot projects, small in scale, which have been summarized in excellent reports from the Civil Justice Initiative⁷⁵ and IAALS.⁷⁶ Previous efforts at federal measurement were conducted in the 1990s with the passage of the Civil Justice Reform Act ("CJRA");⁷⁷ however, the CJRA pilot program has largely failed to provide definitive empirical results on whether case management projects are actually effective and efficient.⁷⁸

A 1996 study conducted by the RAND Institute for Civil Justice is arguably the most significant study of federal civil justice reforms that has, as of now, been conducted.⁷⁹ The study "summarizes three

⁷² *Id.* at 67–68. Of the respondents who represented primarily plaintiffs, approximately sixteen percent (16%) agreed or strongly agreed, thirty-three percent (33%) felt neutral, and forty-six percent (46%) disagreed or strongly disagreed. *Id.* Of the respondents who represented primarily defendants, approximately eleven percent (11%) agreed or strongly agreed, thirty-seven percent (37%) felt neutral, and forty-nine percent (49%) disagreed or strongly disagreed. *Id.*

⁷³ Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 672 (2010) [hereinafter Gensler, *Caught in the Crossfire*] ("But even though we are nearly thirty years into the case management era, many practical questions about the real-world effectiveness of judicial case management remain at least partly unanswered."); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982) [hereinafter Resnik, *Managerial Judges*].

⁷⁴ *Id.*

⁷⁵ See generally, e.g., CJI REPORT, *supra* note 32.

⁷⁶ See generally, e.g., GERETY & KAUFFMAN, *supra* note 7.

⁷⁷ Civil Justice Reform Act of 1990 (CJRA), Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (codified in part at 28 U.S.C. §§ 471–482 (2016)).

⁷⁸ Gensler, *Caught in the Crossfire*, *supra* note 73, at 716 (explaining that insufficient participation and individualized case management, as well as inconsistent tracking, were reasons for the CJRA's failure to provide meaningful empirical data).

⁷⁹ JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER

technical reports that document RAND's evaluation of the [CJRA]."⁸⁰ The study found that "what judges do to manage cases matters" in several different respects.⁸¹ The RAND study found that early judicial case management, including setting a trial schedule early, firm and shortened discovery cutoffs, and appropriate settlement conferences, significantly reduced time to disposition.⁸² While the study found that costs were significantly increased by early case management, the study also found that this increase could be offset by the decrease in discovery costs associated with firm and shortened discovery cutoffs.⁸³ This combination of early case management and firm discovery cutoffs, RAND concluded, resulted in "no cost penalty for a reduced time to disposition of approximately four to five months."⁸⁴

With regard to the relationship between time and cost, RAND explained its conclusions in the following way:

Early judicial case management has significant effects on both time and cost. We estimate a 1.5 to 2 month reduction in median time to disposition for cases that last at least nine months, and an approximately 20-hour increase in lawyer work hours. . . . [However] costs to litigants are also higher in dollar terms and in litigant hours spent when cases are managed early. These results debunk the myth that reducing time to disposition will necessarily reduce litigation cost.⁸⁵

THE CIVIL JUSTICE REFORM ACT (1996), https://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR800.pdf.

⁸⁰ *Id.* at v. The three reports summarized in the RAND study are the following: (1) *Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts*; (2) *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*; and (3) *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act*. *Id.*

⁸¹ *Id.* at 1–2.

⁸² *Id.*

⁸³ *Id.* at 2.

⁸⁴ *Id.*

⁸⁵ *Id.* at 14.

The RAND study also found that early judicial case management shifted work earlier in the case, but found that active management of discovery reduced costs during the discovery phase. Specifically, early judicial case management involves a tradeoff between shortened time to disposition and increased lawyer work hours.⁸⁶ Despite this tradeoff, the study found that, “[s]horter time from setting a discovery schedule to discovery cutoff is associated with both significantly reduced time to disposition and significantly reduced lawyer work hours.”⁸⁷ Of all the different factors investigated in the study, judicial management of discovery is the only technique that produced the effect of reducing lawyer work hours, and, in turn, litigation costs.⁸⁸

The RAND study also found that, “in terms of predicting reduced time to disposition, setting a schedule for trial early was the most important component of early management.”⁸⁹ This provides solid evidence of most lawyers’ continued obsession with a trial date.⁹⁰ Although most cases are disposed of by means *other* than trial,⁹¹ the continued obsession with trial dates results in management by way of an extremely rare event;⁹² in other words, trial dates are a cultural loadstar that guides lawyers and judges to earlier dispositions and thus, reduced litigation costs.⁹³ Interestingly, eighty-five (85%) of the judges surveyed in pilot districts with regard to case management before and after the CJRA responded that the CJRA made “no difference” in the way they managed cases.⁹⁴

⁸⁶ *Id.*

⁸⁷ *Id.* at 16.

⁸⁸ *Id.* at 26.

⁸⁹ *Id.* at 14.

⁹⁰ *See generally, e.g.,* CIVIL PROCEDURE IN THE 21ST CENTURY, *supra* note 58, at 7.

⁹¹ Langbein, *supra* note 12, at 524–25.

⁹² *See id.* at 26 (stating that lawyer work hours are driven predominantly by factors *other* than case management and that “[w]hen time to disposition is cut, lawyers seem to do much the same work, but do it in less time”).

⁹³ *Id.* at 14; David C. Steelman, *What Have We Learned About Court Delay, “Local Legal Culture,” and Caseflow Management Since the Late 1970s?*, 19 JUST. SYS. J. 145, 159–60 (1997).

⁹⁴ KAKALIK ET AL., *supra* note 79, at 24. Furthermore, ninety-two percent (92%) of the judges in comparison districts also believed the CJRA made “no difference” in the way they managed cases. *Id.*

The RAND Study is twenty-three years old;⁹⁵ however, other studies are even older. Steven Flanders conducted a study in 1975 “of civil cases that were terminated in six large courts.”⁹⁶ This study found that judges who used strong case management controls settled cases within 366 days while judges who used limited or no case management controls resolved cases within 682 days.⁹⁷ The study also found that judges who used strong case management controls tried cases within 472 days while judges who used limited or no case management controls tried cases within 945 days.⁹⁸

One of the other empirical challenges in evaluating civil case management as a tool to reduce cost and delay is answering the inherently subjective questions of how much is too much and how long is too long. Some indicia can be evaluated: for example, a survey conducted by the American Institute of Certified Professional Accountants estimated that continuances increase hours of expert witness preparation.⁹⁹ Forty-four percent (44%) of the survey’s respondents estimated an increase between eleven to twenty-five percent (11–25%), another thirty-two percent (32%) estimated an increase of more than twenty-five percent (25%).¹⁰⁰ Ninety-six percent (96%) of respondents said their preparation time, and therefore costs, increased due to continuances.¹⁰¹ The AICPA survey provides tangible evidence of costs due to continuance.¹⁰²

Research on litigants’ perspectives of trial suggests that satisfaction with the court is more likely to be influenced by considerations of procedural fairness than it is by absolute cost or time.¹⁰³ Delay

⁹⁵ *Id.* at 5.

⁹⁶ Steven Flanders, Commentary, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505, 516–18 (1984).

⁹⁷ *Id.* at 519.

⁹⁸ *Id.*

⁹⁹ AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, ANOTHER VOICE: FINANCIAL EXPERTS ON REDUCING CLIENT COSTS IN CIVIL LITIGATION 4 (2012), http://iaals.du.edu/sites/default/files/documents/publications/financial_experts_on_reducing_client_costs_in_civil_litigation.pdf.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ E. ALLAN LIND ET AL., RAND INST. FOR CIVIL JUSTICE, THE PERCEPTION OF JUSTICE: TORT LITIGANTS’ VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 77 (1989) [hereinafter LIND ET AL.,

was a similarly elastic concept.¹⁰⁴ Specifically, while “[c]ase delay did affect the litigant’s attitudes, . . . what mattered was not the absolute delay but rather the litigants’ personal evaluations of whether the delay was reasonable.”¹⁰⁵ Furthermore, evaluations of case delay showed no consistent relationship to how litigants’ actually perceive fairness.¹⁰⁶ Accordingly, research shows that “delay-reducing efforts should be targeted at those aspects of delay that are most likely to be seen as unreasonable.”¹⁰⁷

Another challenge to measuring the success of case management derives from a lack of consistent definition of the appropriate parameters of case management and the wide degree of individualization employed in judicial approaches.¹⁰⁸ As a result, frustration with the progress on civil justice innovation may be driving leaders to demand case management on faith.¹⁰⁹ Without specific evidence of efficacy, however, skeptics properly note that case management

THE PERCEPTION OF JUSTICE] (“The litigants’ judgments of fairness and their satisfaction with the court showed remarkably little relation to the cost of the case or how long it took to resolve. . . . Economic concerns of all sorts seemed to play at most a minor role in determining litigants’ attitudes. . . . Case delay did affect the litigants’ attitudes, but what mattered was not the absolute delay but rather the litigants’ personal evaluations of whether the delay was reasonable.”); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 L. & SOC’Y REV. 953, 980, 984 (1990) [hereinafter Lind et al., *In the Eye of the Beholder*]; Tyler, *supra* note 29, at 882 (“[S]tudies of people’s reactions to their experiences in court and mediation suggest that there is little relationship between objective indicators of cost and delay and litigant’s subjective evaluations of their experience with the legal system.”).

¹⁰⁴ See PERCEPTION OF JUSTICE, *supra* note 103, at 78.

¹⁰⁵ *Id.* at 77.

¹⁰⁶ Lind et al., *In the Eye of the Beholder*, *supra* note 103, at 971.

¹⁰⁷ PERCEPTION OF JUSTICE, *supra* note 103, at 77.

¹⁰⁸ See Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 321 (2008); see also, e.g., Tidmarsh, *Pound’s Century*, *supra* note 1, at 575–76; Jonathan T. Molot, *An Old Judicial Role for a New Legislation Era*, 113 YALE L.J. 27, 41, 43, 90–91 (2008); Flanders, *supra* note 96, at 507; Gensler, *Caught in the Crossfire*, *supra* note 73, at 722–23; Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 647–48.

¹⁰⁹ Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure (May 19, 2010), <http://www.uscourts.gov/>

may be “either an effective tonic for undue cost and delay or a snake-oil solution that is doomed to leave the patient sick.”¹¹⁰

The challenge of conducting good empirical study is understandable, given the myriad of species of individualized judicial case management. For example, the RAND study took five years to complete.¹¹¹ Debate about the ability of case management to reduce cost and delay is nothing new, nor is it unique to the United States. But it remains critically important. One of the focuses of the latest wave of empirical studies is to determine whether case management has fulfilled its promise. If case management does not help at all, or, as Professor Tidmarsh recently suggested, it turns out to be counterproductive, then we need to quickly start taking steps to turn around the battleship.¹¹² Accordingly, the need for additional study is important.

Despite the lack of empirical data, the proliferation of specialized courts that serve high-profile constituencies and have a high degree of court case management provide practical evidence of the need for judicial case management. For example, the expansion of Multidistrict Litigation courts,¹¹³ the success of Delaware’s Court of Chancery as a forum of choice,¹¹⁴ and the spread of business courts in many jurisdictions¹¹⁵ all demonstrate that case management is beneficial to the success of the courts and support the existence of a

rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2010 (discussing the 2010 Duke Conference proposals on how to manage cost and delay in litigation and stating that “[p]leas for universalized case management achieved virtual, perhaps absolute, unanimity”); Steven Baicker-McKee, *Reconceptualizing Managerial Judges*, 65 AM. U. L. REV. 353, 353, 365–68 (2015) (“Survey data suggest an uncommon agreement between plaintiffs and defendants that more judicial involvement leads to quicker, less expensive and more satisfying results.”).

¹¹⁰ Gensler, *Caught in the Crossfire*, *supra* note 73, at 727.

¹¹¹ KAKALIK ET AL., *supra* note 79.

¹¹² Gensler, *Caught in the Crossfire*, *supra* note 73, at 729.

¹¹³ John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2229–31 (2008).

¹¹⁴ Randy J. Holland, *Delaware’s Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 773–74 (2009).

¹¹⁵ John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1918, 1922–23 (2012).

market demand for judicial case management in complex matters.¹¹⁶ However, the breadth of continued calls for judicial case management reform¹¹⁷ demonstrates that, notwithstanding years of debate and rule changes promoting case management, it is simply not occurring or being enforced in day to day dockets.¹¹⁸

In sum, for decades civil case management has been repeatedly identified as one of the most effective tools to move cases fairly, justly, effectively, and efficiently through the civil courts. Case management as a means by which courts can differentiate and tailor management of each case according to its need has been the subject of justice research and advocacy efforts since the late 1970s.¹¹⁹ Despite the cheerleading, the pleas from bar leadership, the mandates in the Federal Rules of Civil Procedure, and the proof from different pilot projects across the states,¹²⁰ civil case management is still not generally employed.¹²¹ The proof of its absence as part of standard

¹¹⁶ See, e.g., *Complex Litigation: Key Findings*, *supra* note 47, at 6.

¹¹⁷ CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., EXCESS & ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 7–8 (2011) [hereinafter GERETY, EXCESS & ACCESS].

¹¹⁸ See, e.g., CIVIL PROCEDURE IN THE 21ST CENTURY, *supra* note 58, at 13; SURVEY OF THE ARIZONA BENCH, *supra* note 47, at 3, 51–52.

¹¹⁹ NAT'L CONFERENCE OF STATE TRIAL JUDGES COURT DELAY REDUCTION COMM., AM. BAR. ASS'N, LITIGATION CONTROL: THE TRIAL JUDGE'S KEY TO AVOIDING DELAY 7 (1996) (discussing THOMAS CHURCH JR. ET AL., NAT'L CTR. FOR STATE COURTS, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978)); NANCY E. GIST, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE FACT SHEET: DIFFERENTIATED CASE MANAGEMENT 1 (1995), <https://www.ncjrs.gov/textfiles/dcm.txt>.

¹²⁰ See KAKALIK ET AL., *supra* note 79, at 2–3, 26–30; Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 854; Baicker-McKee, *supra* note 109, at 365–68; Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, 647–50; CJI REPORT, *supra* note 32, at 2–4, 15–38.

¹²¹ Gensler, *Caught in the Crossfire*, *supra* note 73, at 735–37; Baicker-McKee, *supra* note 109, at 358, 368–71; Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 650; CJI REPORT, *supra* note 32, at 4; GERETY, EXCESS & ACCESS, *supra* note 117, at 14–15, 18; Freer, *supra* note 8, at 1520–21. *Cf.* Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 854 (stating that, even though the research on and use of case management has increased in recent years, lawyers and judges did not implement the 1983 changes to the Federal Rules of Civil Procedure until recently due to various worries).

court operations is evident by the repeated continuing clarion calls for its adoption as the best option for improving civil justice.¹²²

II. FRAMING THE ISSUE

This historical background leads to the key questions that the following research seeks to address: given the broad call for judicial case management, what are the attitudes of rank and file judges? Why do judges make the decisions they do about whether or not to case manage? Is this a conscious decision or a product of the workload? Do judges have a handle on their overall caseload in terms of types of cases? What might incentivize judges to engage in civil case management? When advocates recommend civil case management, what do they mean, and what does their audience understand them to mean? These questions are particularly timely for state courts given the new technological opportunities now available due to the recent shift to digital files in state courts,¹²³ which was over twenty-five years behind the federal shift to the electronic PACER system,¹²⁴ and endorsed by the policy recommendations reflected in the CJI Report.¹²⁵ For example, Florida, the chosen research location, only began the shift towards digital court files in the civil circuit courts in 2009.¹²⁶

As a matter of practice, there are three approaches to civil case management:

¹²² CJI REPORT, *supra* note 32, at 2–3, 16; Baicker-McKee, *supra* note 109, at 358.

¹²³ See Jenni Bergal, *Courts Plunge into the Digital Age*, PEW (Dec. 8, 2014), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/12/8/courts-plunge-into-the-digital-age> (“We’ve got 50 states and everybody is doing some kind of e-filing project. That was not true even at the beginning of this year. It’s really exciting[.]” (quoting Jim McMillan, a technology consultant for the National Center for State Courts)).

¹²⁴ *25 Years Later, PACER, Electronic Filing Continue to Change Courts*, U.S. CTS., (Dec. 9, 2013), www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts.

¹²⁵ CJI REPORT, *supra* note 32, at 15–38 (listing recommendations on judicial case management).

¹²⁶ In Re: Statewide Standards for Electronic Access to the Courts, AOS09-30 (Fla. July 1, 2009) (adopting and incorporating the Florida Supreme Court Statewide Standards for Electronic Access to the Courts); *see also* FLA. R. JUD. ADMIN. 2.520, 2.525.

- Traditional deferential case management, with near complete reliance on litigants to progress the case to resolution requiring only the obligation to provide a hearing date or trial upon request, and in the absence of such a request, allows continued inactivity.
- Reactive court case management, in which the court routinely gets involved upon a request for enforcement or ruling by a party, and additionally recognizes an obligation to act when there is period of inactivity in the case or the case is aged beyond the judge's tolerance level;¹²⁷ and
- Proactive court case management which recognizes an obligation to provide consistent momentum through a court-supervised case management plan designed from the outset to ensure effective progress through case stages, with a defined anticipated resolution deadline, whether by trial or settlement, without unnecessary delay between events.¹²⁸

Under the traditional deferential approach, case management is perceived as a responsibility of the lawyers and parties, rather than the courts, because the litigants themselves know their case the best and know what it needs and when it needs it.¹²⁹ In this approach, courts are theoretically available to assist upon request; parties can call on the court when they need it.¹³⁰ As illustrated by the continuing demands for stronger course case management previously detailed, this approach is widespread among judges.¹³¹ The effectiveness of this approach is measured by the timeliness of access and the

¹²⁷ KAKALIK ET AL., *supra* note 79, at 1; Gensler, *Caught in the Crossfire*, *supra* note 73, at 734; Nagareda, *supra* note 10, at 672–73; Resnik, *Managerial Judges*, *supra* note 73, at 384.

¹²⁸ Gensler, *Caught in the Crossfire*, *supra* note 73, at 671–72; Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 871–74; WHAT MAKES CIVIL JUSTICE EFFECTIVE?, *supra* note 31, at 6.

¹²⁹ Molot, *supra* note 108, at 29, 32, 39; Tidmarsh, *Pound's Century*, *supra* note 1, at 562–63; Resnik, *Managerial Judges*, *supra* note 73, at 384–86.

¹³⁰ Resnik, *Managerial Judges*, *supra* note 73, at 384.

¹³¹ See, e.g., GERETY, EXCESS & ACCESS, *supra* note 117, at 14; CJI REPORT, *supra* note 32, at 4.

discipline and effectiveness of enforcement.¹³² Furthermore, because this approach requires cases to compete for judicial attention on an on-demand, first-come-first-served basis depending on the availability of resources, the urgency of the issues in any given case does not always guarantee access.¹³³ In other words, access depends on which cases are earlier in the judge's queue and how much time and attention those cases require.¹³⁴ Additionally, many lawyers complain existing rules are not effectively invoked or timely enforced.¹³⁵ Therefore, most court leaders—Chief Justices, Chief Judges, and innovative individual judges—reject this party-based deferential approach,¹³⁶ particularly as they are regularly asked to account for case statistics to legislatures and the public. Its lack of success may be reflected in the declining reputation of and diminishing caseloads in state courts.¹³⁷

While the reactive approach to court case management recognizes the responsibility of courts to manage cases to a timely and efficient resolution, court involvement under this approach is ad hoc and irregular, triggered only by a request of the parties or inactivity in the case.¹³⁸ The length of inactivity sufficient to capture judicial attention is individually defined,¹³⁹ except where specific procedural

¹³² Molot, *supra* note 108, at 29.

¹³³ Resnik, *Managerial Judges*, *supra* note 73, at 414–15; Molot, *supra* note 108, at 39–40.

¹³⁴ Resnik, *Managerial Judges*, *supra* note 73, at 414–15.

¹³⁵ Molot, *supra* note 108, at 90; Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 645. For example, a survey conducted in 2010 in connection with judicial enforcement of Arizona's mandatory disclosure rules found that only twenty-one percent (21%) of judges enforced the rules almost always or often, nineteen percent (19%) enforced the rules half the time, and fifty-five percent (55%) enforced the mandatory disclosure rules almost never or occasionally. Therefore, Rule changes designed to promote improvement are ineffective if not enforced. SURVEY OF THE ARIZONA BENCH, *supra* note 47, at 26.

¹³⁶ See Resnik, *Managerial Judges*, *supra* note 73, at 417; GERETY, EXCESS & ACCESS, *supra* note 117, at 7–8.

¹³⁷ CJI REPORT, *supra* note 32, at 11; EXAMINING THE WORK, *supra* note 3, at 1–2.

¹³⁸ Molot, *supra* note 108, at 39–40; KAKALIK ET AL., *supra* note 79, at 1; Gensler, *Caught in the Crossfire*, *supra* note 73, at 734; Nagareda, *supra* note 10, at 672–73; Resnik, *Managerial Judges*, *supra* note 73, at 384.

¹³⁹ Resnik, *Managerial Judges*, *supra* note 73, at 384; CJI REPORT, *supra* note 32, at 12.

rules are utilized such as for lack of prosecution.¹⁴⁰ Progress occurs from court event to court event, with limited intermediate deadlines and no effort to reduce unnecessary delay between events.¹⁴¹ There is no defined overall plan for the case and no end date in the horizon.¹⁴² Rather, ultimate deadlines are created when a party notices the case for trial, which generates a trial order with deadlines counted backwards from a putative trial date.¹⁴³ However, even the efficacy of those trial preparation deadlines is based on compliance, access, enforcement, and the judge's continuance policy.¹⁴⁴

The proactive court case management approach has been embedded in the federal rules since the 1983 amendments, which made Rule 16(b) conferences available and civil case management orders increasingly common among federal judges.¹⁴⁵ Furthermore, proactive court case management has been emphasized with great enthusiasm in federal courts since the Duke Conference.¹⁴⁶ The proactive approach requires the judge to establish a case management plan at the inception of a case, which includes setting reasonable intervals for intermediate deadlines, with the goal that at each deadline the case is ready to move to the next phase and towards resolution.¹⁴⁷ Under these plans, for example, a case would not be continued for

¹⁴⁰ See, e.g., FLA. R. CIV. P. 1.420(e) (permitting action by the court, including dismissal for failure to prosecute, if nothing has occurred in the case for a period of 10 months).

¹⁴¹ CJI REPORT, *supra* note 32, at 12, 21.

¹⁴² See *id.* at 21–22; Gensler, *Caught in the Crossfire*, *supra* note 73, at 670–71.

¹⁴³ Resnik, *Managerial Judges*, *supra* note 73, at 384; see, e.g., FLA. R. CIV. P. 2.085(e)(1) (providing specific timing from filing to resolution).

¹⁴⁴ See AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, *supra* note 99, at 4–5; KAKALIK ET AL., *supra* note 79, at 1; GERETY, EXCESS & ACCESS, *supra* note 117, at 12–13.

¹⁴⁵ Baicker-McKee, *supra* note 109, at 358; Rosenthal, *Defining the Problem*, *supra* note 7, at 238–41; Langbein, *supra* note 12, at 555; Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, UCLA L. REV. 1652, 1655, 1678 (2013).

¹⁴⁶ DUKE CONFERENCE REPORT, *supra* note 38, at 79; Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 647–50. See generally, e.g., THE JUDICIAL CONFERENCE OF THE U.S. COMM. ON COURT ADMIN. AND CASE MGMT., CIVIL LITIGATION MANAGEMENT MANUAL 5–8 (2d ed. 2010) [hereinafter CIVIL LITIGATION MANAGEMENT MANUAL].

¹⁴⁷ See, e.g., CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 146, at 6–7.

failure to complete discovery because the completion of discovery would have been assured by a prior deadline before the trial date.¹⁴⁸ The success of proactive court case management depends on the issuance of a reasonable plan, preferably issued in collaboration with the parties, the monitoring and enforcement of the intermediate deadlines, and the degree to which the parties and the court engage in managing the case through the process.¹⁴⁹

However, one of the continuing challenges for court case management is the degree of highly variable individualized practice among judges and the lack of common standards and definitions.¹⁵⁰ Urging courts to undertake systemic case management without defining the task may be weakening advocacy efforts.¹⁵¹ What do judges, staff, and lawyers envision? The following research is designed in part to determine how these questions of definition and scope affect adoption of court case management.

III. STATE VS. FEDERAL: THE STATE COURT CASELOAD

The research and debate on case management in academia has focused on federal courts, and in doing so, has omitted the majority of American civil litigation.¹⁵² As of December 2018, there were 677 authorized United States District Court judgeships.¹⁵³ According to 2016–2017 data compiled by the National Center for State

¹⁴⁸ *Id.* at 31–37.

¹⁴⁹ Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 652–53; JUDICIAL CONFERENCE, *supra* note 111, at 5–8; CJI REPORT, *supra* note 32, at 12, 16, 18.

¹⁵⁰ See Bone, *supra* note 108, at 321; Tidmarsh, *Pound's Century*, *supra* note 1, at 575–76; Molot, *supra* note 108, at 41, 43, 90–91; Gensler, *Caught in the Crossfire*, *supra* note 73, 722–23.

¹⁵¹ Molot, *supra* note 108, at 42; Resnik, *Managerial Judges*, *supra* note 73, at 419–20.

¹⁵² COURT STATISTICS PROJECT, <http://www.courtstatistics.org/> (last visited Dec. 17, 2018) (“More than 95% of U.S. Cases are filed in state courts.”); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004).

¹⁵³ *Vacancy Summary for December 2018*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/12/summary> (last updated Dec. 1, 2018).

Courts, responding states reported 10,199 trial judges in general jurisdiction state courts across the country.¹⁵⁴ Florida alone has 599 circuit court trial judges.¹⁵⁵ United States District Courts are “courts of limited jurisdiction,”¹⁵⁶ while “state courts are courts of general jurisdiction” and are open to all non-federal disputes.¹⁵⁷ Unsurprisingly, the breadth of the state court docket poses management challenges. “The development of tracking systems in state courts presents a much different situation because of differences in the cases that populate the state court docket.”¹⁵⁸ In 2016, 291,851 civil cases were filed in federal district courts.¹⁵⁹ In 2015, there were over 7,000,000¹⁶⁰ civil cases filed in state court general jurisdiction or single tier courts.¹⁶¹ Florida had 176,740 new case filings in civil circuit court during the 2015–2016 fiscal year.¹⁶²

While all courts are loosely coupled organizations in which a judge has the responsibility for his or her own docket without a traditional boss, state courts face particular organizational challenges. First, because judges in state courts frequently change over the life of a case, either due to rotation, election, or elevation,¹⁶³ these

¹⁵⁴ NAT'L CTR. FOR STATE COURTS, STATE COURT ORG., at tbl. 3.2a (S. Strickland et al. eds., 2017), www.ncsc.org/sco.

¹⁵⁵ FLA. STAT. § 26.031 (2018); NAT'L CTR. FOR STATE COURTS, *supra* note 154, at tbl. 3.2a.

¹⁵⁶ *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 376 (2012).

¹⁵⁷ *State Courts vs. Federal Courts*, JUDICIAL LEARNING CTR., <http://judicial-learningcenter.org/state-courts-vs-federal-courts/> (last visited Dec. 17, 2018).

¹⁵⁸ Gensler, *Caught in the Crossfire*, *supra* note 73, at 708 n.174.

¹⁵⁹ *U.S. District Courts – Judicial Business 2016*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2016> (last visited Dec. 19, 2018).

¹⁶⁰ EXAMINING THE WORK, *supra* note 3, at 3.

¹⁶¹ Forty-two states divide their caseload between general jurisdiction courts and limited jurisdiction courts, which hear a defined caseload, usually below a set dollar amount in controversy or covering specific areas like landlord/tenant. EXAMINING THE WORK, *supra* note 3, at 3–5.

¹⁶² FLA. OFFICE OF THE STATE COURTS ADMN'R, FLORIDA'S TRIAL COURTS STATISTICAL REFERENCE GUIDE FY 2015–16, at 4-2 to 4-5 (2016), https://www.flcourts.org/content/download/218355/1976076/Chapter-4_Circuit-Civil-FY15-16.pdf.

¹⁶³ *E.g.*, ARIZ. CALL TO REFORM, *supra* note 47, at 21 (“We note that a strict practice of rotating judges . . . can inject additional delays and inefficiencies into civil cases, when judges who have become familiar with the parties and the issues in an ongoing case are suddenly replaced by a new judge with no background in

changes introduce uncertainty to the risk calculation for parties pursuing litigation and can generate cost and delay, which is often due to each judge's differing approach to case management.¹⁶⁴ This is distinct from the federal system, in which a single judge holds a lifetime appointment within a geographic area and enjoys the support of a magistrate judge, law clerks, and other staff.¹⁶⁵

Additionally, as one judge emphasized in his interview, state court is much more informal than federal court.¹⁶⁶ As opposed to the typical Federal court practice of submission of written motions and briefing followed by a written ruling without a hearing,¹⁶⁷ state court relies much more significantly on oral argument at a hearing event, which results in a verbal ruling subsequently reduced to writing.¹⁶⁸ As hearings are typically requested and set by attorneys as opposed to the court, the progress of the case is dictated by the diligence of counsel in setting hearings and calendar time availability.¹⁶⁹ In Florida, outside of specialty courts, it is rare for courts to issue rulings without a hearing first.¹⁷⁰ As opposed to written rulings, state court justice is typically delivered in person face-to-face.¹⁷¹ "Many of

the case, and sometimes no background in civil law. Abrupt judicial rotation requires a new learning curve for the new judge.").

¹⁶⁴ CJI REPORT, *supra* note 32, at 12.

¹⁶⁵ ADMIN. OFFICE OF THE U.S. COURTS, THE FEDERAL COURT SYSTEM IN THE UNITED STATES: AN INTRODUCTION FOR JUDGES AND JUDICIAL ADMINISTRATORS IN OTHER COUNTRIES 15–16, 19 (4th ed. 2016).

¹⁶⁶ Telephone Interview with Anonymous Judge 4 (transcript on file with the University of Miami Law Review) [hereinafter Telephone Interview 4].

¹⁶⁷ Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 864–65.

¹⁶⁸ *Id.* at 849–50; HENRY P. TRAWICK, JR. & DEBRA M. SALISBURY, TRAWICK'S FLORIDA PRACTICE AND PROCEDURE § 15:3–§15:5 (2018 ed. 2017) [hereinafter TRAWICK'S FLORIDA PRACTICE AND PROCEDURE].

¹⁶⁹ TRAWICK'S FLORIDA PRACTICE AND PROCEDURE, *supra* note 168, § 15:4 at 261–63; *see infra* Section IV.C.

¹⁷⁰ *See* TRAWICK'S FLORIDA PRACTICE AND PROCEDURE, *supra* note 168, § 15:4, at 261–63.

¹⁷¹ Time spent in court face to face with litigants and their lawyers is frequently referred to as "bench presence." Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, 91 NORTE DAME L. REV. 1831, 1915 (2016) [hereinafter Resnik, *Revising Our Common Intellectual Heritage*]. State court judges have a much larger bench presence than do federal court judges. Compare TRAWICK'S FLORIDA PRACTICE AND PROCEDURE, *supra* note 168, § 15:4, at 261–62 ("When a motion is served, the court usually conducts a hearing to determine what order is proper unless the motion can be heard ex parte because it is granted as a matter of course or because no

these interactions are decidedly trial-like in substance and outcome, though they may not be recorded as formal trials.”¹⁷² Further,

[w]hile trials are on the decline in state courts just as they are in federal courts, state court litigation differs in important ways. In person interactions between judges and parties are still the primary means of conducting business in state courts. Judges and parties routinely interact in open court to process and dispose of litigation; few cases are resolved based on written pleadings and motions.¹⁷³

The potentially significant impact that successful innovations to improve costs and reduce delays would have is obvious, as such innovations would benefit almost all cases in state courts.¹⁷⁴ Further, such innovations could also have a potentially commensurate benefit to public trust and confidence in the court system, since state courts are the ‘community courthouses’ from which most people seek resolutions to their disputes.¹⁷⁵ However, to further understand judicial attitudes about case management, it is important to understand the civil caseload.¹⁷⁶ As discussed, the state caseload is far more diverse than a typical federal docket.¹⁷⁷ Understanding *what* is being managed is a first step in understanding *how* to manage it.¹⁷⁸

The National Center for State Courts surveyed 152 civil courts in ten urban counties across the United States to examine caseloads

substantive rights of a party are affected.”), with Resnik, *Revising Our Common Intellectual System*, *supra*, at 1915 (stating that “[f]ederal judges spent less than two hours a day on average in the courtroom” (citing Jordan M. Singer & Hon. William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565, 565–66 (2014))).

¹⁷² Anna E. Carpenter et al., *Studying the New Civil Judges*, 2018 WIS. L. REV. 249, 277 (2018).

¹⁷³ *Id.* at 255.

¹⁷⁴ See CJI REPORT, *supra* note 32, at 4.

¹⁷⁵ See *id.* at 3.

¹⁷⁶ See *id.* at 8.

¹⁷⁷ See Markus B. Zimmer, *Overview of Specialized Courts*, 2 INT’L J. CT. ADMIN. 56–57 (2009), <http://doi.org/10.18352/ijca.111>.

¹⁷⁸ CJI REPORT, *supra* note 32, at 8. You cannot manage what you do not measure. In fact, inventorying the caseload is part of the first recommendation from the Conference of Chief Justices. *Id.* at 16.

between July 1, 2012 and June 30, 2013.¹⁷⁹ The resulting study, entitled *The Landscape of Civil Litigation in State Courts*, included 925,344 cases, which is approximately five percent (5%) of the state civil caseload across the country.¹⁸⁰ The resulting study established that nearly sixty-four (64%) of the caseload was contract cases, most of which were debt collection and landlord/tenant disputes.¹⁸¹ Only seven percent (7%) of the caseload consisted of tort cases.¹⁸² Of that amount, product liability and malpractice made up five percent (5%), which was less than one percent (1%) of the total caseload.¹⁸³ Even among contract cases, the average judgment was \$9,428, indicating that the number of complex commercial cases was a small percentage of the overall contract docket.¹⁸⁴

In another study, the National Center for State Courts Court Statistics Project found that, in 2015, contract cases represented fifty-one percent (51%) of the entire civil caseload, while torts case represented only four percent (4%) of the entire civil caseload.¹⁸⁵ Furthermore, the study found that tort case filings declined twenty-one percent (21%) between 2000 and 2015.¹⁸⁶

Another significant characteristic of the civil caseload in state courts is the prevalence of self-represented litigants. In 1992, the Civil Justice Survey of State Courts found that both plaintiffs and defendants were represented by counsel in ninety-five percent (95%) of state court cases.¹⁸⁷ By 2013, the Landscape study found

¹⁷⁹ LANDSCAPE OF CIVIL LITIGATION, *supra* note 26, at iii. The NCSC surveyed the following ten counties: (1) Maricopa County, Arizona (Phoenix); (2) Santa Clara County, California (San Francisco); (3) Miami-Dade, Florida; (4) Oahu, Hawaii; (5) Cook County, Illinois (Chicago); (6) Marion County, Indiana (Indianapolis); (7) Bergen County, New Jersey; (8) Cuyahoga County, Ohio (Cleveland); (9) Allegheny County, Pennsylvania (Pittsburgh); and (10) Harris County, Texas (Houston). *Id.* at 15.

¹⁸⁰ *Id.* at iii.

¹⁸¹ *Id.*

¹⁸² *Id.* at iv.

¹⁸³ *Id.* at 19.

¹⁸⁴ LANDSCAPE OF CIVIL LITIGATION, *supra* note 26, at 24.

¹⁸⁵ EXAMINING THE WORK, *supra* note 3, at 26. Based on this national data, I included in my survey to Florida judges a question about the prominence of contract cases in their overall caseload. *See infra* Figure 33.

¹⁸⁶ EXAMINING THE WORK, *supra* note 3, at 8. *See also* CJI REPORT, *supra* note 32, at 9 (“Tort cases . . . have largely evaporated.”).

¹⁸⁷ LANDSCAPE OF CIVIL LITIGATION, *supra* note 26, at 31 (discussing the 1992 Civil Justice Survey of State Courts, which was part of a large-scale national

that, while plaintiffs were still represented by counsel in ninety-two (92%) of the cases, defendants were represented in only twenty-six (26%) of cases and both sides had representation in only twenty-four percent (24%) of cases.¹⁸⁸ The growing number of self-represented litigants compromises the traditional assumption that the competing interests of the parties will promote case momentum and that the court can rely on parties to enforce the rules.¹⁸⁹ Due to the simple lack of knowledge on the part of pro se litigants and inattention from plaintiffs, these cases can languish.¹⁹⁰

Our modern civil justice system was not designed—outside of the small claims context—for lay people. It was designed by and for lawyers, with a baseline assumption of party control over litigation. . . . At the outset, lay people may lose a case simply because they do not understand the need to show up. If they do make it to the courthouse, they struggle with basic procedures and paperwork and may never make it to the hearing room. They lose meritorious cases due to procedural challenges or because they misunderstand substantive law.¹⁹¹

study of civil caseloads conducted by the US Department of Justice Bureau of Justice Statistics in 1992, 1996, 2001, and 2005).

¹⁸⁸ *Id.* at 31. Florida has not conducted a similar study, however, Florida Supreme Court Chief Justice Jorge Labarga appointed a statewide commission on Access to Civil Justice that identified similar challenges involving self-represented litigants in Florida. FLA. COMM'N ON ACCESS TO CIVIL JUSTICE, FINAL REPORT 1, 3–4 (2016), <http://www.flacesstojustice.org/wp-content/uploads/2016/06/ATJ-Final-Report-Court-06302016-ADA.pdf>; *About Us*, FLA. COMM'N ON ACCESS TO CIV. JUST., <http://www.flacesstojustice.org/> (last visited Dec. 19, 2018).

¹⁸⁹ LANDSCAPE OF CIVIL LITIGATION, *supra* note 26, at 35; CJI REPORT, *supra* note 32, at 34. On the traditional model of litigation with counsel, see generally David Marcus, *From “Cases” to “Litigation” to “Contract”: A Comment on Stability in Civil Procedure*, 56 ST. LOUIS UNIV. L.J. 1231, 1237 (2012); Molot, *supra* note 108, at 39.

¹⁹⁰ CJI REPORT, *supra* note 32, at 34. For a discussion on how technology can help to cure the inequality faced by self-represented litigants, see James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 259 (2012).

¹⁹¹ Carpenter et al., *supra* note 172, at 260–61.

While much of the debate about civil case management focuses on complex cases, relatively simple cases may be even more likely to benefit from civil case management because, among other things, the disproportionate presence of self-represented litigants in simple cases require increased judicial supervision to keep pro se cases moving.¹⁹²

An examination of the academic research on case management also evidences the significant challenges in evaluating the management issues confronting the courts and my fellow judges: we do not know our caseload.¹⁹³ The docket in our heads does not match the docket in our files. There is a disconnect between the most prevalent case types on the docket and judge's perception of where case management benefits most likely lie. This suggests that judges tend to overestimate the complexity of their caseloads.¹⁹⁴ Certainly, most of the discussion around case management centers on complex cases.¹⁹⁵ However, as Judge Rosenthal and Professor Gensler point out, "[i]n many ways, it is the smaller cases that benefit the most from judicial management because they can least bear the costs of needless (and avoidable) discovery and motions practice."¹⁹⁶

IV. FLORIDA AND ITS COURTS: EMPIRICAL STUDY OF CASE MANAGEMENT IN FLORIDA'S CIRCUIT CIVIL COURTS

I chose Florida as the location for this research not only because of my close personal proximity, but also because it is one of the largest and most diverse states. Florida is the third largest state by population, with 21,299,325 residents in July 2018.¹⁹⁷ The state's

¹⁹² Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 859; CJI REPORT, *supra* note 32, at 33–34; Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 645.

¹⁹³ *See, e.g.*, CJI REPORT, *supra* note 32, at 12, 31–32.

¹⁹⁴ *See id.* at 8.

¹⁹⁵ *Id.*

¹⁹⁶ Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 859.

¹⁹⁷ *National Population Totals and Components of Change: 2010-2018*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/pepest/2010s-national-total.html#par_textimage_2011805803 (follow “Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018 (NST-EST2018-01)” hyperlink under “Population Estimates, Population Change, and Components of Change” (last updated July 1, 2018)).

economy relies on international trade, tourism, agriculture, construction, space, health, and tech services.¹⁹⁸ The state mirrors the country's political division with the majority of voters almost evenly split between the two most prominent political parties—4.4 million registered Republicans and 4.6 million registered Democrats—while 3 million registered Independents represent the majority of recently registered voters.¹⁹⁹ Florida's twenty-nine electoral votes went to Republican Donald Trump in 2016, while they went to Democrat Barack Obama in 2012 and 2008.²⁰⁰ The state's pivotal razor-close vote count in the 2000 election between George W. Bush and Al Gore is notorious.²⁰¹ Florida's range from rural conservative to urban liberal makes it an ideal location for this research as responses will almost certainly be varied among differing viewpoints across the state.²⁰²

Florida's twenty circuit courts further reflect the diversity of the state.²⁰³ There are twenty circuits throughout the state, which represent a wide cross-section of population characteristics: from large urban circuits such as Miami, to small multi-county, largely rural circuits.²⁰⁴ They range in size from Monroe County, home of the Florida Keys, with a population of 73,873 in 2011 and four circuit court judges, to Miami-Dade County, with a population of

¹⁹⁸ *Florida Quick Facts*, STATEOFFLORIDA.COM, www.stateofflorida.com/facts.aspx (last visited Dec. 19, 2018).

¹⁹⁹ Martin Savidge, *Florida: The Swingiest Swing State*, CNN (Aug. 9, 2016), <https://www.cnn.com/2016/08/09/politics/election-2016-donald-trump-hillary-clinton-florida/index.html>.

²⁰⁰ *Florida, 270TOWIN*, <https://www.270towin.com/states/Florida> (last visited Dec. 19, 2018).

²⁰¹ See generally Frank Cerabino, *Ten Years Later, Infamous 2000 Election Ballot Recount Still Defines Palm Beach County to Many*, PALM BEACH POST (Mar. 31, 2012), <http://www.palmbeachpost.com/news/ten-years-later-infamous-2000-election-ballot-recount-still-defines-palm-beach-county-many/uscC5niN1BtOOs7d33V8GL/>.

²⁰² Steve Schale, *Everything You Wanted to Know About Florida 2016 But Were Afraid to Ask*, OBSERVER (Aug. 15, 2016, 2:44 PM).

²⁰³ THE FLA. LEGISLATURE OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, REP. NO. 15-13, A REVIEW OF FLORIDA CIRCUIT COURTS 1 (2015), <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1513rpt.pdf> [hereinafter OPPAGA REPORT].

²⁰⁴ *Id.* at 2; Schale, *supra* note 202.

2,554,766 in 2011 and eighty circuit court judges.²⁰⁵ For statistical analysis, the Florida Office of the State Court Administrator categorizes the circuits as small, medium, large, and very large.²⁰⁶ Florida's circuit civil caseload is generally assigned on a one judge-one case basis. Master calendars are not favored in Florida, and the research conducted with the state's trial court administrators reflected that there are no master calendar systems in use in the circuit civil caseload across the state.²⁰⁷ Florida's circuit dockets are generally divided up into subject divisions: felony criminal; juvenile dependency/delinquency; family divorce/paternity/child support; probate/trusts/guardianship; and general civil cases.²⁰⁸ In most large and mid-size circuits, judges are assigned to a single division, for example civil, family or felony.²⁰⁹ In some circuits—particularly in multi-county or small circuits—judges are assigned to multiple division types and hear a mixed docket, such as civil and probate or civil and family.²¹⁰ Florida's circuit court judges have general jurisdiction over all civil disputes in excess of \$15,000.²¹¹

In addition, the Florida judicial branch faces challenges in accumulating data on its caseload. In Florida, the Clerks of Court are separate constitutional officers and are not under the direct supervision of the judicial branch.²¹² It is the responsibility of the Clerks of each circuit to manage and assemble all caseload data; however, there is no uniform system used across all of the circuits.²¹³ Currently, there is almost no statewide data on *pending* civil cases by action type; rather, the only caseload data provided by the local Clerks of Court to the Office of the State Court Administrator is information on *filings* and *dispositions*.²¹⁴ Therefore, Florida is lacking any definitive information regarding its *pending* civil case count

²⁰⁵ OPPAGA REPORT, *supra* note 203, at 16; *Florida Quick Facts*, *supra* note 146.

²⁰⁶ FLA. OFFICE OF THE STATE COURTS ADMN'R, *supra* note 162, at 4-6.

²⁰⁷ Email Survey of 20 Trial Court Administrators (Nov. 2017 to Jan. 2018) (on file with author).

²⁰⁸ OPPAGA REPORT, *supra* note 203, at 1-2.

²⁰⁹ *See id.*, at 3-4.

²¹⁰ *See id.*

²¹¹ *Id.* at 1.

²¹² *Id.* at 3.

²¹³ *Id.* at 4-6.

²¹⁴ *See generally*, e.g., *id.*; FLA. OFFICE OF THE STATE COURTS ADMN'R, *supra* note 162. According to the Florida Office of the State Court Administrator, in

by action type. As a result, it is difficult to acquire caseload data for case management.

While Florida's judicial branch leadership has publicly endorsed case management as a key to the future of the branch in its *Long Range Plan 2016–2021*,²¹⁵ there has been no separate initiative regarding civil justice or emphasis on broad-based civil case management with trial judges and, as illustrated by the following research, the emphasis has not translated to engagement at the trial-judge level. Although many state bar associations or supreme courts have formed blue-ribbon commissions or committees to address the civil justice system innovation, Florida has not yet established such a commission.²¹⁶ Therefore, Florida judges have not yet been exposed to the publicity about civil case management that typically follows such a branch effort.²¹⁷

In sum, Florida state circuit court judges serve as good study subjects for the survey on trial court attitudes about civil case management, as they represent the courts of general jurisdiction in the state and have experience managing various cases.²¹⁸ I benefitted as

2015, real property/foreclosure cases represented 44.4% of the state civil circuit court filings, contract cases represented 21.9% of filings, auto and other negligence cases represented 18.3%, and product liability and malpractice cases constituted 1.8% of the state filings. *Id.* at 4-16. The percentages may be significantly higher if the caseloads of the limited jurisdiction county courts had been included. See EXAMINING THE WORK, *supra* note 3, at 7 (finding that Florida had a thirty-four percent (34%) contract case filing rate in 2015).

²¹⁵ See generally FLA. SUPREME COURT, JUSTICE: FAIR AND ACCESSIBLE TO ALL—THE LONG-RANGE STRATEGIC PLAN FOR THE FLORIDA JUDICIAL BRANCH 2016-2021, <http://www.flcourts.org/core/fileparse.php/581/urlt/2016-2021-Long-Range-Strategic-Plan-Floridaweb.pdf> [hereinafter THE LONG RANGE PLAN]. This plan contains specific goals designed to improve case management, including the following: (1) “1.2 Ensure the fair and timely resolution of all cases through effective case management;” (2) “1.3 Utilize caseload and other workload information to manage resources and promote accountability;” and (3) “4.3 Create a compatible technology infrastructure to improve case management and meet the needs of the judicial branch and court users.” *Id.* at 3–4.

²¹⁶ As discussed, Florida's efforts to date have focused on access to justice in the civil system as opposed to broader civil justice innovation. See generally, e.g., FLA. COMM'N ON ACCESS TO CIVIL JUSTICE, *supra* note 188.

²¹⁷ *Id.*

²¹⁸ Florida's Circuit Judges have previously served as guinea pigs for judicial research, such as during the Circuit Judge's Conference in 2006. See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 13 (2007).

a circuit court judge, the administrative judge for the Eleventh Judicial Circuit, and a member of this group, as it enabled me to secure the necessary access to distribute the surveys.²¹⁹ In addition, although case management received significant attention during the foreclosure crisis in Florida's state courts between 2008 and 2015, that case management effort was directed solely at the tsunami of foreclosure cases.²²⁰ Accordingly, among the other benefits discussed, Florida represented a relatively neutral territory in which to identify judicial attitudes about case management.

A. *Research Methods*

To get the most accurate and complete picture of the environment of the Florida civil circuit courts, I gathered two different sets of information: (1) information from current circuit court judges across the state as to the character and management of the pending civil caseload in circuit courts; and (2) information from circuit trial court administrators ("TCAs") for each of Florida's twenty circuits about the level of civil case management occurring in their circuits.²²¹ All twenty circuits provided the requested information.

The inquiries related to civil case management asked about the existence of any systemic case management programs in place, institutional support for case management, specialty divisions, standardized procedures, the degree of individualization among the circuit's civil judges, data measurement and distribution, and the "local court culture" of each circuit.²²² The purpose of gathering this information from both judges and court administrators was to identify whether the information gathered from the judges matched the information gathered from the trial court administrators in the same circuit, or whether there were disconnects and disagreements between the two sets of information. The caseload information was gathered to gauge the judges' knowledge of the constellation of

²¹⁹ See CJI REPORT, *supra* note 32, at 6; *infra* Section IV.A.

²²⁰ In Re: Final Report and Recommendations of the Foreclosure Initiative Workgroup, AOSC13-28, 1 (Fla. June 21, 2013) [hereinafter Foreclosure Initiative Workgroup].

²²¹ Time constraints prohibited also surveying attorneys about their case management experiences as a means to corroborate or refute judge and trial court administrator perceptions. This additional step invites further study.

²²² The surveys and questionnaires used in this research are on file with the Author and the *University of Miami Law Review*. They are available upon request.

cases on their dockets and to compare the cases types between circuits. However, comparing the various circuits' civil case types proved to be an unanticipated patchwork task.

Research within the judiciary was approached through two vehicles: (1) a quantitative written survey for judges; and (2) qualitative telephone interviews I conducted with judges. The first vehicle, the quantitative written surveys, was conducted between late July and December 2017 and contained a series of statements targeted towards factors that the prior pilot projects, academic research, studies, and surveys discussed above have identified as influencing case management decision-making.²²³ Specifically, the written survey targeted the following factors:

- Lack of awareness of case management;
- Misunderstanding or lack of definition of case management;
- Philosophy of judicial independence and perception of case management as an administrative versus judicial function;
- Cross-incentives such as elections, bar polls, attorney fees and ambition;
- Institutional inertia or “local court culture;” and
- Lack of time or support to case manage.

The written survey asked judges to indicate their level of agreement or disagreement with each particular statement, including an option for “no opinion.” The survey responses were anonymous as to the judge's own identity, but requested information about the circuit in which each judge sits as well as each judge's years of service. This permitted analysis of the responses based on both experience level and geographic diversity. The title, “Civil Case Management Survey on Judicial Views,” appears in large bold letters at the top of the survey, and the instructions provided a deliberately broad and generic definition of case management: “In considering these questions, please use the following definition for Case Management: Case management is the entire set of actions that a court takes to

²²³ Any mention of standard judicial survey questions and TCA interview questions can be found in the surveys and questionnaires on file with the Author and the *University of Miami Law Review*.

monitor and progress cases, from filing to disposition to post-disposition, to assure that each case is resolved fairly, justly, cost-effectively and without undue delay.”

I conducted the survey research in two phases. Initially, the survey was handed out to a live audience on July 23, 2017 in Orlando at the annual Florida Circuit Court Judge’s Conference, the educational opportunity for judges to secure their required continuing judicial education requirements.²²⁴ In addition to currently sitting circuit court judges, “senior judges,” who are retired judges who sit upon request to assist circuits when needed, also attend this conference.²²⁵ The instructions with the survey informed judges that they should participate only if they had judicial experience in the civil division, relying upon judges to self-police in terms of their response. Of the 457 judges at the conference,²²⁶ 123 responded to the survey at the conference, representing a twenty-seven percent (27%) response rate. It is important to note, however, that the attendance records did not break down the number of judges who had been or were currently assigned to a civil docket. It also did not break down the number of sitting judges versus the number of retired senior judges at the conference. Therefore, it is impossible to determine the exact number of potentially qualified responders who were in attendance at the conference but declined to respond.²²⁷

As a result, because I wanted to ensure that the attitudes of currently sitting judges were adequately represented in the results, I also mailed the survey to all circuit court judges in Florida. The instructions included with the mailed survey made very clear that if the judge had taken the survey in person at the conference, he or she should not take the survey again. The survey was mailed to all sitting circuit court judges, and an additional 177 responses were returned. Again, it is impossible to determine how many judges were eligible to complete the survey as there is no effective way to track whether

²²⁴ Judges must attend one conference every three years to satisfy their educational requirements. FLA. R. JUD. ADMIN. 2.320.

²²⁵ *Senior Judges*, FLA. SUPREME CT., <http://www.floridasupremecourt.org/employment/senior-judges.shtm> (last visited on Nov. 3, 2018).

²²⁶ Email from Charles Hydovitz, Conference Manager, to Jennifer Bailey, Circuit Court Judge, Eleventh Judicial Circuit Court of Florida (Aug. 24, 2017) (on file with University of Miami Law Review).

²²⁷ Judges were instructed that they should execute the survey only if they had civil judicial experience and not all judges have been assigned to a civil docket.

a given judge had ever been assigned to circuit civil dockets, even if they were now sitting elsewhere due to judicial rotation.²²⁸ This effort relied on judges accurately following the directions and only executing the survey if they actually had civil experience, for which there is no good control. In addition, although the survey instructions were very clear, it was handed out live and then again by mail, and the possibility exists that some judges may have filled out the survey twice.²²⁹

As a result of the two-phased effort, a total of 303 surveys were received. The results of the survey are reflected in the analysis that follows, which includes graphs that depict the responses to each statement. Each graph includes the statement being surveyed listed at the top, followed by a number indicating its respective position in the survey sequence. Each survey included an invitation to volunteer for a follow-up interview. Responses to that invitation were fairly robust, in that forty-seven judges volunteered to be interviewed. These volunteers were the subject of the next phase of research.

The second vehicle I conducted was qualitative, journalistic-style interviews with the volunteer circuit court judges. Each interview included a set of open-ended questions directed at judicial background and experience, why and how the individual judge case managed, and the perception of what motivated judicial colleagues. The interviews took, on average, between forty-five and seventy-five minutes. Because the group volunteered for interviews, it is fair to conclude that the volunteers were actively interested in case management, which was further revealed in the interviews themselves. I conducted twenty-one²³⁰ qualitative interviews with judges from most circuits across the state, most of which were done via telephone

²²⁸ Rotation is the process by which circuit judges change assignments to different divisions of the court. Circuits can have differing rotation procedures and schedules and, generally, they are divided into criminal, civil, family, juvenile, and probate sections. *See generally* FLA. R. JUD. ADMIN. 2.215.

²²⁹ A number of conscientious judges contacted me to make sure that I had received their first survey at the conference and to ask whether they could ignore the mail-out version, which offered some comfort in terms of attention to the directions. An additional set returned the mail survey to me in blank with a note that they had already executed it.

²³⁰ Time limitations due to thesis deadlines prevented interviewing all volunteers. I selected interviewees based on geography, circuit size, and those who responded when I asked for interview dates and times.

but a few from my own circuit were done in person. In terms of experience, judges ranged from two-and-a-half to twenty-seven years on the bench. These interviews provided additional insights into the data gathered through the surveys. Notwithstanding the built-in bias from the volunteer process, a diverse set of perspectives emerged.

The qualitative interview began by securing basic information about the judges: total years on the bench, years of civil judicial experience, and available staff support. The questions then turned to individual definitions of case management and how that judge case managed. The next questions directly addressed factors related to why judges may or may not elect to case manage. As in the first phase of research, the factors were derived from pilot projects, prior surveys, and other academic research. These factors are the same factors that the written survey was designed to test:

- Lack of awareness of case management;
- Misunderstanding or lack of definition of case management;
- Philosophy of judicial independence and perception of case management as an administrative versus judicial function;
- Cross-incentives such as elections, bar polls, attorney fees and ambition;
- Institutional inertia or “local court culture;” and
- Lack of time or support to case manage.

I asked for each judge’s reactions and comments with regard to the individual factors. Virtually all respondents answered enthusiastically and thoughtfully. I took detailed written notes for each interview. I used a standard interview sheet with the questions listed, so that each judge would be asked each question with similar language, without missing or skipping questions. In order to assure complete and candid responses, I guaranteed that the identity of each judge I interviewed would remain anonymous.

The results of the qualitative interviews, as discussed further below, reflected that there is no real uniform understanding amongst judges regarding what the standard definition and scope of “civil case management” is. While each judge was asked what “case management” meant to them, each judge had his or her own individual definition, which then framed and animated their subsequent responses. Therefore, the qualitative interviews further revealed the

inherent variation in approaches to case management amongst the judges, which provides challenges to the broad-based adoption of civil case management that is currently proposed.

The Trial Court Administrator surveys were drafted with a series of open-ended questions about administrative support among the circuits for civil case management, utilization of differentiated case management in the civil division of the subject circuit, use of standardized procedures or forms for civil case management, use of single judge assignment to cases versus master calendar, data distribution and performance report distribution, and TCA perception of how judges manage civil cases in their circuit. These questions were delivered to the Trial Court Administrators for every circuit by email, and the responses were delivered by email and executed by the administrators or their designees. Every circuit responded. Responses were received between October 2017 and January 2018. The purpose of these surveys was to gauge the judicial awareness of available resources, use of data available to them, and whether the administrator's reports correlated to the judges' perceptions.

It would be fair and reasonable to question the ability that a sample of a single state's judges has to extract broader conclusions about court case management and identify the barriers to its universal adoption. While Florida seems like a fertile soil from which to glean such attitudes, it is still only a single state, and many states may rightfully assert they have little in common with the third most populous state in the nation.²³¹ However, while Idaho, for example, may have little in common with Miami, it is likely to have much in common with small or mid-size rural communities in Florida, and those attitudes are likely to be reflected herein. There are more than twenty million people currently living in Florida, who span across an array of different communities and, for those who participate in litigation at some point in their lives, file a wide variety of civil cases. In short, the most logical response to such criticism is that we have to start somewhere if we are to determine how the national efforts towards implementation of uniform civil case management can succeed.

Finally, it would also be fair to criticize the qualitative effort, specifically, due to the potential self-selection bias of the judges who volunteered for the qualitative interviews. While it is true that

²³¹ *National Population Totals and Components of Change: 2010-2018*, *supra* note 197.

no judge who volunteered for the interviews professed animosity to case management as a tool or concept, the survey data—both my own and in the past—suggests that such animosity exists, albeit in a minority.²³² These are the judges who will be the most difficult to convince of the benefits that case management will have on themselves, the court, and most importantly, the litigants we serve. Other than capturing their observations in the anonymous written survey responses, engaging with these judges presented an insurmountable problem in this setting.

B. Trial Court Administrator Survey Results

All of the TCA's reported that their circuits use a one judge/one case system, in which a single judge is assigned to handle all the cases—from filing to disposition—in their assigned civil docket, as opposed to a master calendar system, in which cases move from judge to judge based on the procedural status of the case.²³³ In practice, judges in Florida rotate among substantive assignments periodically, which may result in multiple judges being assigned to a case if it is not resolved within a single rotation timespan.²³⁴

When asked whether the circuit had a formally structured civil case management system, only four circuits answered that they did.²³⁵ The Eighteenth Circuit, located mid-way up the east coast of Florida, sets a case management conference when a case has been inactive for a specified period of time and, if appropriate, sets up a schedule of dates culminating in a trial date.²³⁶ A scheduling conference is held when cases are noticed for trial.²³⁷ In the Sixteenth Circuit in the Florida Keys, case management orders are issued for the general civil caseload at the judge's discretion at commencement of

²³² See *infra* Figure 7. See, e.g., Gensler, *Caught in the Crossfire*, *supra* note 73, at 689–92; Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 650.

²³³ FLA. R. JUD. ADMIN. 2.215.

²³⁴ *Id.*

²³⁵ There is no data available comparing case closure rates between these circuits and other circuits, which might be a source of further study. Interestingly, there was no reference to these systems in any of the interviews.

²³⁶ E-mail from Mark Van Bever, Trial Court Adm'r, Eighteenth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 05, 2017, 12:17 EST) (on file with the University of Miami Law Review) [hereinafter Eighteenth Circuit TCA Response].

²³⁷ *Id.*

the case.²³⁸ In the Tenth Circuit, mid-state, a case management conference is set when there has been a lack of activity in the case,²³⁹ and in the Twentieth Circuit, a case management order is sent out at the inception of the case.²⁴⁰

None of the TCAs reported any kind of routine differentiated case management based on case types across the divisions of their general civil circuit dockets.²⁴¹ Differentiated case management is only utilized in establishing specialty courts within civil circuits. Four large circuits (Eleventh–Miami, Thirteenth–Tampa, Fifteenth–Palm Beach, and Seventeenth–Fort Lauderdale) use specialty divisions to segregate and handle different case types—such as family

²³⁸ E-mail from Paunece Scull, Dir. Case Mgmt., Sixteenth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 17, 2017, 09:14 EST) (on file with the University of Miami Law Review).

²³⁹ E-mail from Nick Sudzina, Trial Court Adm'r, Tenth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 16, 2017, 13:14 EST) (on file with the University of Miami Law Review) [hereinafter Tenth Circuit TCA Response].

²⁴⁰ E-mail from Sheila Jerome, Civil/Family Div. Dir., Twentieth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 10, 2017, 11:19 EST) (on file with the University of Miami Law Review) [hereinafter Twentieth Circuit TCA Response].

²⁴¹ During the foreclosure crisis in Florida, many circuits had separate foreclosure divisions to handle caseload backlogs, which also included specially designated funding for senior judges and case manager positions. *See generally* Foreclosure Initiative Workgroup, *supra* note 220. However, most funding for those divisions terminated in 2015 and most of these divisions have been closed as the case backlog has been nearly resolved. *See* Paul Owners, *South Florida Foreclosures 'Tantalizingly Close to Normal,'* SUN SENTINEL (Jan. 12, 2017, 9:26 AM); Kimberly Miller, *Expiring Foreclosure Court Money May Help and Hurt Homeowners,* PALM BEACH POST (May 11, 2015, 12:01 AM), <https://www.palm-beachpost.com/news/business/real-estate/expiring-foreclosure-court-money-may-help-and-hurt/nmDkG/>.

law, complex business litigation, complex tort, asbestos, and tobacco cases.²⁴² One smaller circuit, the Eighth Circuit, has a specialized division to which extraordinary writs are assigned.²⁴³

In terms of case management staff positions, most circuits have a limited number of positions dedicated to reviewing cases for inactivity, lack of prosecution, and lack of service.²⁴⁴ Each case manager works on a ratio of one case manager to between two and twelve judges, with the exception of the Twentieth Circuit which has case managers on a 1:1 or 1:2 ratio for their case management system.²⁴⁵ Five circuits have no civil case managers assisting judges.²⁴⁶

While standard form orders such as trial orders and pretrial compliance orders are widely used, there was no evidence that any broader standardized approach to case management is used across

²⁴² E-mail from Maria Harris, Circuit Civil Operations Div. Dir., Eleventh Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Nov. 13, 2017, 15:48 EST) (on file with the University of Miami Law Review) [hereinafter Eleventh Circuit TCA Response]; E-mail from Robyn Gable, Trial Court Adm'r, Fourteenth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 16, 2017, 16:59 EST) (on file with the University of Miami Law Review) [hereinafter Fourteenth Circuit TCA Response]; Eighteenth Circuit TCA Response, *supra* note 236.

²⁴³ E-mail from Bridget Baker, Dir. of Court Operations, Alachua Cty. Family and Civil Justice Ctr., Eighth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 23, 2017, 10:03 EST) (on file with the University of Miami Law Review) [hereinafter Eighth Circuit TCA Response].

²⁴⁴ OPAGGA REPORT, *supra* note 151, at 11–18. There are five circuits in which TCAs report using case managers to assist with unresolved and aged foreclosure cases from the foreclosure crisis. As these are not part of the regular docket but are rather still directed at special backlog reduction efforts, I discounted those positions as they do not benefit the general caseload.

²⁴⁵ Twentieth Circuit TCA Response, *supra* note 240.

²⁴⁶ E-mail from Susan Wilson, Dir. of Research and Data, Second Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 23, 2017, 10:03 EST) (on file with the University of Miami Law Review) [hereinafter Second Circuit TCA Response]; E-mail from Walt Smith, Court Adm'r, Twelfth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 05, 2017, 12:17 EST) (on file with the University of Miami Law Review) [hereinafter Twelfth Circuit TCA Response]; Fourteenth Circuit TCA Response, *supra* note 242.

judges' dockets. Even within the systems referenced above, it appears, based on the responses, that individual judges decide whether and how to use those case management systems within their caseload.

The TCA responses also indicate that, across the board in Florida, every judge sets his or her own case management procedures with the exception of minor standardization in part of the Twentieth Circuit.²⁴⁷ However, even in the Twentieth Circuit, there is some individual "tweaking" of case management procedures set forth in those counties that use the system.²⁴⁸ Otherwise, the degree of consistency between judges in a geographic location depends on personal relationships between the judges.

In terms of data or reports that enable judges to identify case management issues, seven circuits do not distribute any routine data or reports to their judges.²⁴⁹ Of the remaining thirteen circuits, the data or reports distributed are geared towards case age, inactivity,

²⁴⁷ Twentieth TCA Response, *supra* note 240.

²⁴⁸ *Id.*

²⁴⁹ Second Circuit TCA Response, *supra* note 246; E-mail from Virginia B. Norton, Judge, Circuit Civil Div., Fourth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 23, 2017, 10:03 EST) (on file with the University of Miami Law Review) [hereinafter Fourth Circuit TCA Response]; Eighth Circuit TCA Response, *supra* note 243; E-mail from Matthew Benefiel, Trial Court Adm'r, Ninth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Jan. 22, 2017, 16:21 EST) (on file with the University of Miami Law Review); Fourteenth Circuit TCA Response, *supra* note 242; E-mail from Thomas Genung, Trial Court Adm'r, Nineteenth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 23, 2017, 10:03 EST) (on file with the University of Miami Law Review) [hereinafter Nineteenth Circuit TCA Response].

and clearance rates.²⁵⁰ Two circuits provide reports on jury trials.²⁵¹ No circuits routinely generate and distribute reports on time standard compliance or reports that track disposition of intermediate court events such as pending motions, requests for hearings or matters under judicial advisement.

All TCAs reported that the majority of court events are set upon request by attorneys, either by contacting the judicial office or by online scheduling. Cases are typically only set by the court where the judge has identified an issue due to the age of the case, inactivity, or some other attention-grabbing issue which prompts a reaction by the court, or where a trial order is initiated, usually in response to a notice for trial from a party.²⁵²

²⁵⁰ E-mail from Sondra M. Lanier, Court Adm’r, Third Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 16, 2017, 10:37 EST) (on file with the University of Miami Law Review) [hereinafter Third Circuit TCA Response]; E-mail from Jonathan Lin, Trial Court Adm’r, Fifth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 17, 2017, 11:21 EST) (on file with the University of Miami Law Review) [hereinafter Fifth Circuit TCA Response]; E-mail from Gay Inskeep, Trial Court Adm’r, Sixth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 09, 2017, 11:15 EST) (on file with the University of Miami Law Review) [hereinafter Sixth Circuit TCA Response]; E-mail from Mark Weinberg, Court Adm’r, Seventh Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 9, 2017, 16:13 EST) (on file with the University of Miami Law Review) [hereinafter Seventh Circuit TCA Response]; Tenth Circuit TCA Response, *supra* note 239; Eleventh Circuit TCA Response, *supra* note 242; Twelfth Circuit TCA Response, *supra* note 246. The term “clearance rate” measures how a court is keeping up with its caseload and whether judges are closing as many cases as are being filed. In Florida, it is described as:

The clearance rate is a useful measure of the responsiveness of a court to the demand for services, and is nationally recognized as a measure of court performance. The rate is determined by dividing the total number of cases *disposed* by the total number of cases *filed* during a specific time period.

FLA. OFFICE OF THE STATE COURTS ADMN’R, *supra* note 162, at 10-3.

²⁵¹ Eleventh Circuit TCA Response, *supra* note 242; E-mail from Kathleen Pugh, Trial Court Administrator, Seventeenth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 6, 2017, 3:37 PM EST) (on file with the University of Miami Law Review).

²⁵² See TRAWICK’S FLORIDA PRACTICE AND PROCEDURE, *supra* note 168, § 15:5, at 261–63.

In the large majority of civil cases, TCAs reported that there are no case management or scheduling orders issued at the commencement of the case as a standard procedure.²⁵³ Case management is usually triggered by inactivity, and scheduling usually occurs through deadlines set forth in a pretrial or a trial order once a case is noticed for trial.²⁵⁴ The exception is, again, the Twentieth Circuit, which sets a standard case management conference at 150 days in three of five counties in the circuit.²⁵⁵

When asked about local court culture and case management, court administrators acknowledged that their circuit's procedures are largely based on the discretion of each individual judge.²⁵⁶ Most TCAs reported that attorneys drove case progress as opposed to the court taking responsibility.²⁵⁷ At the same time, every circuit acknowledged the court's responsibility to control the pace of litigation. Many reported that judges tend to grant attorneys leeway until delay in the case becomes an issue, and that every judge has different standards.²⁵⁸ However, most judges still move cases from court event to court event based on what the parties set down before them. When asked specifically whether judges or attorneys set the pace, every TCA reported that, while it differs widely by judge, progress and pace is largely attorney-driven.²⁵⁹

The TCAs' responses included their thoughts on why judges do not engage in civil case management.²⁶⁰ There were two common

²⁵³ See, e.g., Fourth Circuit TCA Response, *supra* note 249; Seventh Circuit TCA Response, *supra* note 250; Nineteenth Circuit TCA Response, *supra* note 249.

²⁵⁴ Tenth Circuit TCA Response, *supra* note 239; Eleventh Circuit TCA Response, *supra* note 242; Fourteenth Circuit TCA Response, *supra* note 242.

²⁵⁵ Twentieth Circuit TCA Response, *supra* note 240.

²⁵⁶ See, e.g., Eighth Circuit TCA Response, *supra* note 243.

²⁵⁷ See, e.g., Second Circuit TCA Response, *supra* note 246; Third Circuit TCA Response, *supra* note 250; Fifth Circuit TCA Response, *supra* note 250; Tenth Circuit TCA Response, *supra* note 239.

²⁵⁸ Tenth Circuit TCA Response, *supra* note 239; Eleventh Circuit TCA Response, *supra* note 242; Fourteenth Circuit TCA Response, *supra* note 242.

²⁵⁹ See, e.g., Second Circuit TCA Response, *supra* note 246; Third Circuit TCA Response, *supra* note 250; Fifth Circuit TCA Response, *supra* note 250; Tenth Circuit TCA Response, *supra* note 239.

²⁶⁰ See, e.g., Second Circuit TCA Response, *supra* note 246; Third Circuit TCA Response, *supra* note 250; Fourth Circuit TCA Response, *supra* note 249; Seventh Circuit TCA Response, *supra* note 250; Nineteenth Circuit TCA Response, *supra* note 249.

refrains: a lack of resources and lack of case management support personnel. Trial court administrators across the board indicated that case management in their circuits suffered due to the lack of support, technology as well as staff. The lack of consensus among the judges within each circuit was also evident in the responses: differences in the degree to which judges rely on attorneys to drive cases, the appropriate time to intervene when a case is inactive, and how to prioritize the judge's time and attention between cases make any systemic initiative on the part of court administration difficult. At the same time, all the TCAs expressed confidence in and admiration of the judges' dedication to timely resolution of the matters before them.

C. Judicial Survey and Interview Results:

The discussion that follows grouped survey questions aimed at specific factors with the interview responses that expanded on that factor. The grouping includes questions that occurred at different points in the survey in an effort to test responses for consistency, and each graph includes a number denominating the numeric order of the question in the survey. In many instances, the total responses reflected in the survey do not total 100% because respondent judges skipped or missed a question. The incidence of these omissions was typically one to two percent (1–2%) of respondents, the highest total skip rate was four percent (4%).

As referenced earlier, the research was designed to address the following factors, which have emerged as potential influences affecting the success and use of judicial case management:

- Lack of awareness of case management;
- Misunderstanding or lack of definition of case management;
- Philosophy of judicial independence and perception of case management as an administrative versus judicial function;
- Institutional inertia or “local court culture”;
- Cross-incentives such as elections, bar polls, attorney fees and ambition; and
- Lack of time or support to case manage.

The first three factors—awareness, misunderstanding, and philosophy—are individual considerations for a judge. The last three factors—local culture, cross-incentives, and support—are institutional considerations which consider the effect of outside influences on the case management choice. The next Sections discuss each factor, including both the related survey results and insights gained from the qualitative interviews. The results will also be discussed in further detail based on data subsets, which take a closer look at the results based on the size of the circuits—large, medium, and small—and experience level of the judges—zero to three years (new), three to six years, six to nine years, nine to twelve years, twelve to eighteen years, and over eighteen years²⁶¹ with regard to those results in which some distinct difference appeared between subset responses.

1. AWARENESS

When identifying causal factors in judicial decision-making about case management, the first question is whether judges are even aware of case management as a tool in the civil judge's toolbox. The traditional deferential approach of judges sitting back and resolving only the matters put to them by the parties is still the dominant mode of operation in civil courts,²⁶² but does that mean that judges are not aware that case management is part of the job? Case management is implicit in both the Florida Rules of Civil Procedure and the Florida Rules of Judicial Administration. Florida Rule of Civil Procedure 1.010 provides that, “[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every action.”²⁶³ As noted in the comment to the rule, “whether an action is to be determined in the manner contemplated will depend, in great measure, upon the attitudes of judges and lawyers in approaching legal controversies and in employing and applying the rules.”²⁶⁴ Civil case management is taught as a routine topic at judicial education conferences and was extensively utilized during the

²⁶¹ While I do not also include graphs that depict these results of the data subsets, such graphs are available and on file with myself and the University of Miami Law Review.

²⁶² See, e.g., GERETY, *EXCESS & ACCESS*, *supra* note 117, at 14; CJI REPORT, *supra* note 32, at 4.

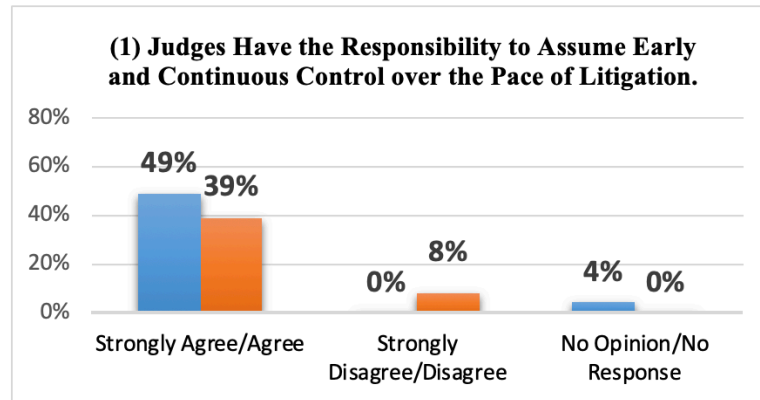
²⁶³ FLA. R. CIV. P. 1.010.

²⁶⁴ FLA. R. CIV. P. 1.010 comment to 1967 amendment.

foreclosure crisis.²⁶⁵ While case management is emphasized as a means to improve judicial performance in the Florida Judicial Branch's *Long Range Strategic Plan*,²⁶⁶ the means to implement those goals is undefined.

As one interviewed judge put it, “[a]re you asking me if judges are oblivious?”²⁶⁷ Anonymous survey responses to a set of questions testing basic awareness of case management indicate that while some judges are, in fact, oblivious, most are not.

Figure 1



While eighty-eight percent (88%) of total respondents agreed or strongly agreed with the statement “judges have a responsibility to assume early and continuous control over the pace of litigation,” eight percent (8%) of total respondents disagreed or strongly disagreed and four percent (4%) had no opinion.²⁶⁸ Florida Rule of Judicial Administration 2.545, entitled “Case Management,” states that, while “parties and counsel shall be afforded a reasonable time to prepare and present their case,”

The trial judge shall take charge of all cases at an early stage in the litigation and shall control the progress of the case thereafter until the case is determined. The trial judge shall take specific steps to

²⁶⁵ See generally THE LONG RANGE PLAN, *supra* note 215; Foreclosure Initiative Workgroup, *supra* note 220.

²⁶⁶ See generally, THE LONG RANGE PLAN, *supra* note 215.

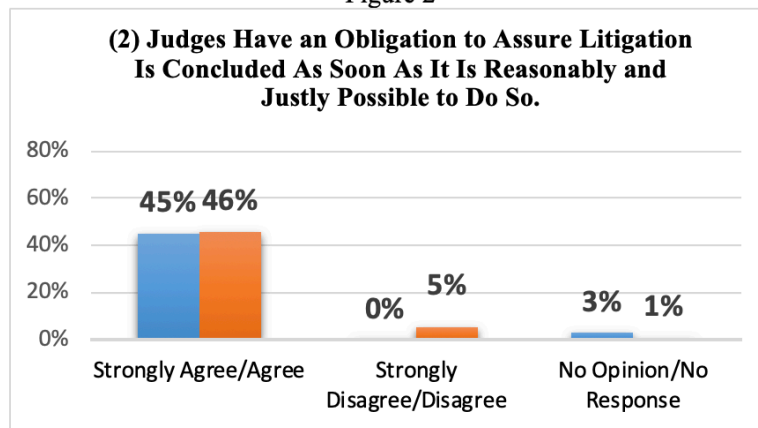
²⁶⁷ Telephone Interview with Anonymous Judge 13 (transcript on file with the University of Miami Law Review) [hereinafter Telephone Interview 13].

²⁶⁸ Figure 1.

monitor and control the pace of litigation, including the following: (1) assuming early and continuous control of the court calendar.²⁶⁹

A further breakdown of the data reveals that a significant seventeen percent (17%) of newer judges—those who have only zero to three years' experience—disagreed with the statement. Most support was found from respondents in larger circuits, who strongly agreed at sixty-nine percent (69%), nearly twenty points higher than the small- to medium-sized circuits.

Figure 2

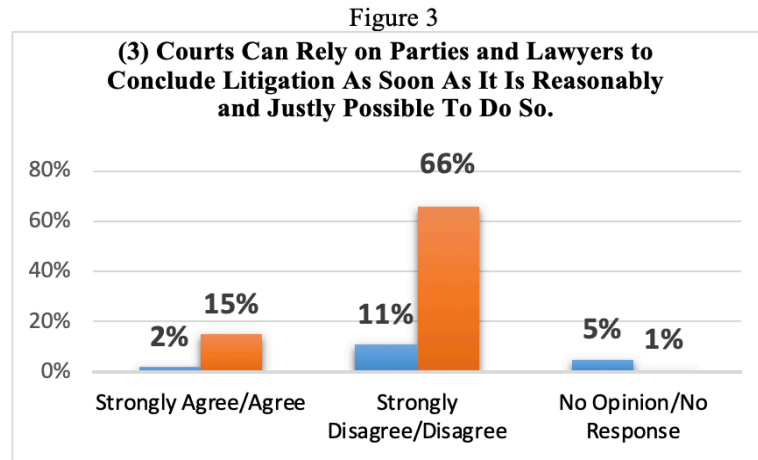


Florida Rule of Judicial Administration 2.545 also provides that “[j]udges and lawyers have a professional obligation to conclude litigation as soon as it is reasonably and justly possible to do so.”²⁷⁰ Accordingly, this statement resulted in only three percent (3%) reporting no opinion and five percent (5%) reporting strong disagreement.²⁷¹ Interestingly, eleven percent (11%) of newer judges disagreed. The consistent agreement in responses to these questions indicates that judges are aware of the court’s responsibility to manage and progress litigation.

²⁶⁹ FLA. R. JUD. ADMIN. 2.545(a)–(b).

²⁷⁰ FLA. R. JUD. ADMIN. 2.545(a).

²⁷¹ Figure 2.



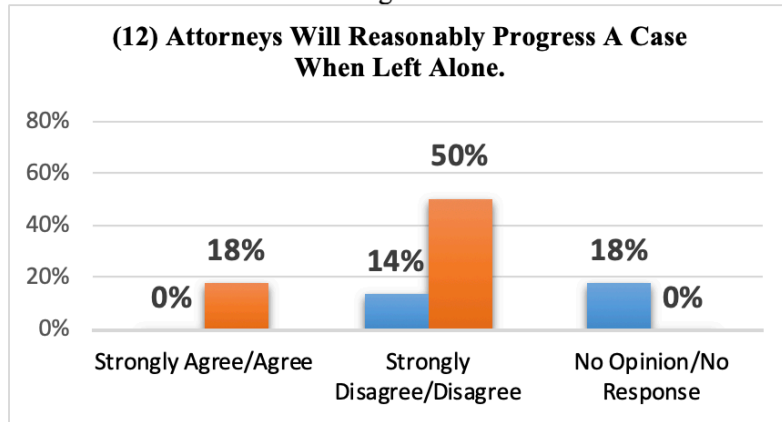
As discussed, Florida Rule of Judicial Administration 2.545 imposes the obligation “to concluded litigation as soon as it is reasonably and justly possible to do so” on both judges *and* lawyers.²⁷² However, few judges expressed confidence in litigants’ ability to do so, with only seventeen percent (17%) strongly agreeing/agreeing and five percent (5%) expressing no opinion.²⁷³ In contrast, seventy-seven percent (77%) stronglydisagreed/disagreed.²⁷⁴ This frames the challenge for courts: if courts do not think the parties and the lawyers can execute this task, how are courts to supervise and ensure the promise of reasonable, swift justice? This result highlights disconnects between broad conceptual knowledge of the obligation to case manage and the actual execution of case management on a day-to-day basis. All of the interviewed judges repeatedly raised issues of strategic delay, overburdened lawyers, financial incentives, and inattention as compromising litigant dependability in providing for case momentum. At the same time, interviewed judges emphasized the need to collaborate with lawyers to assure that reasonableness pervades any case management effort. Ideally, each case should get what it needs at the time it needs it as much as organizationally possible.

²⁷² FLA. R. JUD. ADMIN. 2.545(a).

²⁷³ Figure 3.

²⁷⁴ *Id.*

Figure 4



A similar response was reflected here with sixty-four percent (64%) expressing disagreement, but a much higher eighteen percent (18%) having no opinion.²⁷⁵ This is a large “no opinion” set for such a basic question about handling a docket; it represents a 250% increase in “no opinion” responses from the earlier-referenced question about litigant reliability and reflects a somewhat startling ambivalence about attorney roles.²⁷⁶ A total of eighty-one percent (82%) disagreed, strongly disagreed, or had no opinion, which again suggests judges do not rely on lawyers to move cases.²⁷⁷ Only eighteen percent (18%) agreed that lawyers reasonably progress cases on their own.²⁷⁸ Again, many judges professed no opinion, in ranges from ten to twenty-seven percent (10%–27%) across the data subsets based on size of circuit and experience. This speaks to a potential absence of case management by lawyers and judges.

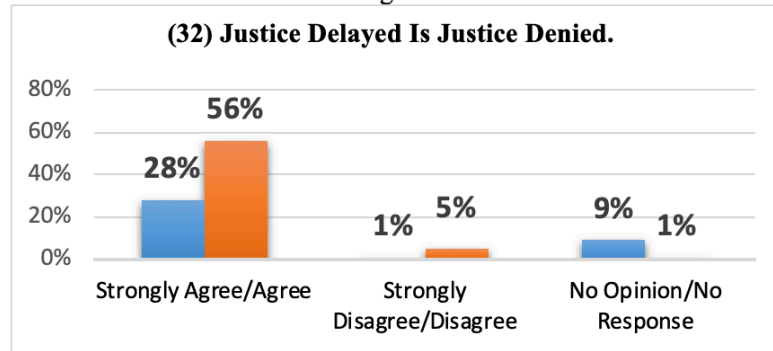
²⁷⁵ Figure 4.

²⁷⁶ Compare Figure 4, with Figure 3.

²⁷⁷ Figure 4.

²⁷⁸ *Id.*

Figure 5



Overall, eighty-four percent (84%) of the judges interviewed agreed with this oft-quoted principle²⁷⁹: “justice delayed is justice denied.”²⁸⁰ In practice, this adage means that the result must be delivered while the outcome is still meaningful.²⁸¹ For case-management purposes, this question recognizes the importance of timely access. The six percent (6%) who disagreed or strongly disagreed indicate that, while they are the clear minority, there is a group of judges in the dissent. In terms of data subsets, responders from large circuits strongly agreed nearly twenty-three percent (23%) more often than those from smaller circuits.

Interviewed judges defined this issue in terms of providing access.²⁸² Every judge agreed that timely access resolves issues and

²⁷⁹ Figure 5.

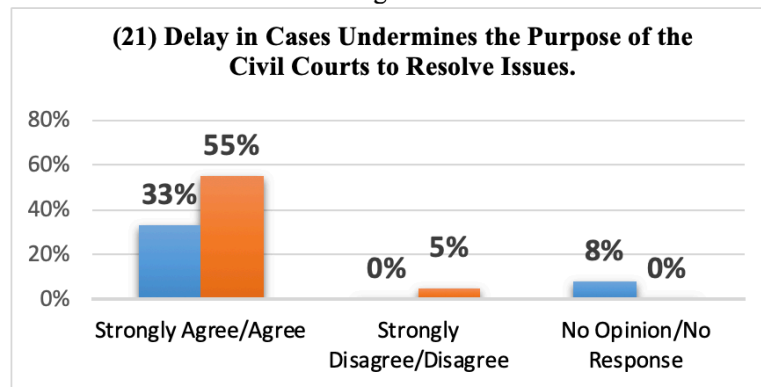
²⁸⁰ See generally, e.g., Erwin Chemerinsky, *Justice Delayed is Justice Denied*, 2 NEXUS 21 (1997); Alexander B. Aikman, *An Essay on Restoring Case Flow Management to “The Heart of Court Management*, CT. MANAGER, Spring 2013, at 6, 16 (2015).

²⁸¹ See Chemerinsky, *supra* note 280, at 39.

²⁸² Telephone Interview with Anonymous Judge 1 (transcripts on file with the University of Miami Law Review) [hereinafter Telephone Interview 1]; Telephone Interview with Anonymous Judge 2 (transcripts on file with the University of Miami Law Review) [hereinafter Telephone Interview 2]; Telephone Interview 4, *supra* note 166; Telephone Interview with Anonymous Judge 10 (transcripts on file with the University of Miami Law Review) [hereinafter Telephone Interview 10]; Telephone Interview with Anonymous Judge 11 (transcripts on file with the University of Miami Law Review) [hereinafter Telephone Interview 11]; Telephone Interview with Anonymous Judge 14 (transcripts on file with the University of Miami Law Review) [hereinafter Telephone Interview 14]; Telephone Interview with Anonymous Judge 17 (transcripts on file with the University of Miami Law Review) [hereinafter Telephone Interview 17]; Telephone Interview

moves cases.²⁸³ Several judges had interesting observations about how their colleagues evaluated their own ability to deliver justice.²⁸⁴ They observed that judges who do *not* case manage viewed justice delivery at the level of the individual case, without really evaluating how that case affected other pending matters,²⁸⁵ while judges who *do* case manage viewed justice delivery across their entire docket, to ensure that each case received justice.²⁸⁶ The related questions to this two-tiered view of case management were designed to investigate how the judges surveyed viewed the scope of their obligation to deliver timely justice. The following questions were interspersed through the survey to test those concepts.

Figure 6



The rate of agreement in this statement is similar to the above question at eighty-eight percent (88%),²⁸⁷ which reinforces the view that the timeliness of resolutions is a significant aspect of judicial effectiveness. Again, judges in large circuits strongly agreed at a rate twenty points higher than judges from smaller circuits. The results of this statement suggest that judges understand that timely access is essential.²⁸⁸ At the same time, the most common traditional deferential and reactive approaches to case management suggest that

with Anonymous Judge 21 (transcript on file with the University of Miami Law Review) [hereinafter Telephone Interview 21].

²⁸³ See *supra* note 282.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

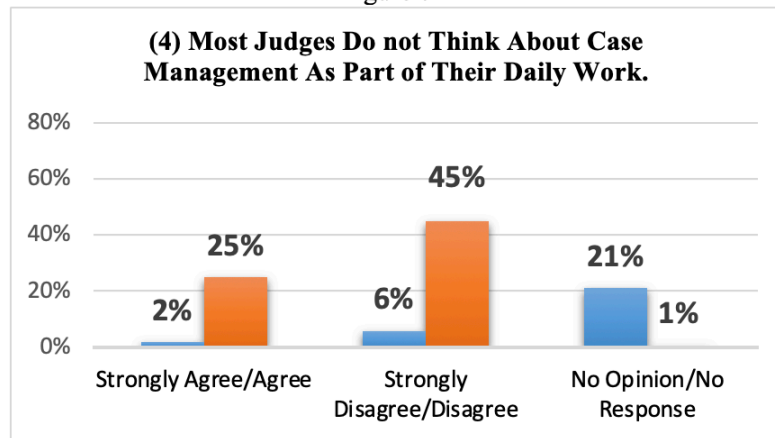
²⁸⁷ Figure 6.

²⁸⁸ See, e.g., Telephone Interview 1, *supra* note 282 Telephone Interview 2, *supra* note 282; Telephone Interview with Anonymous Judge 9 (transcript on file

court involvement is sought only *after* an issue has erupted, which requires waiting in line to be heard.²⁸⁹ Proactive case management contemplates pre-established access points designed to prevent delay and problems from accruing.²⁹⁰ These results indicate that all three approaches can work, depending on the degree of timeliness of access and how a judge prioritizes their workload, as the responses indicates a fundamental understanding that delay compromises the Court's mission and implicates the public's confidence in the courts to resolve their issues.

However, the disarray in addressing this problem was captured in the following set of questions.

Figure 7



The responses to this statement evidenced the opposition and the work that advocates for case management must face. While only twenty-seven percent (27%) of total responding judges agreed or strongly agreed, twenty-one percent (21%) had no opinion.²⁹¹ In other words, roughly fifty percent (50%) of responding judges either do not think about case management or had no opinion. Fifty one percent (51%) rejected the statement. Interestingly, newer judges

with the University of Miami Law Review) [hereinafter Telephone Interview 9]; Telephone Interview with Anonymous Judge 19 (transcript on file with the University of Miami Law Review) [hereinafter Telephone Interview 19].

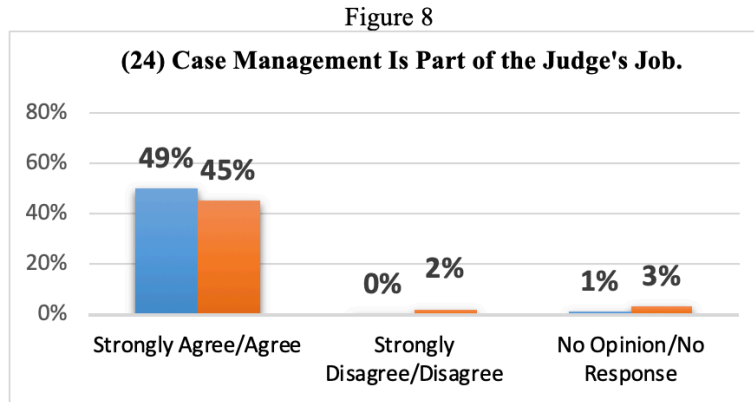
²⁸⁹ Resnik, *Managerial Judges*, *supra* note 73, at 384, 414–15.

²⁹⁰ Gensler, *Caught in the Crossfire*, *supra* note 73, at 671–72; Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 871–74; WHAT MAKES CIVIL JUSTICE EFFECTIVE?, *supra* note 31, at 6.

²⁹¹ Figure 7. It is important to note that one percent (1%) of the judges surveyed provided no response to this statement.

had strong opinions: They strongly disagreed at a significantly higher rate of seventeen percent (17%).

Additionally, the responses frame a larger question: If attorneys and parties cannot be trusted to reliably progress cases and delay threatens justice, how does timely justice get delivered if judges are not thinking about case management? This series of responses seems to acknowledge problems but avoids confronting court responsibility for solutions.



This statement appeared halfway through the survey and was designed to test the consistency of the responses and identify potential definitional issues. Total responding judges agreed or strongly agreed at ninety-four percent (94%), while only two percent (2%) strongly disagreed, and three percent (3%) either had no opinion or did not respond to this statement.²⁹² There were high levels of agreement across all the data sets, with little disagreement. However, it is difficult to reconcile the broad agreement on this statement if roughly fifty percent (50%) of judges are not thinking about case management daily, as reflected in the previous results.²⁹³ This draws the larger question into crisper focus: how can case management be part of the judge's job if half of the bench has no opinion or does not think of case management as part of their daily work? These results imply that judges *know* that case management is their responsibility but lack the specifics to implement it on a daily basis.

Most of the interviewed judges either strongly objected to, or indicated disagreement with, any assertion about the civil bench's

²⁹² Figure 8.

²⁹³ See *supra* Figure 7.

lack of awareness as a contributing factor to a lack of civil case management.²⁹⁴ Judges generally felt that the frequency of reference to case management suggested that only deliberate ignorance could produce a lack of awareness. All interviewed judges felt that nearly every judge is *aware* of case management, but whether they chose to employ it or not is a different issue. If judges say they are not aware, interviewees believe it to be an excuse or a result of willful ignorance.²⁹⁵ A few judges expect that there is a small number of judges—the very old and the very new—who might not be as aware as they should be.²⁹⁶ The interviewed judges generally felt that case management was the subject of education and awareness, but that simply raising it as an issue is insufficient without incentivizing judges to engage—“lip service.” “We need to get past just raising this at New Judges’ College,” said one judge.²⁹⁷

While these comments point to a generalized awareness, they also point to a lack of more specific understanding of the responsibility, a failure to define the scope of what civil case management entails, a lack of information about its direct benefits for the judge both personally and to the parties and the branch, and the lack of any real accountability. The deference given to individual choices by individual judges managing their docket their own way prevents systemic case management in the interviewed judges’ views, due to the consequential lack of uniformity on procedures. Many complained that there is no strong leadership consensus that case management is important or has value in individual cases or systematically. These judges all case managed as a result of their own initiative, because

²⁹⁴ See, e.g., Telephone Interview with Anonymous Judge 3 (transcript on file with the University of Miami Law Review) [hereinafter Telephone Interview 3]; Telephone Interview 4, *supra* note 166; Telephone Interview 9, *supra* note 288; Telephone Interview 11, *supra* note 282; Telephone Interview with Anonymous Judge 12 (transcript on file with the University of Miami Law Review) [hereinafter Telephone Interview 12]; Telephone Interview 13, *supra* note 267; Telephone Interview with Anonymous Judge 15 (transcript on file with the University of Miami Law Review); Telephone Interview 17, *supra* note 282; Telephone Interview 19, *supra* note 288; Telephone Interview with Anonymous Judge 20 (transcript on file with the University of Miami Law Review) [hereinafter Telephone Interview 20].

²⁹⁵ See, e.g., Telephone Interview 12, *supra* note 294.

²⁹⁶ E.g., Telephone Interview 17, *supra* note 282.

²⁹⁷ *Id.*

they see it as essential to being a good judge, as opposed to any institutionalized incentive. Many commented that there were no consequences for judges whose dockets reflected undue delay, disarray, lack of access, or for judges who lacked work ethic. Judges repeatedly commented that case management must be established as a high priority and that judges must be told that if “you don’t engage in civil case management, you are letting the system down and people are not going to get justice.”²⁹⁸

One of the most significant insights about case management awareness from the interviews was in regard to judges comparing civil case management with criminal case management, particularly since most Florida judges rotate through a criminal assignment.²⁹⁹ Multiple judges pointed out that criminal court has an extremely structured case management process.³⁰⁰ Every criminal case has a series of deadlines—from arrest, to a constitutionally guaranteed bond hearing, to arraignment to trial.³⁰¹ A criminal case always has a future date and deadline.³⁰² This structure is intentionally designed and imposed without question, systemically, by the judges assigned to criminal dockets.³⁰³ In other words, criminal case management is not viewed as optional or a matter of judicial choice.³⁰⁴ The interviewed judges compared the criminal system with the apathy towards civil case management simply because, as the civil system currently exists, it is individually judge-dependent in choice, design, and execution.³⁰⁵

²⁹⁸ Telephone Interview 11, *supra* note 282.

²⁹⁹ *See, e.g.*, Telephone Interview 1, *supra* note 282; Telephone Interview 10, *supra* note 282; Telephone Interview 11, *supra* note 282; Telephone Interview 13, *supra* note 267; Telephone Interview with Anonymous Judge 16 (transcript on file with the University of Miami Law Review) [hereinafter Telephone Interview 16]; Telephone Interview with Anonymous Judge 18 (transcript on file with the University of Miami Law Review) [hereinafter Telephone Interview 18]; Telephone Interview 20, *supra* note 294.

³⁰⁰ *Id.*

³⁰¹ *See Steps in a Criminal Case in Florida*, AYO & IKEN, <https://www.myfloridalaw.com/criminal-defense/steps-criminal-case/> (last visited Dec. 23, 2018); *supra* note 299.

³⁰² *See supra* note 301.

³⁰³ *Id.*

³⁰⁴ *See supra* note 299.

³⁰⁵ *Id.*

In sum, the responses to the statements targeting awareness established that a strong majority of judges understand that the responsibility to case manage exists. If judges are aware of civil case management and that they cannot rely on lawyers to move cases forward, but are simply not exercising case management, then execution may be an issue, which implicates the next targeted factor: a misunderstanding or lack of definition of case management;

2. DEFINITION: WHAT IS THE MEANING AND SCOPE OF CIVIL CASE MANAGEMENT?

One issue echoed both in the academic debate and in the interviews I conducted was the wide variation in how judges defined the scope and execution of civil case management.³⁰⁶ As Professor Elliott noted, the “specific techniques advocated by self-styled managerial judges vary so widely that it is not clear what, if anything, they have in common.”³⁰⁷ Objections and resistance to civil case management are extremely dependent on how the scope of the job is defined.³⁰⁸ As noted, there are three general approaches to civil case management: deferential, reactive, and proactive.³⁰⁹

In the traditional party-dependent deferential approach, the judge employs wide judicial discretion to make management decisions on a case-by-case and an event-by-event basis upon request of an initiating party.³¹⁰ Historically, this entailed deference to the parties regarding case progress: “Unless and until one of the parties requested some sort of judicial action . . . judges did not intervene” in the pretrial process.³¹¹ Additionally, “[t]he parties might undertake discovery, negotiate settlement, or let the case lie dormant for years

³⁰⁶ See Elliott, *supra* note 11, at 309, 316–317. Elliott’s article illustrates how this issue has existed for decades by describing a 1985 workshop in which federal judges were asked to manage the same hypothetical case. The results revealed “dramatic differences” in the ways each judge would have managed the case. *Id.*

³⁰⁷ *Id.* at 309.

³⁰⁸ See Tidmarsh, *Pound’s Century*, *supra* note 1, at 515–16, 559–60, 568.

³⁰⁹ See *supra* Part II.

³¹⁰ KAKALIK ET AL., *supra* note 79, at 27; Resnik, *Managerial Judges*, *supra* note 73, at 384.

³¹¹ Resnik, *Managerial Judges*, *supra* note 73, at 384. *Accord* Molot, *supra* note 108, at 29, 39–40.

— all without judicial scrutiny.”³¹² This is the methodology used in the decades following the initial adoption of the 1938 Federal Rules of Civil Procedure and follow-on efforts by the states. After initial adoption of the 1983 amendments initiating federal case management rules, the first debates began about the discretionary character of case management and the scope of judicial action.³¹³ What is encompassed by civil court case management? What are the appropriate parameters of judicial action?

Traditionalists, led eloquently by Professor Judith Resnik, deplored judicial case management as the abandonment of the neutral adjudicatory role. Resnik decried “managerial judging” in an influential 1982 article in the *Yale Law Journal*.³¹⁴ She worried that “[j]udicial management has its own techniques, goals, and values, which appear to elevate speed over deliberation, impartiality, and fairness.”³¹⁵ Traditionalists like Resnik expressed alarm about unreviewable and potentially biased decision-making focused not on justice, but rather on a judge’s case disposition statistics, with parties strong-armed into settlements and alternative dispute resolutions (“ADR”) promoted as a means to reduce cost and delay.³¹⁶ Resnik expressed concern that the movement of cases from open court to ADR compromises the public’s opportunities to have firsthand knowledge about the claims brought, the disputants, and the decisions made.³¹⁷ Other commentators expressed concern that the emphasis on case management had fundamentally changed the role of the judge from a reactive and neutral umpire to an active manager obsessed with efficiency, front-loading, and adjudication without trial.³¹⁸ They raised concern about judges injecting themselves into a case of which they have little knowledge, expressing the long-held

³¹² Resnik, *Managerial Judges*, *supra* note 73, at 384. *See, e.g.*, Baicker-McKee, *supra* note 109, at 371–78 (detailing three long trials in which discovery and/or settlement proceeded with minimal court intervention).

³¹³ Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 653.

³¹⁴ *See* Resnik, *Managerial Judges*, *supra* note 73.

³¹⁵ *Id.* at 424–25.

³¹⁶ Resnik, *Privatization of Process*, *supra* note 8, 1802.

³¹⁷ *Id.*

³¹⁸ Freer, *supra* note 8, at 1517.

deferential belief that the lawyers know their case best.³¹⁹ They argued that the lawyers should control the case, and that momentum is a choice that the parties can make themselves.³²⁰

Given the changes in federal pleading and summary judgment law that created opportunities to dispose of cases at early stages,³²¹ traditionalists are particularly concerned about pretrial adjudication. While these concerns are less pronounced in state courts, in which dismissals on pleadings and summary judgments occur much less frequently than in federal court,³²² these debates contributed to uncertainty about the definition and scope of the case management task and continue to reinforce any tendency to defer to the attorneys.³²³ One commentator has proposed a useful methodology for distinguishing between practices in case management.³²⁴ UCLA Professor Joanna Schwartz distinguished between those “gateway” managerial processes that move a case in or out of court, such as definitive pleading rulings, summary judgment rulings, forced ADR, and judicial involvement in settlements, versus those “pathway” processes that move a case from event to event to consistently progress to the resolution of the parties’ choice, whether settlement or trial.³²⁵ Traditionalists express much more alarm over judicial activism in gateway case management and pay less attention to pathway management, but they blur the distinction by referring to all actions as “case management.”³²⁶ For example, as expressed by Professor Jay Tidmarsh,

Case management has taken on a life of its own, and dismissals for failure to abide by court-imposed scheduling deadlines, issue-narrowing requirements, and final pretrial orders fill the reporters. Many cases

³¹⁹ Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 645 (1989).

³²⁰ *Id.*

³²¹ *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

³²² LANDSCAPE OF LITIGATION, *supra* note 26, at iv.

³²³ *See Elliott*, *supra* note 11, at 321.

³²⁴ Schwartz, *supra* note 145.

³²⁵ *Id.* at 1652

³²⁶ Tidmarsh, *Pound’s Century*, *supra* note 1, at 560

are determined on the criteria of efficiency and obedience to judicial will rather than on their merits.³²⁷

For purposes of considering the path forward for civil case management, these accusations regarding decisions which dispose of cases on technicalities may be more fairly treated as concerns regarding the underlying federal rules and substantive law affecting gateway decisions, as opposed to an animating feature of case management.³²⁸ These are concerns for which there is little parallel in current state systems, particularly in the absence of uniform state conformity with reformation of federal pleading standards.³²⁹

A large portion of the attorney surveys regarding civil case management conducted within the last decade reflect a demand for more management and reflect less evidence of the overreaching anticipated by Resnik over the last thirty-five years. A 2012 survey by the Federal Judicial Center investigated practice with regard to the early case management conference prescribed by Federal Rule of Civil Procedure 16(b).³³⁰ Rule 16(b) conferences were not held in fifty percent (50%) of the respondents' cases, either due to settlement, a local exemption, or "other."³³¹ Of those held, only thirty-one percent (31%) reported live conferences; the other nineteen percent (19%) reported telephonic conferences.³³² Additionally, twelve percent (12%) of respondents who originally indicated they did not have a Rule 16(b) conference reported that they conferred via "correspondence."³³³ Fifty-seven percent (57%) of respondents reported that the conference lasted between ten and thirty minutes.³³⁴ Twenty-three percent (23%) reported that the conference lasted less than ten

³²⁷ *Id.*

³²⁸ *Cf.* Schwartz, *supra* note 145, at 1697–701.

³²⁹ Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 109–11 (2010), <http://yalelawjournal.org/forum/tremors-of-things-to-come-the-great-split-between-federal-and-state-pleading-standards>.

³³⁰ EMERY G. LEE III, FED. JUDICIAL CTR., EARLY STAGES OF LITIGATION ATTORNEY SURVEY 1, 6 (2012).

³³¹ *Id.* at 6.

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* at 7.

minutes, which means eighty percent (80%) of cases had a 16b conference that lasted less than thirty minutes.³³⁵ Ninety-four percent (94%) respondents reporting said the 16b conferences almost always resulted in a scheduling order.³³⁶ During the course of the case, the scheduling order was modified fifty percent (50%) of the time.³³⁷ However, only fifteen percent (15%) of respondents reported that deadlines were enforced.³³⁸ The respondents were asked to rate the involvement of the presiding judge in the management of the case on a scale of one to five, five being very involved.³³⁹ The average response was 2.6 for all cases.³⁴⁰ Where a 16b conference occurred, judicial involvement was rated at 2.9, and at 3.1 where there were substantive discussions about the case.³⁴¹ These survey results refute early concerns about dictatorial managerial judging occurring through proactive case management in the federal courts.³⁴²

Advocates for court case management see the traditionalist objections as untethered to reality. In a 1983 response written to Professor Resnik's *Managerial Judges*, Professor Steven Flanders charged that traditionalists like Resnik confuse genuinely questionable approaches with all accepted and essential case management approaches.³⁴³ He agreed, as do most case management advocates, that judges should never strong arm settlements or set abusive deadlines.³⁴⁴ Judicial case management advocates, led enthusiastically by United States District Court Judge Lee Rosenthal and Professor Steven Gensler, point out that "[c]alibrating [application of] the rules to individual cases is one good way to describe case management."³⁴⁵ They argue that if existing rules are not used, and those rules are adequate and well-designed, as the surveys generally suggest they are, then the critical elements in bridging the gap between

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *See id.*

³⁴³ Flanders, *supra* note 96, at 505.

³⁴⁴ *Id.* at 506.

³⁴⁵ Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 652; Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 856.

the rules and their enforcement are access, judicial engagement, and involvement in cases that need it.³⁴⁶ Instead of shaping the litigation process in response to a request by a party to rule one specific issue at a time, advocates recommend that processes should be calibrated and designed for the case at outset, creating a plan for the path forward.³⁴⁷

Furthermore, the engaged court case management process is one of more visibility, not less, from the judge.³⁴⁸ Advocates describe a case management platform for dialog between the judge, the lawyers, and the parties in order to get information, clarify issues, set timelines and priorities with reasonable deadlines.³⁴⁹ The case management conference becomes the opportunity to give the judge the salient information about the case that the judge needs to understand.³⁵⁰ It is not and should not be a process of pushing reluctant parties to settle. Rather, it should be a process of tailoring pretrial work to get the necessary information in a cost-effective manner and to value the case, which may result in settlement or trial depending on the parties.³⁵¹ The goal is not to push settlement, but given that settlement is the resolution for the vast majority of cases, to permit settlement earlier as opposed to later with less work, less cost, and consequently, less waste.³⁵² So long as adjudication remains a viable option, the choice to settle is voluntary.³⁵³ Advocates speculate that greater judicial case management may result in more trials by reducing the distortive exploitation of pretrial process, which leaves the parties with resources to try their case within a timeline in which resolution is still meaningful.³⁵⁴ Judges who are trusted to deliver fair trials under a traditional construct should be equally trustworthy to manage pretrial processes fairly.³⁵⁵ Further, the ideal of engagement that Professor Resnik espouses has not been evident in courts

³⁴⁶ Rosenthal, *Defining the Problem*, *supra* note 7, at 231; Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 651.

³⁴⁷ Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 663–64.

³⁴⁸ Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 852.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.* at 856.

³⁵² *Id.*

³⁵³ Langbein, *supra* note 12, at 561.

³⁵⁴ Nagareda, *supra* note 10, at 689.

³⁵⁵ Baicker-McKee, *supra* note 109, at 359.

for decades: lawyers and clients in routine adversarial litigation have little contact, and clients report little control over their lawsuits.³⁵⁶

In the meantime, advocates point out, crowded dockets and overzealous litigants compete for the attention of the most expensive resource in the courthouse: the judge's time. Without case management, there is no organization or prioritization of those demands.³⁵⁷ As a result, justice process flaws are exploited to distort the value of anemic claims and minimize the value of meritorious claims.³⁵⁸ As Professor Tidmarsh pointed out, "[t]he judicial discretion that the 'on the merits' principle dictates also increases direct litigation costs, because discretion allows judges to reinvent the procedural wheel for each case and gives parties an incentive to argue over the shape of the wheel."³⁵⁹ The concerns enunciated by the traditionalists focus on the risk of case management in an individual case, but fail to acknowledge the risks to other cases that failure to manage or inconsistent management could impose.³⁶⁰ Professor Jonathan Molot recognized that "[i]n an overcrowded court system, partisanship's tendency to string out the litigation process meant fewer court resource for other pending cases,"³⁶¹ noting that there is a real risk overzealous litigants might not just inflict harm on their immediate adversaries, but also clog dockets and deprive future litigants of their day in court.³⁶² Even Professor Resnik acknowledges the problem and seems to call for management at some level to solve it:

Court services, particularly judges' time, have become scarce commodities. A continually expanding

³⁵⁶ Tidmarsh, *Pound's Century*, *supra* note 1, at 585 n.292.

³⁵⁷ Aikman, *supra* note 280, at 16; BRIAN J. OSTROM & ROGER A. HANSON, NAT'L CTR. FOR STATE CTS., *ACHIEVING HIGH PERFORMANCE: A FRAMEWORK FOR COURTS* 34 (2010) ("If backlogs and bottlenecks exist, each individuals' case suffers from excessive waiting time and likely inconsistent treatment which it comes to the amount of attention they receive from the court. No court where processes and events occur without rational control can persuasively assert that cases receive the amount of individual attention warranted.").

³⁵⁸ See Resnik, *Managerial Judges*, *supra* note 73, at 423; Molot, *supra* note 108, at 41-43; Nagareda, *supra* note 10, at 672-74; Langbein, *supra* note 12, at 552-53.

³⁵⁹ Tidmarsh, *Resolving Cases*, *supra* note 7, at 420.

³⁶⁰ Molot, *supra* note 108, at 91-92.

³⁶¹ *Id.* at 39.

³⁶² *Id.*

number of consumers are seeking access to the courts, but are forced to wait. One (apparent) cause for the wait is the queue—the line created by claimants already waiting for judicial services. A second cause comes from some claimants, already in the courthouse, who appear to abuse their places at the head of the line by monopolizing court time. Attorneys, motivated by their own interests or those of their clients, seem to be the critical actors in the apparent misuse of court resources. According to proponents of judicial management, judges . . . should take charge of the system and allocate their time in a prudent, coherent, and fair manner.³⁶³

Such a process necessarily contemplates case management.

During the qualitative interviews, I asked each judge to provide their definition of case management. One judge described case management as a “nebulous concept”,³⁶⁴ another used the word “amorphous.”³⁶⁵ All agreed that there is wide individual variation in how judges define case management. One judge stated that “[a] lot of us have different philosophies or thoughts about what works best for us depending on individual judges’ personalities; different methods work for different judges.”³⁶⁶ others said it’s a widely held belief that case management is part of the job, but different judges define it in different ways.³⁶⁷ A judge in a leadership position referenced the “different concepts that we all have,” and that there are different skills for managing a civil case and managing a civil docket.³⁶⁸ All agreed that defining the scope of case management is a challenge to universal engagement.

These observations were consistent with the varying approaches to court case management. Interviewed judges each described their

³⁶³ Resnik, *Managerial Judges*, *supra* note 73, at 414–15.

³⁶⁴ Telephone Interview 20, *supra* note 294.

³⁶⁵ Telephone Interview 19, *supra* note 288.

³⁶⁶ Telephone Interview 17, *supra* note 282.

³⁶⁷ Telephone Interview 1, *supra* note 282; Telephone Interview 3, *supra* note 294; Telephone Interview with Anonymous Judge 5 (transcript of file with the University of Miami Law Review); Telephone Interview 13, *supra* note 267; Telephone Interview 18, *supra* note 299.

³⁶⁸ Telephone Interview 17, *supra* note 282.

approach to case management. One group focused on ensuring that the lawyers and the parties were complying with court rules, deadlines, and orders—primarily referencing keeping the case moving towards resolution by reactively policing inactivity and following up on problems as opposed to preventing delay in the first instance. The second group focused on the proactive approach of creating a defined schedule at inception, with anticipated court interaction, creating expectations over the life of the case as opposed to event from event—all with the goal of consistent progress to resolution whether by trial or settlement at the parties' choice by a relatively certain date.

All this debate about the role of the judge, the lawyers, the justice principles, and competing interests involved may have produced a corresponding ambivalence on the bench about case management. “There is no broad normative consensus to unite reformers. Although there is a widespread feeling that the system needs repair, there is no clear sense of how serious the problems really are, what to do about them, or even whether they can be solved at all,”³⁶⁹ observed Professor Robert Bone. Tidmarsh observed:

[W]e tossed upon the ocean, buffeted in the 1980s by concerns for inefficiency and by disaffection with the sharp practices of a lawyer-driven, costly, and dilatory litigation system. Political pressures to reform procedure to achieve short-term policy objectives blew in during the 1990s. Transnational pressures and the concern for the ‘vanishing trial’ brought water into the boat in the 2000s. ...[W]e are still afloat on Pound’s ocean. We cannot—or at least have not—imagined a fresher and better approach to procedure.³⁷⁰

Many state judges, particularly without the strong rule-based directives and autonomy of the federal system, may have mixed reactions to directives to case manage because of a lack of clear scope. The surveys indicate that most lawyers and judges find the rules

³⁶⁹ Bone, *supra* note 108, at 321.

³⁷⁰ Tidmarsh, *Pound’s Century*, *supra* note 1, at 576.

themselves adequate, but lacking enforcement.³⁷¹ The survey referenced above conducted by IAALS and the ACTL, the FJC, the ABA, and the Duke Conference conveners indicate strong support for case management, but a reality in which case management rarely occurs in a meaningful way.³⁷² As noted by Gensler and Rosenthal, “[t]he current Civil Rules are built upon the expectation that judges will manage their cases. But the rules themselves provide little guidance on the critical questions of calibration and scale necessary to guide judges on how to manage.”³⁷³ The need for a definition is evident:

For every excess that managerial judging’s critics identify, its defenders identify other cases in which judicial case management has facilitated efficient resolutions and saved valuable court resources. Without a conceptual framework to weigh these costs and benefits, scholars have been unable to agree on a course of reform. . . . [W]e must move beyond simply weighing the tradeoffs that surround new judicial practices and develop a framework to help us decide which costs are worth bearing and which are not.³⁷⁴

There is a further distinction between state and federal courts that is important. In many cases in state court, a formal case management conference may be unnecessary given the broad diversity of the character of the cases.³⁷⁵ There are many noncomplex cases in state court that could still benefit from a case management structure in the form of a schedule without the necessity of a formal conference, particularly uncontested or minimally contested matters that still need deadlines to progress.³⁷⁶ The significant number of

³⁷¹ See SURVEY OF THE ARIZONA BENCH, *supra* note 47, at 3. Rule changes designed to promote improvement are only as effective as their enforcement.

³⁷² DUKE CONFERENCE REPORT, *supra* note 38, at 82–83; See also Lee III & Willging, *supra* note 7, at 775.

³⁷³ Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 643.

³⁷⁴ Molot, *supra* note 108, at 42.

³⁷⁵ Telephone Interview 1, *supra* note 282; Telephone Interview 11, *supra* note 282.

³⁷⁶ There may be problems in relying upon high-volume law firms to reliably progress cases. See Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J.

self-represented litigants is particularly impacted by a lack of predictable and consistent structure for cases moving through the court system, as the lack of consistency in practices among judges creates confusion, consumes staff resources, and enhances perceptions of a deck that is stacked against those who cannot afford a lawyer.³⁷⁷ Inability to understand the process of how a case will move through the court system, because of a lack of systemic consistency, contributes to pro se frustration and consumes valuable staff resources in providing guidance one case at a time.³⁷⁸ Ad hoc management contributes to issues of public trust.³⁷⁹

Given these realities, which have been repeatedly established by empirical data cited above, the need for an operative definition has emerged as a factor to be explored in this research. What is included in case management? Who is supposed to be doing what? Both statements on the survey and the qualitative interviews conducted attempted to explore the role of definitional issues in case management adoption. What should and should not be done? What is the extent of court responsibility?

LEGAL ETHICS 1485, 1488 (2009). Issues regarding foreclosure case processing contributed to a landmark Justice Department settlement addressing abusive litigation and servicing practices. Press Release, Dep't of Justice, Fed. Gov't and State Att'ys General Reach \$25 Billion Agreement with Five Largest Mortg. Servicers to Address Mortg. Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), <https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest>.

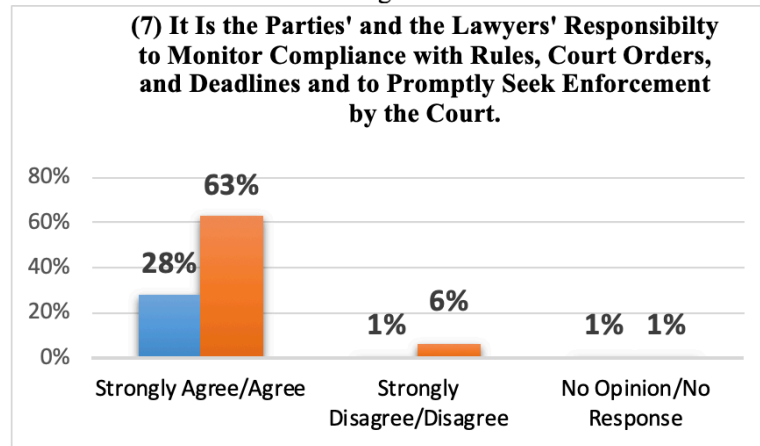
³⁷⁷ Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 859; CJI REPORT, *supra* note 32, at 33–34; Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 645; LANDSCAPE OF CIVIL LITIGATION, *supra* note 26, at 35.

³⁷⁸ LANDSCAPE OF CIVIL LITIGATION, *supra* note 26, at 35.

³⁷⁹ CJI REPORT, *supra* note 32, at 3; Molot, *supra* note 108, at 39–40; KAKALIK ET AL., *supra* note 79, at 1; Gensler, *Caught in the Crossfire*, *supra* note 73, at 734; Nagareda, *supra* note 10, at 672–73; Resnik, *Managerial Judges*, *supra* note 73, at 384.

The next series of questions was designed to identify attitudes and beliefs that shape the potential scope of court case management.

Figure 9



This question was designed to test the tendency of judges to rely upon the parties: the traditional deferential approach. Ninety-one percent (91%) of judges put the responsibility for rule compliance, deadlines, and order enforcement on the litigants.³⁸⁰ At the same time, the responses here conflict with the reality established in the results discussed previously: two-thirds of judges do not believe that litigants will reasonably progress a case or conclude litigation as soon as reasonably or justly possible.³⁸¹ Accordingly, this response appears to indicate, consistent with decades of broader survey results, that while courts believe that the responsibility should lie with the litigants, courts know that litigants will not, cannot, or are unable to exercise this responsibility.

This is also an interesting metric from the standpoint of the state and national trend of growing self-representation, which generally suggests that self-represented litigants are ill-equipped to police litigation effectively, especially if the other side is represented.³⁸² The statement, as phrased, suggests responsibility, but does not specify a hierarchy of responsibility, so it is unclear whether the respondents

³⁸⁰ Figure 9.

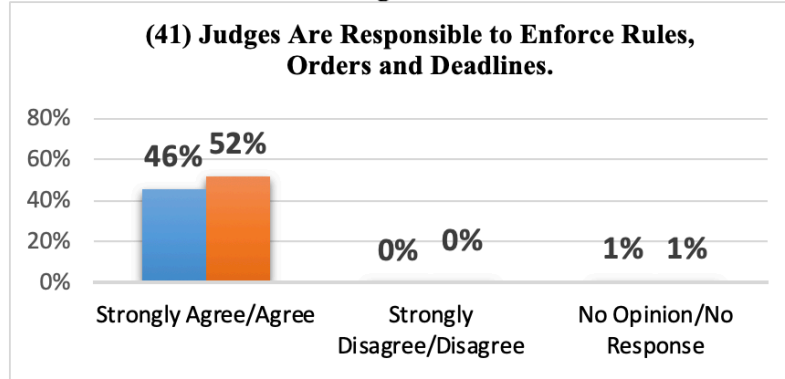
³⁸¹ See *supra* Figure 3.

³⁸² LANDSCAPE OF CIVIL LITIGATION, *supra* note 26, at vi. Nina Ingwer Van Wormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 996 (2007).

envision this statement as responsibility in tandem with the court, or whether litigants bear the lion's share of responsibility for policing compliance. Again, very large circuits were eighteen points higher than small or mid-size circuits in their rate of strong agreement.

The results also ignore the uncontested, one-sided case where there is no conflict to produce momentum. Most of the court-generated case management described across the judicial interviews occurred as a result of a one-sided failure to comply with the rules deadlines over an extended period of time: failure to serve within 120 days, failure to prosecute the case in any way over ten months. These results seem to establish that Florida judges, even those who are strong case management advocates, manage reactively, rather than proactively.

Figure 10



The high level of agreement to this statement speaks to this conflict between the shared responsibility of lawyers and judges when examined in relationship to the views expressed about the enforcement obligations of the litigants.³⁸³ The broad agreement also speaks to the initial observations of the interviewed judges. This is an easy statement to agree with, but there is an absence of definition as to what this entails and how and when it should occur. How are judges to know when enforcement is needed? Traditionalists rely upon parties.³⁸⁴ Court case management advocates want to supplement with diligent attention from the court.³⁸⁵ Reactive case managers look to

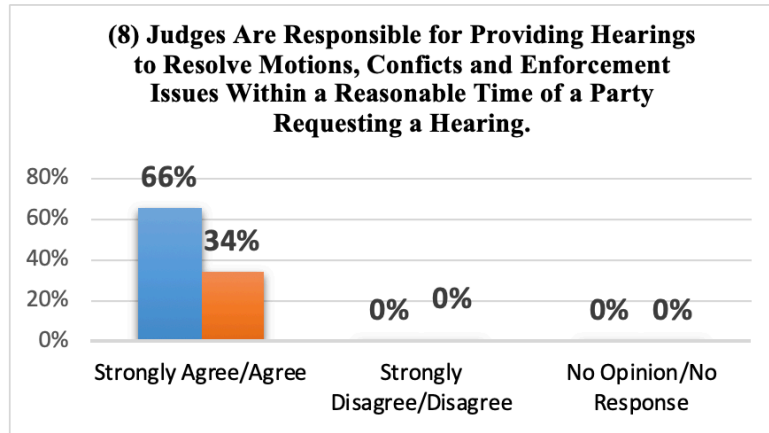
³⁸³ Compare Figure 10, with Figure 3.

³⁸⁴ Resnik, *Managerial Judges*, *supra* note 73, at 384.

³⁸⁵ Gensler, *Caught in the Crossfire*, *supra* note 73, at 671–72; Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 871–74; WHAT MAKES CIVIL JUSTICE EFFECTIVE?, *supra* note 31, at 6.

act upon requests and cases in limbo,³⁸⁶ and proactive case managers look to ensure compliance by monitoring and preventing failure to comply by setting clear deadlines, consequences, and prophylactic future dates.³⁸⁷ All three approaches are dependent on the court providing prompt access for enforcement issues, instead of incentivizing bad behavior by delaying access to enforcement.³⁸⁸ This challenge was captured in the next series of questions.

Figure 11



While agreement to this statement was unanimous,³⁸⁹ very large counties strongly agreed nearly twenty points higher than other circuits. This statement is designed to highlight the question of how judges view case management on an individual case level fitting into the larger challenges of case management across an entire docket. These results show that judges universally acknowledge the need to provide a timely hearing at an individual case level without regard to other demands.

³⁸⁶ KAKALIK ET AL., *supra* note 79, at 1; Gensler, *Caught in the Crossfire*, *supra* note 73, at 734; Nagareda, *supra* note 10, at 672–73; Resnik, *Managerial Judges*, *supra* note 73, at 384.

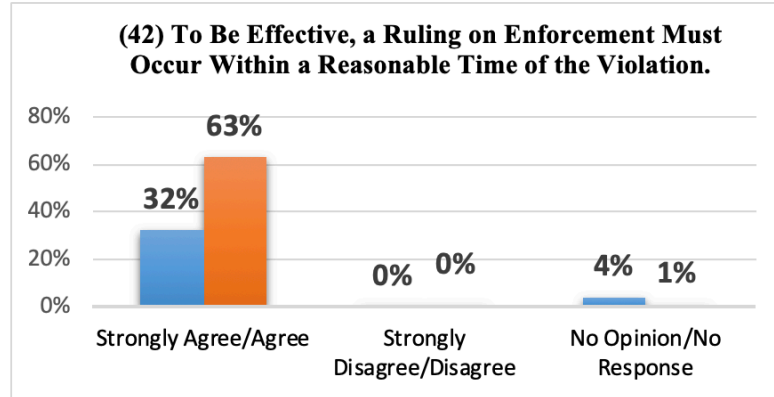
³⁸⁷ See, e.g., CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 146, at 6–7.

³⁸⁸ See Baicker-McKee, *supra* note 109, at 356; Resnik, *Privatization of Process*, *supra* note 8, at 1825; Telephone Interview 2, *supra* note 282; Telephone Interview 11, *supra* note 282; Telephone Interview 14, *supra* note 282.

³⁸⁹ Figure 11.

This unanimity was also evident among the interviewed judges. Each strongly emphasized the importance of prompt access to hearings as an absolutely essential component to state court case management.

Figure 12



Following the question as to policing compliance, ninety-five percent (95%) of respondents agreed that effective enforcement must be timely.³⁹⁰ This question also recognizes that delayed enforcement is less effective. Parties for whom delayed access results in rulings of declining value would agree, which is again driven by access.³⁹¹ Where cases are one-sided, or involve a self-represented party, a substantial lag in enforcement can occur unnecessarily, causing delay in a case.³⁹² This question implicates the broader scope issue previously referenced: how can courts promptly respond to a rule or order violation requiring enforcement when there is no corresponding compliance monitoring in the first instance? In other words, relying upon the diligence of the parties—previously established as the subject of significant skepticism by all judges³⁹³—

³⁹⁰ Figure 12.

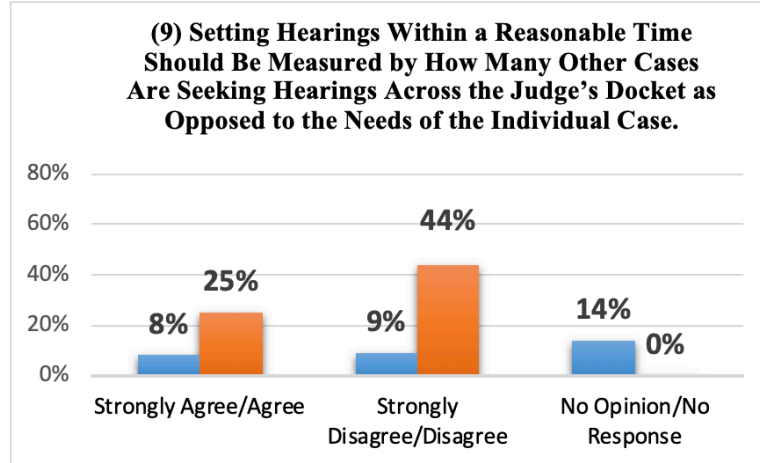
³⁹¹ Telephone Interview 11, *supra* note 282; Telephone Interview 12, *supra* note 294; Telephone Interview 14, *supra* note 282.

³⁹² Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 859; CJI REPORT, *supra* note 32, at 33–34; Gensler & Rosenthal, *Four Years After Duke*, *supra* note 9, at 645; LANDSCAPE OF CIVIL LITIGATION, *supra* note 26, at 35.

³⁹³ See *supra* Figure 9.

seems like a poor management choice, as reflected in the current state of affairs. Delays reward and incentivize bad behavior.³⁹⁴

Figure 13



This statement targeted how judges view their responsibilities to a single case versus the demands across a docket.³⁹⁵ In Florida, most hearings that are not short five-minute matters set on a multi-case calendars are set by specific request, or “special set hearings.”³⁹⁶ Those hearings are typically scheduled in the chronological order in which the request is received.³⁹⁷ If many cases are requesting hearing time, then the time available may be pushed to a more remote future date, which will delay the case.³⁹⁸ In some instances, a delay in getting a hearing may extend beyond the useful date of securing the resolution.³⁹⁹

For example, getting a hearing on a motion to compel discovery is of little use if it is set after the trial date is scheduled. As a practical matter, the number of cases which need hearings always affects the available time. The responses here suggest that fifty-three percent (53%) of judges believe that a hearing should be made available based on the needs of the requesting case, and thirty-three percent

³⁹⁴ Baicker-McKee, *supra* note 109, at 356.

³⁹⁵ See Figure 13.

³⁹⁶ TRAWICK’S FLORIDA PRACTICE AND PROCEDURE, *supra* note 168, § 15:4, at 261–63.

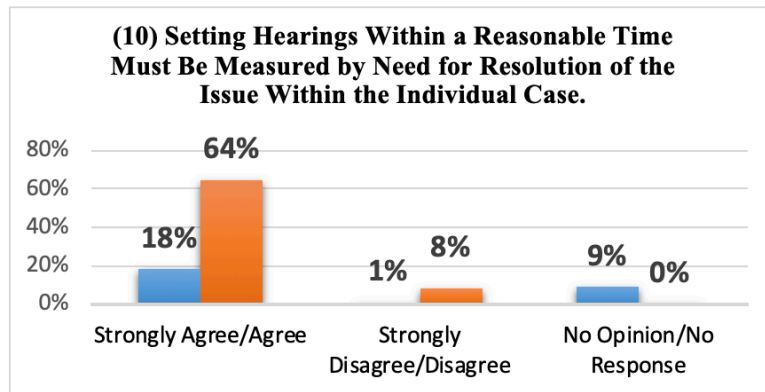
³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

(33%) acknowledge that the number of cases waiting for hearings will affect the timeliness of dates offered. At fourteen percent (14%), this is one of the higher no opinion findings, which, combined with the agreement categories, totals forty-seven (47%), very nearly equaling the disagreements. This suggests an overall lack of clarity of thought as to this problem and is consistent with prior answers about the failure to think about case management.⁴⁰⁰

Figure 14



This statement is the converse of the statement above.⁴⁰¹ The eighty-two percent (82%) of judges who agree or strongly agree seem to indicate that the needs of the individual case are the appropriate measure—only nine percent (9%) of judges disagree or strongly disagree.⁴⁰² The need to deliver a timely resolution may drive a more aspirational response to this question as opposed to the above question, which reflects the difficulties of juggling busy dockets. Smaller circuits agreed or strongly agreed at a rate of ninety-five percent (95%).

A significant number of the interviewed judges expressly differentiated between case management at the case level and at the docket level. They expressed the view that managing at the individual case level was insufficient if other cases' needs were not being met.⁴⁰³ Parties who are evaluating their court experience do not have any appreciation for the demands of a docket.⁴⁰⁴ They will evaluate

⁴⁰⁰ See *supra* Figure 7.

⁴⁰¹ Compare Figure 14, with Figure 13.

⁴⁰² Figure 14.

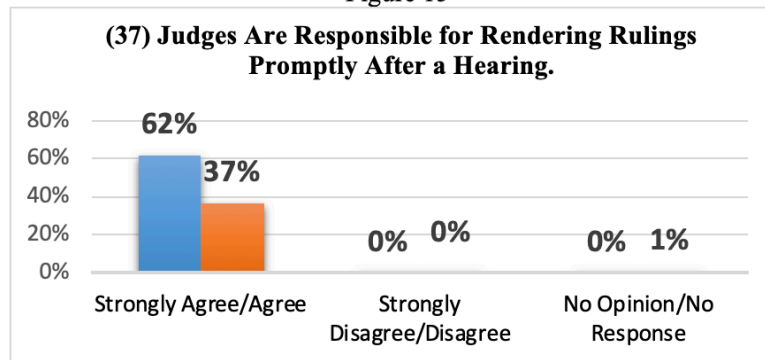
⁴⁰³ Telephone Interview 2, *supra* note 282.

⁴⁰⁴ *Id.*

the competency of the court and the efficacy of the court system on being able to get their hearing in their case heard within a reasonable time.⁴⁰⁵ Interviewed judges strongly emphasized the need for consistent awareness of how long parties are waiting for hearing dates, as well as the need to adjust schedules and prioritize on a continual basis through use of case management in order to deliver prompt access at the case level across the docket. In other words, providing access is the judge's job.⁴⁰⁶

Given the lack of data being distributed to Florida judges on any routine basis, judges have to search out the vantage point for case-load overviews. They will not know how long parties are waiting for hearings unless they monitor their settings or they ask. Judges have to actively engage with their staff to determine when hearings and trials are being routinely set, clearance rates, and continuance numbers. These are not organic systemic operations in most circuits, and as result, depend heavily on the engagement of the individual judge, based on interview comments. At the same time, many of the judges expressed that this docket view is essential to public trust and confidence in the courts, the reputation of the judicial branch overall, and ties into the importance of timeliness in justice delivery.

Figure 15



Judges are very clear about their obligation to deliver rulings quickly after a hearing.⁴⁰⁷ However, some of the data from national surveys suggest that the reality does not always comport with this

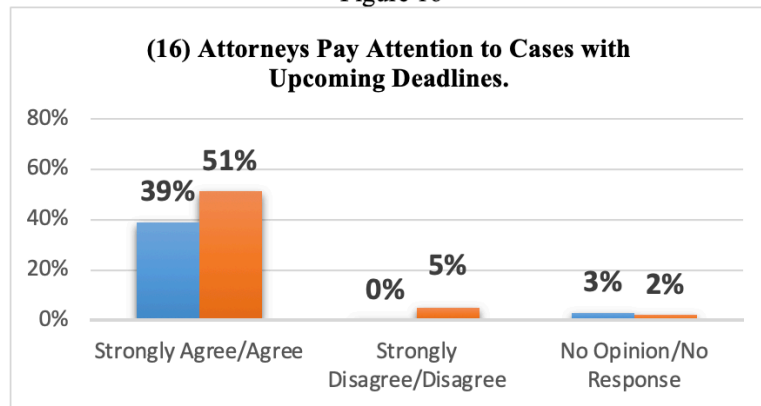
⁴⁰⁵ *Id.*

⁴⁰⁶ *See supra* Figure 8.

⁴⁰⁷ Figure 15.

vision of justice.⁴⁰⁸ These results establish that once enforcement is sought, courts must be prompt in ruling on enforcement.

Figure 16



This statement was designed to identify how judges believe case progress can be impacted. Ninety percent (90%) of judges agreed that setting deadlines is an important tool, with only five percent (5%) disagreeing and three percent (3%) expressing no opinion.⁴⁰⁹ This view is ratified in the interviews. Judge after judge emphasized the importance of consistently enforcing deadlines and a firm trial date to ensure a case progresses forward.⁴¹⁰ Equally, judge after judge emphasized that access to hearing time is key.⁴¹¹ When a hearing looms, parties frequently resolved the contested matter without the necessity of a court hearing or ruling, and the judge's involvement is reduced to signing an agreed order memorializing the parties' resolution. Access to prompt hearings produces prompt resolutions.⁴¹² Equally, keeping problem cases on "a short leash" minimized the amount of conflict and delay in the case according to the interviewed judges.⁴¹³ Many reported that cases that were problem-

⁴⁰⁸ See generally, e.g., EXAMINING THE WORK, *supra* note 3.

⁴⁰⁹ Figure 16.

⁴¹⁰ See, e.g., Telephone Interview 2, *supra* note 282; Telephone Interview 11, *supra* note 282; Telephone Interview 12, *supra* note 294.

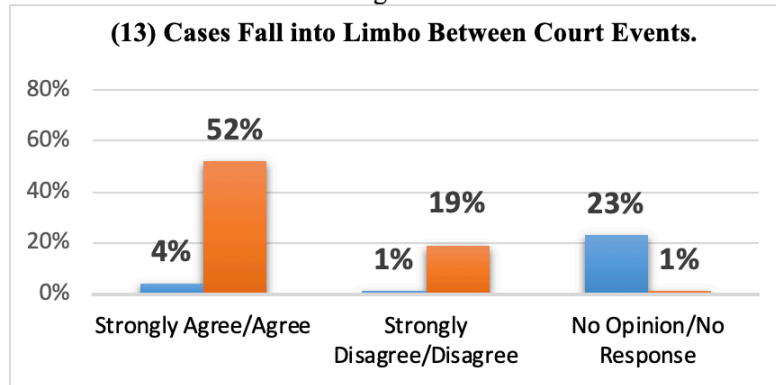
⁴¹¹ *Id.*

⁴¹² Telephone Interview 2, *supra* note 282.

⁴¹³ Telephone Interview 11, *supra* note 282.

atic were scheduled for case management events on a frequent basis.⁴¹⁴ By providing access, the court can deliver clear guidance, prevent additional controversies from accruing, and frequently reorganize the relationship between warring lawyers. Strong case management resulted in less court involvement, not more, as opposed to the combatants seeking hearings on a continual ad hoc issue by issue basis with no end in sight.

Figure 17



Judges were much more uncertain about how and why cases go off track. Only fifty-six percent (56%) agreed with this statement, still a majority, but twenty-three percent (23%) had no opinion and twenty percent (20%) disagreed for a total of forty-three percent (43%).⁴¹⁵ This question was designed to begin to distinguish between proactive judicial case management, in which cases consistently have prospective upcoming deadlines, and reactive case management, which reacts to periods of inactivity or requests for action with judicial intervention to restore momentum. Given the strong belief that attention correlates to deadlines,⁴¹⁶ the ambiguity of these responses suggests the overall uncertainty about how to assure constant progress toward resolution.

The broad tendency to reactive case manage among the interviewed judges reinforced the observation of ambivalence. Interviewed judges again emphasized the contrast between criminal cases, which had consistent deadlines as a result of system architec-

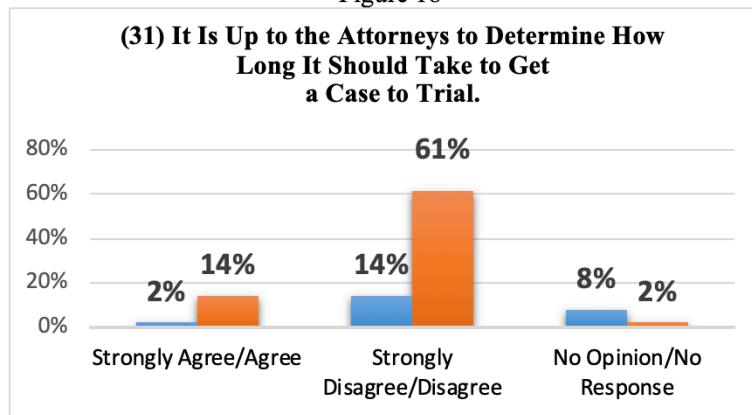
⁴¹⁴ Telephone Interview 2, *supra* note 282.

⁴¹⁵ Figure 17.

⁴¹⁶ See *supra* Figure 16.

ture, and civil cases, in which deadlines were inconsistently set absent individual case management.⁴¹⁷ The high number of no opinion responses again seems to demonstrate confusion about responsibility. The prior responses affirm that lawyers pay attention to cases with deadlines,⁴¹⁸ that parties and lawyers cannot be trusted to progress cases alone,⁴¹⁹ yet there is apparent reluctance to acknowledge the role of court events in moving cases along. There is no ambiguity in the view of the interviewed judges. They all believe that dates and deadlines, fairly and consistently enforced, are essential.⁴²⁰

Figure 18



Three quarters of responding judges disagreed with this statement, clearly seeing a role for the court in getting cases to trial.⁴²¹ Only sixteen percent (16%) agreed, while eight percent (8%) expressed no opinion.⁴²² However, consistent with trends reflected above, judges with less experience agreed more often. Twenty-three percent (23%) of new judges agreed, twenty percent (20%) of judges with between three to six years of experience agreed, and twenty-four percent (24%) of judges with six to nine years of experience agreed. In contrast, judges with twelve or more years of experience agreed at only eleven percent (11%).

⁴¹⁷ See, e.g., Telephone Interview 18, *supra* note 299.

⁴¹⁸ See *supra* Figure 16.

⁴¹⁹ See *supra* Figure 10.

⁴²⁰ See, e.g., Telephone Interview 2, *supra* note 282; Telephone Interview 11, *supra* note 282; Telephone Interview 12, *supra* note 294; Telephone Interview 16, *supra* note 299; Telephone Interview 19, *supra* note 288.

⁴²¹ Figure 18.

⁴²² *Id.*

In addition, the trial date remains the star by which virtually every case is navigated. The survey results on this statement reinforce the continuing obsession with a trial date as being the driver of case progress, notwithstanding the overall lack of trials.⁴²³ Large law firms bill by the hour for substantial discovery based-processes, and plaintiffs have shifted to litigation consortia and committees. Yet, as observed by Professor Tidmarsh, four fifths of cases entering the litigation process resolve without trial⁴²⁴:

[O]ur procedural system is structured around the belief that a case will be resolved at a culminating, all-issues jury trial. A fair question is to ask whether the entire procedural system should be designed around that most rare occurrence, the vanishing jury trial. If form follows function, a procedural system designed to develop the types of information useful to settlement or summary disposition, and to structure the litigation process in stages most conducive to settlement or summary disposition, is more logical.⁴²⁵

Every judge interviewed described the essential role trial dates play in managing cases, while at the same time acknowledging how few cases actually go to trial.⁴²⁶

3. PHILOSOPHICAL OPPOSITION

One of the unique challenges to courts as an enterprise is the nature of the organizational relationship between judges. In terms of institutional design, most local courts have a chief judge, and state judicial branches are run by the Chief Justice.⁴²⁷ There are generally Administrative Judges that run specific divisions within a circuit—such as Civil, Felony, and Juvenile.⁴²⁸ However, these leaders do not have the authority generally to select or fire judges and they do

⁴²³ Steelman, *supra* note 93, at 159–60.

⁴²⁴ *Id.* at 549.

⁴²⁵ Tidmarsh, *Pound's Century*, *supra* note 1, at 549.

⁴²⁶ See, e.g., Telephone Interview 2, *supra* note 282; Telephone Interview 11, *supra* note 282; Telephone Interview 12, *supra* note 294; Telephone Interview 16, *supra* note 299; Telephone Interview 19, *supra* note 288.

⁴²⁷ OPPAGA REPORT, *supra* note 203, at 2–3.

⁴²⁸ *Id.*

not have the authority to offer any kind of pay incentive or penalty—the type of hiring, firing, incentives and threats that run the private sector.⁴²⁹ Judge Posner, discussing what judges maximize, points out that judicial salaries can neither be lowered nor raised based on performance.⁴³⁰ Posner identifies other elements that can affect judicial behavior: popularity, prestige, public interest, and reputation.⁴³¹ However, there are no direct consequences for stellar or poor performance.⁴³² The individual judge's boss is the taxpayer and the voter.⁴³³ The taxpayer pays salaries.⁴³⁴ The voter, in states such as Florida which have elections, determines whether a judge keeps his or her job if opposition is filed.⁴³⁵

As a result, the interviewed judges expressed that individual judges frequently assert their independence as elected constitutional judicial officers when asked or instructed by their Chief Justices, their Chief Judges in their circuit, or their Administrative Judge to follow certain procedures.⁴³⁶ Furthermore, interviewed judges indicated that judges may reject case management as inconsistent with their judicial philosophy based on a view that the job belongs either to the lawyers or administration. One judge interviewed estimated that forty to fifty percent (40% to 50%) of judges assigned to civil dockets think case management is an administrative function as opposed to the judge's job,⁴³⁷ although the survey respondents roundly rejected this view.⁴³⁸ While inconsistent with the previous survey results, the estimate is consistent with the minimal utilization of civil

⁴²⁹ See generally Richard A. Posner, *What Do Judges and Justices Maximize (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

⁴³⁰ See *id.* at 4–5.

⁴³¹ *Id.* at 13–15. Though an article from the perspective of federal appellate judges, the concepts raised are arguably analogous to judicial behavior in the trial judge context.

⁴³² *Id.* at 4–5.

⁴³³ See *id.* at 13; Stephen J. Choi et al., *Are Judges Overpaid?: A Skeptical Response to the Judicial Salary Debate*, 1 J. LEGAL ANALYSIS 47, 63, 94 n.110. (2009).

⁴³⁴ Cf. *id.* at 62–63.

⁴³⁵ See *id.* at 94 n.110.

⁴³⁶ See, e.g., Telephone Interview 5, *supra* note 367; Telephone Interview 9, *supra* note 288.

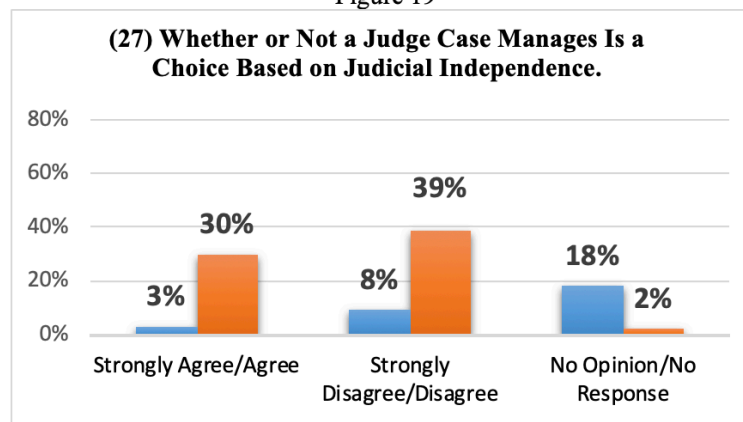
⁴³⁷ Telephone Interview 13, *supra* note 267.

⁴³⁸ See *supra* Figure 8.

case management across not only the state, but also other jurisdictions.⁴³⁹

Most of the interviewed judges felt that the philosophy argument was a relic of a bygone era, and that judges understand that case management is part of the job but simply don't see the incentive or means to engage. Many interviewed judges characterized this approach in essentially the following way: why should I care if they don't care? It's their case.⁴⁴⁰ One said that "many judges have the attitude [of] just let me do my calendar for that day, get on with it, and go home."⁴⁴¹ However, the large majority of interviewed judges rejected that attitude, with one judge stating that judicial philosophy is just an "excuse."⁴⁴² Another judge stated the following: "I do not agree with the 'just the umpire' view. I am the umpire when it comes to decision making and rulings, but I am the manager when it comes to moving the case."⁴⁴³

Figure 19



While forty-seven (47%) of judges disagree with this statement, which suggests the view that case management is not optional

⁴³⁹ Cf. Gensler, *Caught in the Crossfire*, *supra* note 73, at 727 n.256 (citing Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 96–97 (2009)); CJI REPORT, *supra* note 32, at 4–5, 12.

⁴⁴⁰ See, e.g., Telephone Interview with Anonymous Judge 7 (transcript on file with the University of Miami Law Review) [hereinafter Telephone Interview 7]; Telephone Interview 12, *supra* note 294; Telephone Interview 16, *supra* note 299; Telephone Interview 17, *supra* note 282; Telephone Interview 20, *supra* note 294.

⁴⁴¹ Telephone Interview 3, *supra* note 294.

⁴⁴² Telephone Interview with Anonymous Judge 8 (transcript on file with the University of Miami Law Review) [hereinafter Telephone Interview 8].

⁴⁴³ Telephone Interview 2, *supra* note 282.

as a matter of judicial independence;⁴⁴⁴ there is a sizable no opinion response. A solid thirty-three percent (33%) minority agrees that the decision to case manage is an issue of judicial independence. Combined with eighteen percent (18%) who expressed no opinion, these responses evidence a fifty-one to forty-eight (51-48) split.⁴⁴⁵ This split is difficult to reconcile with the prior strong responses to the overall questions about case management as part of the judge's job.⁴⁴⁶ It is equally difficult to reconcile with mandates contained in the Florida Rules of Civil Procedure and Florida Rules of Judicial Administration.⁴⁴⁷ Interestingly, new judges agreed with this broad statement of independence at a rate twenty points higher than any other data subset.

The challenge of this survey response may reflect not only some of the definitional and scope issues about case management previously referenced,⁴⁴⁸ but also how courts define judicial independence. As one interviewed judge stated, "judicial independence is how you decide the issues, not how you move cases."⁴⁴⁹ Overall, interviewed judges pointed out that being part of a court *system* suggested that how cases move through that system should not significantly deviate from standards and norms simply because of the philosophy of which judge is assigned a case by blind-filing. Some spoke more harshly: "Judicial independence is an excuse that justifies nothing but laziness. Part of our job and part of our oath is that we will work to maximize efficiency [and] maximize service to the folks who pay our salaries, the citizens of our counties."⁴⁵⁰

The negative response may be magnified by the degree to which case management currently depends on the individual processes of individual judges, as opposed to broad frameworks of structure and support within civil courts among the circuits. Virtually every trial court administrator across the circuits responded that there was a lack of a systemic case management framework, and case manage-

⁴⁴⁴ Figure 19.

⁴⁴⁵ *Id.*

⁴⁴⁶ *See, e.g., supra* Figure 8.

⁴⁴⁷ FLA. R. CIV. P. 1.010; FLA. R. JUD. ADMIN. 2.545(a).

⁴⁴⁸ *See supra* Section IV.C.2.

⁴⁴⁹ Telephone Interview 14, *supra* note 282.

⁴⁵⁰ Telephone Interview 8, *supra* note 442.

ment was up to the individual judge. Without staff support, technology support, and a systemic framework, it is understandable that judges would see this as a discretionary choice.⁴⁵¹

During the interview process, several judges pointed out the systemic contrast with criminal felony assignments. Although judges seldom think of the process in this manner, criminal court is very case management oriented from arrest forward: constitutional guarantees of first appearance, bond, statutory arraignment timeframes, speedy trial.⁴⁵² All of these features give a preexisting structure to criminal cases in which they always have an upcoming future date and specific events occur on deadlines.⁴⁵³ It is extremely rare for any judge to question the criminal court structure in their circuit, in particular due to the complexities of the timelines as well as the need to coordinate with other stakeholders: state attorneys, public defenders or criminal counsel, jail/corrections to bring the defendant to court, and law enforcement agencies to coordinate and provide testimony/evidence etc.⁴⁵⁴ As the interviewed judges pointed out, judges who see civil case management as a discretionary function of judicial independence do not even think about that independence in the criminal context.⁴⁵⁵ This suggests that a supportive framework that assists the case management execution is critical to systemic improvement. If courts are going to ask judges to handle all civil case management on their own, then it is likely judges will view those choices as individual, discretionary, and optional—in other words, based on judicial independence.

Furthermore, many of the interviewed judges emphasized the need for strong leadership and support to incentivize civil case management adoption. One of the points they repeatedly raised was that, while the time standards have been embedded in the Florida Rules of Judicial Administration for decades,⁴⁵⁶ there is no accountability

⁴⁵¹ See generally OPPAGA REPORT, *supra* note 203, at 4–18.

⁴⁵² See *supra* notes 301–05 and accompanying text; see also Telephone Interview 1, *supra* note 282; Telephone Interview 11, *supra* note 282; Telephone Interview 13, *supra* note 267; Telephone Interview 20, *supra* note 294.

⁴⁵³ *Id.*

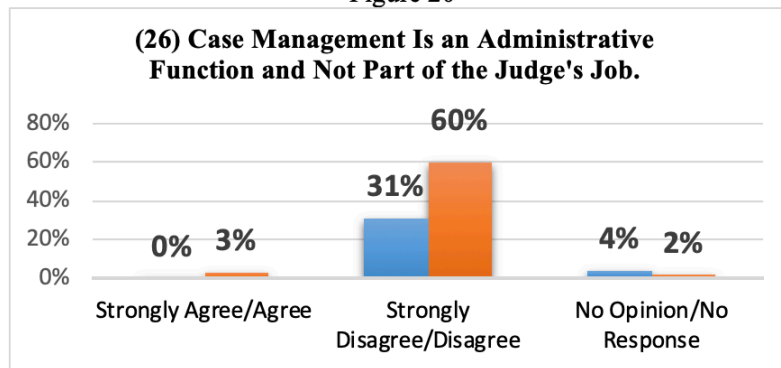
⁴⁵⁴ See, e.g., Telephone Interview 1, *supra* note 282; Telephone Interview 11, *supra* note 282; Telephone Interview 18, *supra* note 299; Telephone Interview 20, *supra* note 294.

⁴⁵⁵ See *supra* notes 301–05 and accompanying text.

⁴⁵⁶ FLA. R. JUD. ADMIN. 2.250(a).

for the time standards and there is no mandate for compliance.⁴⁵⁷ However, the loosely-coupled character of court organization—in other words, no direct boss—makes it difficult to mandate change. As one judge stated, “you cannot force anyone if they view their job selfishly, themselves first, prioritizing convenience and minimizing work.”⁴⁵⁸ Judge Posner’s article on what judges maximize also includes an interesting discussion about the influence that leisure-seeking has on judicial behavior, which he defines as an “aversion to any sort of ‘hassle,’ as well as to sheer hard work.”⁴⁵⁹ Similarly, leisure-seeking behavior was the subject of critical comment by interviewed judges with regard to judges who disregard their case management responsibilities.⁴⁶⁰

Figure 20



No judges strongly agreed with this statement, and only a few agreed.⁴⁶¹ Of those that agreed, nine percent (9%) of judges with zero to three years’ experience made up the largest presence. Still, eighty-seven percent (87%) of those new judges disagreed. Disagreement was strong across all data subsets, which is consistent with earlier questions and establishes awareness of case management and that it is, in fact, part of the judicial task.⁴⁶² While interviewed judges felt that many used this excuse to justify avoiding responsibility for

⁴⁵⁷ See, e.g., Telephone Interview 3, *supra* note 294; Telephone Interview 12, *supra* note 294.

⁴⁵⁸ Telephone Interview 10, *supra* note 282.

⁴⁵⁹ Posner, *supra* note 429, at 20.

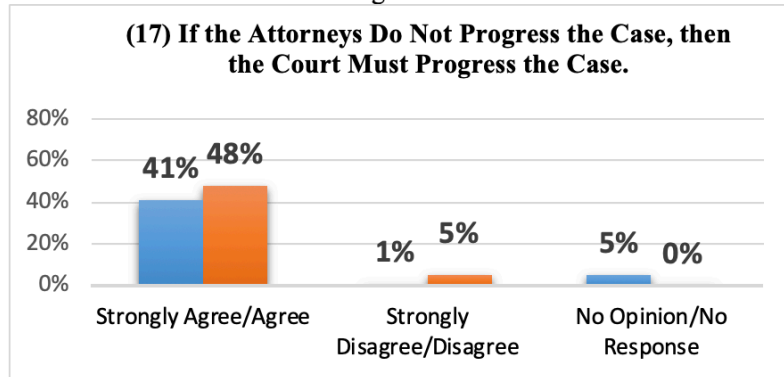
⁴⁶⁰ See, e.g., Telephone Interview 13, *supra* note 267; Telephone Interview 19, *supra* note 288; Telephone Interview 20, *supra* note 294.

⁴⁶¹ Figure 20.

⁴⁶² See, e.g., *supra* Figure 8.

case managing,⁴⁶³ the survey respondents rejected such an assertion.⁴⁶⁴

Figure 21



The fact that eighty-nine percent (89%) of judges agreed with this statement⁴⁶⁵ establishes a clear consensus on the least controversial case management approach: reactive case management to get the case moving in the face of inactivity. This sort of case management can occur through a lack of prosecution notice, a case management conference being set by the court after inactivity of a specific duration, or requiring other action to be taken.⁴⁶⁶ This issue has implications not only for contested matters, but also for uncontested matters that may frequently lose the attention of the prosecuting firm and languish.⁴⁶⁷ This is the basic level of case management, which the vast majority of judges who do undertake case management understand the best and are most comfortable with exercising. However, the results do show there is still a core group of six percent (6%) or so of judges that clings to the traditional deferential approach,⁴⁶⁸ where the case belongs to the lawyers to progress or fail

⁴⁶³ See, e.g., Telephone Interview 13, *supra* note 267.

⁴⁶⁴ See Figure 20.

⁴⁶⁵ Figure 21.

⁴⁶⁶ See KAKALIK ET AL., *supra* note 79, at 1; Gensler, *Caught in the Crossfire*, *supra* note 73, at 734; Nagareda, *supra* note 10, at 672–73.

⁴⁶⁷ CJI REPORT, *supra* note 32, at 35.

⁴⁶⁸ Figure 21.

to progress as they see fit.⁴⁶⁹ As one judicial branch leader acknowledged that there is genuine disagreement about what role the judge should play and how far the judge should go:

Everybody in Florida understands time standards and is aware of case management, that the judge has to be involved in the management of the case, and that judges don't just call balls and strikes. For justice to be relevant, just, and fair, that means timeliness A docket is a pipeline. You have to keep current or everything gets saturated and just stops.⁴⁷⁰

Another judge pointed out that this is a public trust and confidence issue: people need timely results to trust the judiciary.⁴⁷¹

The results of the statements discussed in this Section demonstrate a wealth of good intentions on the part of the bench: most judges understand what their obligations are in terms of providing access and timely resolutions. However, the results also demonstrate the ambiguity that exists regarding how those goals are accomplished and the environment in which the court's business is conducted.

4. CROSS-INCENTIVES: ELECTIONS AND RELATIONSHIPS WITH THE BAR

When asked about the factors, interviewed judges spoke strongly about the current court system and the factors of cross-incentives, institutional inertia, and lack of support. The subject of cross-incentives is a challenging inquiry. The prior interviews and results evidence that judges do not trust parties to timely move cases to resolution.⁴⁷² At the same time, judges in Florida come to the

⁴⁶⁹ Freer, *supra* note 8, at 1510, 1517; Molot, *supra* note 108, at 29; Baicker-McKee, *supra* note 109, at 382–83.

⁴⁷⁰ Telephone Interview 14, *supra* note 282.

⁴⁷¹ Telephone Interview 1, *supra* note 282.

⁴⁷² *See, e.g.*, Figures 4, 9 & 18.

bench by appointment or election, and must thereafter stand for election every six years.⁴⁷³ A judge will be re-elected without opposition if no candidate files to run against him or her.⁴⁷⁴ Unopposition can be a result of judicial reputation or perceived community support liable to generate significant campaign contributions.⁴⁷⁵

The survey results do reflect a willingness of many judges to acknowledge these concerns. However, the high level of no-opinion responses to the inquiries about cross-incentives appear to implicate a reluctance to acknowledge basic concerns that are repeatedly voiced when judges talk “off the record” about case management pros and cons. To be frank, the survey statements were intentionally framed as an attempt to assess what judges thought attorneys believed, which leaves open the opportunity for judges to abdicate, professing that they are not in position to assess attorney opinion. However, this discomfort was not evident in other parts of the survey, as the level of no opinion responses regarding these factors were significantly higher than those in response to other questions about what lawyers and parties do or think. These concerns potentially implicate self-interest, which may be why judges are reluctant to acknowledge them. The high level of “no opinion” responses to these statements suggests that the responding judges profess complete indifference to personal and professional consequences in contemplating case management. However, as noted by Judge Posner, “[p]olitics, personal friendships, ideology, and pure serendipity play too large a role in the appointment of . . . judges to warrant treating the judiciary as a collection of sainted genius-heroes miraculously

⁴⁷³ CONSTITUTIONAL JUDICIARY COMM., FLA. BAR, GUIDE FOR FLORIDA VOTERS: ANSWERS TO YOUR QUESTIONS ABOUT FLORIDA JUDGES, JUDICIAL ELECTIONS, AND MERIT RETENTION 6 (2018), <https://www-media.floridabar.org/uploads/2018/06/2018-Guide-for-Florida-Voters.pdf>.

⁴⁷⁴ FLA. STAT. § 105.051 (2018). *See generally, e.g.*, Dave Berman, *11 Incumbent Circuit Court, County Court Judges Win Re-Election Without Opposition*, FLA. TODAY (May 14, 2018, 3:44 PM), <https://www.floridatoday.com/story/news/local/2018/05/14/11-incumbent-circuit-county-court-judges-winn-re-election-unopposed/606784002/>.

⁴⁷⁵ *See* Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL’Y REV. 301, 374–75 (2003).

immune to the tug of self-interest.”⁴⁷⁶ While integrity, honesty, candor, intellect, fidelity, and honor shape the vast majority of judicial conduct, we should not be so naïve or self-congratulatory as to deny the shadows of fear, laziness, greed, ego, ambition, and power in the judiciary.

These statements asked about potential influences or bias that some judges may want to pretend do not exist, but are evident in public and bar perceptions about why judges fail to case manage.⁴⁷⁷ Interviewed judges acknowledged the concerning reality of cross-incentives and acknowledged that they make a deliberate choice to ignore pressures from the bar, their colleagues, and local court culture. They acknowledged the reality of push back from lawyers, which was also evident in the survey responses. One judge, a strong case manager, openly acknowledged that she is able to wield a firm case management approach because the majority of lawyers who litigate before her come from a neighboring urban area outside her circuit—so they cannot vote against her or run against her.⁴⁷⁸

In 2015, professional court manager Alexander Aikman wrote an unusually forthright article about the lack of utilization of case management.⁴⁷⁹ Aikman was blunt about this factor:

Some judges believe that if they seek to shorten the time to disposition and do not grant the ‘standard’ continuance time—or whatever time the attorneys request—they risk being contested at the next election The risks of a contest and losing are too great to save a few days here and there.⁴⁸⁰

In addition, judges are constantly asked to enforce rules against the attorneys whom they must rely upon for public support in the event of an election. These same lawyers are the lawyers who many judges generally believe exploit the legal process based upon the survey questions discussed above. Further, lawyers have financial

⁴⁷⁶ RICHARD A. POSNER, *OVERCOMING LAW* 110 (1995) (discussing appointment of federal judges).

⁴⁷⁷ *See, e.g.*, Aikman, *supra* note 280, at 10.

⁴⁷⁸ Telephone Interview 19, *supra* note 288.

⁴⁷⁹ Aikman, *supra* note 280.

⁴⁸⁰ *Id.* at 10.

incentives in how they handle cases.⁴⁸¹ As previous scholars have noted, “[t]he discovery-based processes of modern litigation have been conducive to the growth of large law firms and hourly billing. American litigators prefer to leave no stone unturned, provided, of course, they can charge by the stone.”⁴⁸²

Some interviewed judges felt that the identified cross-incentives—concern about attorney attitudes, perceptions of being a threat to fees, bar polls, election opposition or elevation—were a motivating consideration for only a minority of judges. One estimated that minority to be around ten to fifteen percent (10% to 15%).⁴⁸³ Across the board, judges said that there are lawyers who don’t like case management, and that judges can experience push back. Further, interviewed judges attributed the resistance to rejection of any kind of change, while others felt more self-interest was involved. As one judge state, “they want to run on their time clock and billable hours. Billable hours play a significant role in why cases drag on and on, and are a significant concern to me.”⁴⁸⁴ One judge said point blank, “you case manage, you are going to be unpopular. Lawyers would rather be in charge. Participatory/directive judges are all accused of ‘micromanaging.’”⁴⁸⁵ Interestingly, this judge hailed from the only circuit in Florida that reports institutionalized case management—the Twentieth Circuit—in which one might expect that universal adoption should have prevented differences in judicial case management deployment.

The interviewed judges all agreed that these cross-incentives should never be a consideration, but also felt that judges who did not acknowledge that they were aware of these concerns were not being forthright. The point, the interviewees said, is to realize the concern but then deliberately set it aside in the decisions about how to run the docket. They generally felt that the advantages of court case management would become apparent to naysayer attorneys once they experienced the benefits. The consistently high level of no opinion responses to statements about this factor underscores the

⁴⁸¹ Aikman, *supra* note 280, at 10; Gensler, *Caught in the Crossfire*, *supra* note 73, at 734; Tidmarsh, *Pound’s Century*, *supra* note 1, at 524.

⁴⁸² Langbein, *supra* note 12, at 550 (quoting Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 635 (1985)).

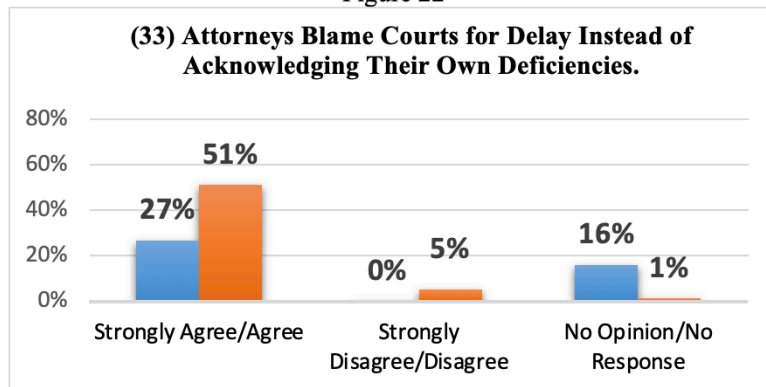
⁴⁸³ Telephone Interview 20, *supra* note 294.

⁴⁸⁴ Telephone Interview 19, *supra* note 288.

⁴⁸⁵ Telephone Interview 18, *supra* note 299.

problem of ambivalence: judges *know* there are issues of cost, delay, and process manipulation and they *know* that they cannot rely on the parties and litigants to solve those issues; yet, they step back from acknowledging their mandated role in solutions. They don't trust the lawyers to move the cases, but may be reluctant to examine what may influence attorney interaction on case management.

Figure 22



This statement was designed to test the judges' sensitivity to the court's reputation for delay. If there is general consensus that litigants do not reliably progress cases,⁴⁸⁶ who is getting blamed? The results show that a large majority of judges believe that the court is blamed. Seventy-eight percent (78%) of judges agreed with this statement, with only five percent (5%) disagreeing and sixteen percent (16%) professing no opinion.⁴⁸⁷

Interviewed judges agreed that there is a "disconnect" between lawyers and clients. According to the interviewed judges, there is delay and resistance to case management on the part of lawyers that their clients do not know about and would not agree with if it meant their cases would move faster. As one judge described it, the problem with the view that the "cases belong to the litigants and if they don't care, I don't care," is that the litigants may actually care but that is not being conveyed to or recognized by the judge.⁴⁸⁸ Others point out that many lawyers don't understand that the court has an obligation to move cases, have never heard of or read the Florida Rules of Judicial Administration, and are almost certainly unaware

⁴⁸⁶ See, e.g., *supra* Figure 8.

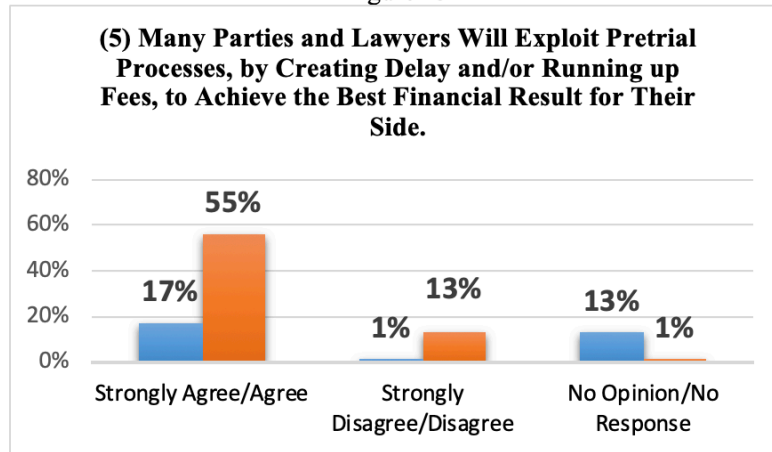
⁴⁸⁷ Figure 22.

⁴⁸⁸ Telephone Interview 7, *supra* note 440.

of the time standards.⁴⁸⁹ In the meantime, one judge expressed the sentiment that the bar throws courts under the bus, telling clients it's the court when delay is due to lawyers' laziness or lack of attention to the case, or too much work, or due to billing motivations. Interviewed judges seemed to agree with Professor Gensler that "[a] sure first step in using culture change to control costs in discovery would be simply to get lawyers to abide by their existing rules-based and ethical duties."⁴⁹⁰

As a public trust and confidence measure, experience has shown that judges have no idea of and no control over the explanations offered by lawyers to clients as to the reasons for delays or what expectations have been created. However, if a case management order is issued at an early stage of the case, the court has set out a clear path, created clear expectations, and made a promise to litigants about what it plans to do with the case, as opposed to the open no-end-in-sight ad hoc procedures without some form of court case management.

Figure 23



Nearly three quarters, or seventy-two percent (72%), of responding judges agreed with this statement.⁴⁹¹ Only fourteen percent (14%) disagreed.⁴⁹² Another fourteen (14%) did not opine, which again evidences judicial ambivalence about acknowledging or confronting process exploitation. The data subset group of small circuits

⁴⁸⁹ Telephone Interview 21, *supra* note 282.

⁴⁹⁰ Gensler, *Caught in the Crossfire*, *supra* note 73, at 735.

⁴⁹¹ Figure 23.

⁴⁹² *Id.*

showed the least amount of agreement, with sixty percent (60%) of smaller circuits agreeing, while the balance of circuits and experience levels ertr in general consensus.

The impact of this perception was strongly ratified by interviewed judges, with one judge stating that “civil cases just languish because lawyers are billing by the hour . . . the legislature believes that the bar and the judges are in a conspiracy.”⁴⁹³ Several judges commented on some attorneys who delay for strategic advantage, and specifically referenced that such conduct violates of a line in the Florida Bar’s Oath of Admission, which all those admitted to the Florida Bar must pledge: “I will never . . . delay anyone’s cause for lucre or malice.”⁴⁹⁴ As one commentator noted, “[r]eforming procedural systems is not an easy task. Expectations about litigation become settled, and the status quo becomes reinforced by the hundred thousand lawyers who do quite well under the present system.”⁴⁹⁵ Many interviewed judges agreed with other commentators, as well as members of the bar, that the conduct of litigation frequently imitates that of “spoiled children”, with courts being required to provide “adult supervision.”⁴⁹⁶

But what to do about it? Having recognized the risk of exploitation by the attorneys, the next questions were designed to test judge’s views of case management as a response to prevent such manipulation. These responses were particularly interesting in that all had a very high “no opinion” responses—implying that judges either prefer not to speculate on attorneys’ views or refuse to

⁴⁹³ Telephone Interview 21, *supra* note 282.

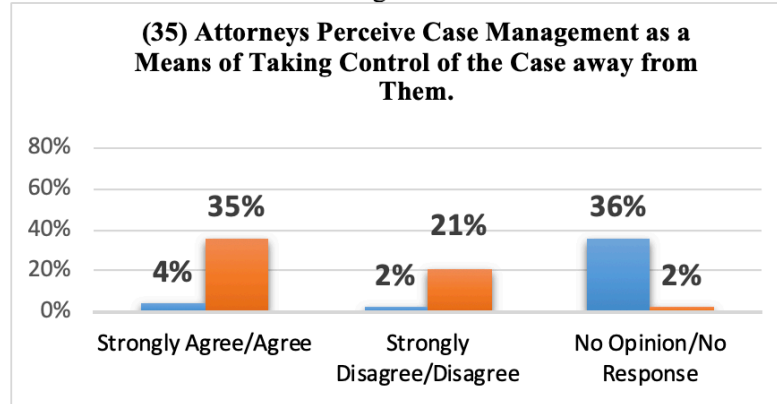
⁴⁹⁴ In Re: Oath of Admission to the Florida Bar, SC11-1702 (Sept. 12, 2011) (adding a civility requirement to the Oath of Admission to the Florida Bar). *See, e.g.*, Telephone Interview 2, *supra* note 282; Telephone Interview 7, *supra* note 440; Telephone Interview 8, *supra* note 442; Telephone Interview 12, *supra* note 294.

⁴⁹⁵ Tidmarsh, *Pound’s Century*, *supra* note 1, at 516.

⁴⁹⁶ Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—and the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 213 (2007); Gensler, *Caught in the Crossfire*, *supra* note 73, at 734.

acknowledge these views. In the following statements, roughly one-third of responding judges confronted these issues head-on.

Figure 24



This statement was designed to start drawing out the cross-incentives that are routine anecdotal impediments to case management. The equivocal responses of no opinion were high, at thirty-six percent (36%).⁴⁹⁷ The agreement level, at thirty-nine percent (39%), evidences judicial awareness that attorneys can experience court case management as threatening their unilateral control over case pace.⁴⁹⁸ The twenty-three percent (23%) disagreement level suggests that a minority of judges take the view that attorneys are not threatened by case management.⁴⁹⁹ Agreement was most strongly expressed in large (38%) and very large (47%) circuits and experienced judges of eighteen plus years (45%).

Interviewed judges repeatedly stressed that attorney case management resistance reflected attorney desire to keep control of case progress despite clear rule mandates for court responsibility. “Judges are afraid of being accused of being too proactive and of drawing opposition at election time. Judges are afraid that if they dig into cases they will be perceived as haughty,” said one judge.⁵⁰⁰ Part of this concern may stem from a lack of consistency among case management approaches among judges, as discussed above.⁵⁰¹ The same judge continued, “Judges who case manage are appreciated. If

⁴⁹⁷ Figure 24.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.*

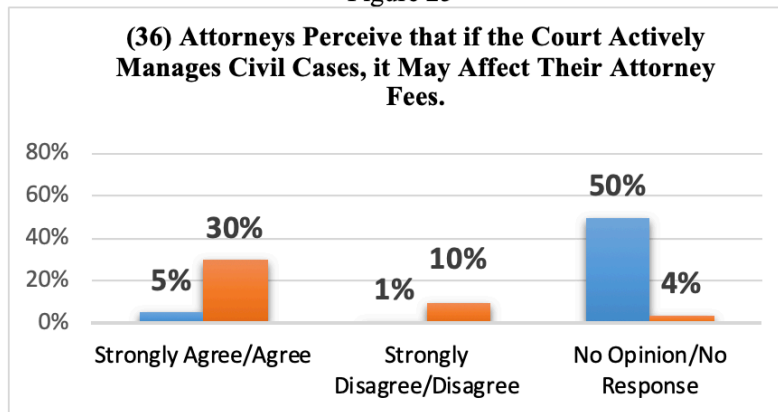
⁵⁰⁰ Telephone Interview 8, *supra* note 442.

⁵⁰¹ *See supra* Part II.

case management is done properly, it is not an issue.”⁵⁰² Attorney experience with state court case management is limited, based on the interviews and the trial court administrator information. Predictability and consistency could allay these concerns, particularly as part of a structured, systemic approach. The high no opinion rate indicates a reluctance to address these issues.

Another factor that complicates civil court case management identified throughout the interviews is the obsessive need for a trial date. Most judges pointed out that many cases are noticed for trial with no relationship to case readiness, but simply to get a trial date, and then expect a continuance if (frequently when) the case is not ready. Many expressed chagrin at the difficulty of attempting to persuade lawyers that there are effective means of organizing deadlines in a case without issuing a largely fictitious trial date. Attorneys are comfortable with the court case managing via trial order, because then they can trigger the process by noticing the case for trial even if they plan to seek continuances. They may perceive more transparent proactive case management from inception as a threat, according to the interviews overall, because of the advanced planning required as opposed to working backwards from a traditional trial order-created case management structure.

Figure 25



This statement was designed to continue pursuing the cross-incentive “anecdota.” With thirty-five percent (35%) of judges agreeing, it is clear that a sizable minority of judges recognize attorney

⁵⁰² *Id.*

apprehension and pecuniary interests as a case management consideration.⁵⁰³ Only eleven percent (11%) disagreed with this statement, which speaks to a level of consciousness about this concern.⁵⁰⁴ However, fifty percent (50%) professed no opinion on the topic.⁵⁰⁵ For clients, the most expensive cost in a case is typically attorney fees. The strong no opinion response here demonstrates possible reluctance to acknowledge the inherent tension between lawyers, who earn their living by attorneys fees, and clients, who want to minimize those fees as much as possible while achieving their sought-after result. This question was designed to test whether judges believe that attorneys see case management as a threat to their living. If case management is promoted to reduce cost, then that cost would include unnecessary attorney fees.

Many judges may also be unaware of growing pressure on traditional fee structures. Alternative fee arrangements are growing as clients responded to the cost issue in civil courts.⁵⁰⁶ Legal process outsourcing, whether domestic or offshore, as well as technological innovation in document review has been a reliable source of billable hours and is changing business structures within the legal practice.⁵⁰⁷ A 2011 report by the Association of Corporate Counsel defined savings as a “reduction in historical spending patterns with same or better outcomes.”⁵⁰⁸ To achieve that goal would draw business for firms, although potentially limiting fees in any single case.

⁵⁰³ Figure 25.

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

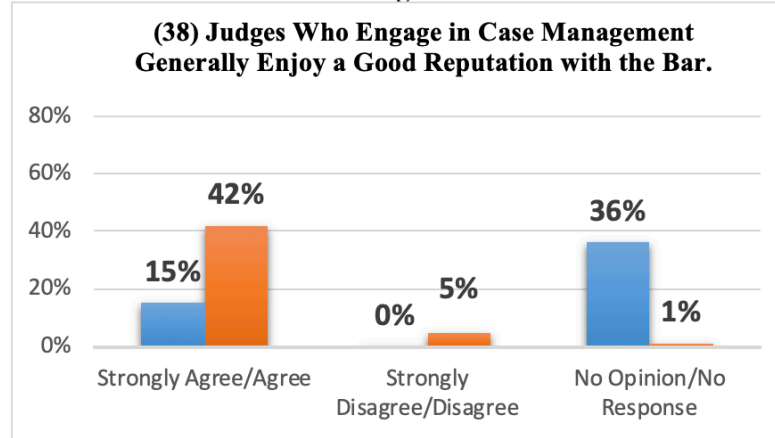
⁵⁰⁶ A 2010 study cited by RAND found that ninety-five percent (95%) of the surveyed firms used some form of alternative fee arrangements, sixty percent (60%) of which were used because clients demanded it. Seventy-eight percent (78%) reported that non-hourly billing was a permanent fixture. MICHAEL D. GREENBERG & GEOFFREY MCGOVERN, RAND INST. FOR CIVIL JUSTICE, AN EARLY ASSESSMENT OF THE CIVIL JUSTICE SYSTEM AFTER THE FINANCIAL CRISIS 34 (2012), https://www.rand.org/content/dam/rand/pubs/occasional_papers/2012/RAND_OP353.pdf.

⁵⁰⁷ *Id.* at 36. In 2010, Thompson Reuters bought the largest Indian legal outsourcing provider, Pangea3. The authors point out that the “combination of traditional legal services and LPO services could dramatically alter the way in which many legal services are provided to the business community.” *Id.*

⁵⁰⁸ FREDERICK PAULMANN, ASS'N OF CORP. COUNSEL, MANAGING VALUE-BASED RELATIONSHIPS WITH OUTSIDE COUNSEL 29 (2011), <http://www.counselmgmtgroup.com/wp-content/uploads/2014/10/Managing-Value-Based-Relationships-with-Outside-Counsel-1.pdf>.

The failure of law firms to recognize utility and business opportunities in the predictability and consistency of civil case management and instead focus on short-term perceived risks demonstrates the same cultural failings that courts face.⁵⁰⁹

Figure 26



While fifty-seven percent (57%) of judges believe that there is a reputational benefit to case management, thirty-six percent (36%) have no opinion.⁵¹⁰ This suggests that while a wide swath of the bench is currently unconvinced, they are still convincible. Judges in very large circuits strongly agreed at a rate fifteen points higher than other circuit types. To some extent, this may be impacted by the power of reputation in large circuits, as the size of the circuit bench reduces the individual attorney's knowledge and repeat experiences with an individual judge.

Interviewed judges all believed that case management enhances a judge's reputation. There was solid consensus that case management paid dividends in terms of reputation. Judges generally felt that as long as case management was conducted in a collaborative, non-dictatorial fashion, lawyers accept and welcome it. One judge stated that lawyers and litigants "just want to know about what's going to happen."⁵¹¹ Another stated that "judges who are predictable, consistent, strong case managers are more successful and popular. Judges who are reactive and situational are less so because lawyers

⁵⁰⁹ See, e.g., Telephone Interview 10, *supra* note 282.

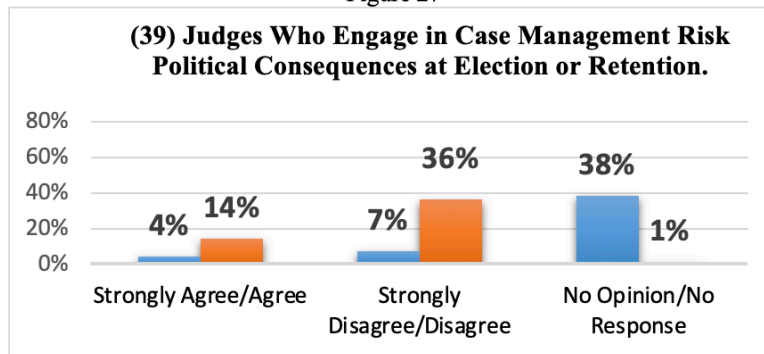
⁵¹⁰ Figure 26.

⁵¹¹ Telephone Interview 4, *supra* note 166.

don't know what they will do."⁵¹² Another acknowledged that while judges "all think about bar polls," it is important to do "stuff for the right reasons and . . . the respectful way," which includes "recognizing [that some] cases . . . need more managing."⁵¹³

One of the most significant reputational consequences of case management is the ability to solve the problem of access. Interviewed judges all emphasized that using case management to set and enforce deadlines, monitor compliance, and prioritize workload resulted in more open hearing time and easier access as matters resolved. The biggest complaint from parties and lawyers reflected in the trial court administrator responses and by interviews was access: waiting too long for hearing time. In other words, long delays result in bad reputations. Across the board, interviewed judges agreed that case management provided swift and predictable access to hearing time at critical points. Across the country, state court judges who proactively case manage a civil docket are convinced it reaps significant reputational benefits.⁵¹⁴

Figure 27



Eighteen percent (18%) of judges associate case management with political risk.⁵¹⁵ Combined with the thirty-eight percent (38%) who profess no opinion, it amounts to a total of fifty-six percent (56%) of the responding judges.⁵¹⁶ The strongest level of agreement

⁵¹² Telephone Interview 13, *supra* note 267.

⁵¹³ Telephone Interview 1, *supra* note 282.

⁵¹⁴ CJI REPORT, *supra* note 32; David Prince, *A New Model for Civil Case Management: Efficacy Through Intrinsic Engagement*, 50 CT. REV. 174, 188 (2015).

⁵¹⁵ Figure 27.

⁵¹⁶ *Id.*

came from brand new judges with zero to three years experience, who agreed twelve points higher than any other subset. In contrast, the strongest disagreement level came from judges with three to six years experience, who disagreed at a rate nineteen points higher than other subsets.

There may be some bias in these answers, in terms of a threat that judges are reluctant to acknowledge. As one judge said, “it’s not expressly a concern, but impliedly and inherently it’s a concern, attorney by attorney. It is an elected position. You don’t want to piss people off. It is a thought in the back of people’s minds.”⁵¹⁷ Another judge compared it to the combination of water and electricity—judges and lawyers seek the path of least resistance: “When you are faced with an agreed motion to continue, it’s not pleasant to say no.”⁵¹⁸ The judge went on to say that lawyers may react differently than their clients; clients want their cases resolved and may accept rejection of an agreed continuance and insistence on a firm trial date more enthusiastically than their lawyers who agreed to the continuance.⁵¹⁹ Another judge felt that cross-incentives play a role close to election times: “Judges don’t want to needlessly make enemies. Unless there are significant problems in a case, you try not to offend anyone.”⁵²⁰

Again, there is a high amount of no opinion responses, which indicates that, although the concerns are real and omnipresent according to the judges interviewed, there is a reluctance to acknowledge these concerns. If courts are to effectively use case management, how can court leaders effectively address these cross-incentives if many judges cling to the pretext that they do not exist?⁵²¹ One solution would be to deploy a structured case management system across the civil docket, so that no single judge would

⁵¹⁷ Telephone Interview 21, *supra* note 282.

⁵¹⁸ Telephone Interview 16, *supra* note 299.

⁵¹⁹ *Id.*

⁵²⁰ Telephone Interview 5, *supra* note 367.

⁵²¹ The author is reminded of the scene in the film classic, *Casablanca*, in which the French police captain is forced into action at Rick’s Café because the occupying Nazis have entered the club:

Rick [Humphrey Bogart]: How can you close me up? On what grounds?

Renault [Claude Rains]: I am shocked, shocked to find that gambling is going on in here!

bear the burden of any initial resistance, and so that the consequences would be borne by the court as a whole as opposed to any single judge. Creating a systemic approach may also permit attorneys and users to have a voice in its design, which may ameliorate these potential unacknowledged barriers.

While some interviewed judges did not believe that case managing caused political consequences, they still believed that many of their colleagues do believe there is risk. This is particularly because institutional inertia has prohibited those judges from seeing the reputational dividends that case management produces.

5. INSTITUTIONAL INERTIA AND LOCAL COURT CULTURE

Judges are all members of their local circuit courts. Each has its own practices and procedures, many of which have been in place many years. These practices are frequently referred to as a “local court culture.”⁵²² Within circuits, there can be multiple geographic courthouses which may also have their own organizational practices.⁵²³

Court operations and institutional design choices made at a particular time can be influenced by geography, budget, strength of personality, competing priorities, and frequently suffer from a “set it and forget it” mentality.⁵²⁴ As a result, system architecture can become archaic without anyone’s noticing. This includes many embedded procedures, the logic of which either evaporated years ago or has been long forgotten, but is institutionalized habit. Local court culture is undergoing a significant challenge to adapt its processes to new technologies, but frequently replicates existing obsolete paper process due to the effort to continue existing operations while adapting.⁵²⁵ Local court culture poses significant challenges to court

[*a croupier approaches, hands Renault a pile of money*]

Croupier: Your winnings, sir.

Renault [sotto voce]: Oh. Thank you very much.

Renault [loudly]: Everybody out at once!

Perhaps “no opinion” judges would express similar shock that other judges are aware of cross-incentives. *CASABLANCA* (Warner Bros. Pictures 1942).

⁵²² Steelman, *supra* note 93, at 145–66; OSTROM & HANSON, *supra* note 357, at 21–25.

⁵²³ OSTROM & HANSON, *supra* note 357, at 21–25.

⁵²⁴ Steelman, *supra* note 93, at 159–60.

⁵²⁵ See OSTROM & HANSON, *supra* note 357, at 52–64.

case management due to the embedded barriers in antediluvian processes that are not examined in an organized way, because “this is how we do things.” Local court culture is frequently spread through ad hoc verbal advice about how to perform court jobs among clerks, bailiffs, judicial assistants, and even judges.⁵²⁶

However, in an age of swift technological change in which technology is increasingly integrated in every aspect of life, outmoded court processes from the last century will no longer be acceptable, particularly if all courts do is digitize them without improving them by taking advantage of new processes available through technological innovation.⁵²⁷ We live in a day in which the vast majority of people carry a computer in the palm of their hand, which is instantly linked to every other computer in everyone else’s palm as well as to most every source of information in the world. The Department of Motor Vehicles, the bureaucratic butt of a thousand jokes, better utilizes technology than the court system. One example would be online scheduling and push notifications: if one can schedule and get an automatic reminder from the DMV about an upcoming appointment, why can’t they get a reminder about a court date? Florida’s Department of Motor Vehicle has had online scheduling for driver’s license appointments for years, yet few courts in Florida offer online scheduling of court dates, instead relying on a cumbersome human system of date coordination.⁵²⁸ Courts across the country are working hard to deploy new technologies that are essential to

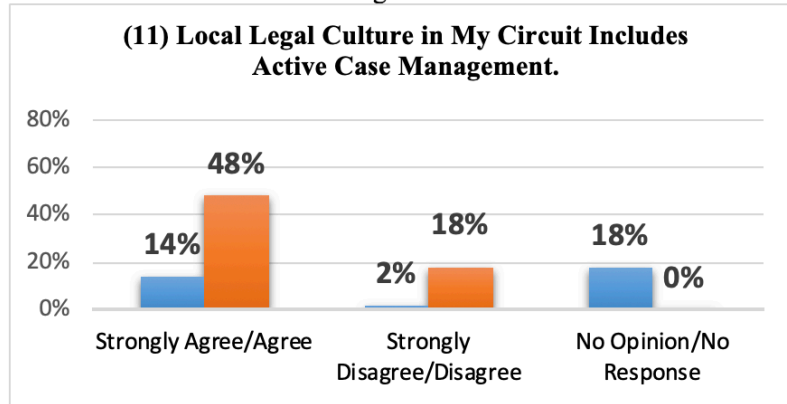
⁵²⁶ Telephone Interview 3, *supra* note 294; Telephone Interview 11, *supra* note 282; Telephone Interview 21, *supra* note 282.

⁵²⁷ JOHN M. GREACEN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., EIGHTEEN WAYS COURTS SHOULD USE TECHNOLOGY TO BETTER SERVE THEIR CUSTOMERS 1–3 (2018), http://iaals.du.edu/sites/default/files/documents/publications/eighteen_ways_courts_should_use_technology.pdf.

⁵²⁸ *Locations*, FLORIDA HIGHWAY SAFETY & MOTOR VEHICLES, <https://www.flhsmv.gov/locations/>.

meet public expectations.⁵²⁹ If courts expect to hold public trust for deciding disputes, they are going to have to do better than the DMV.

Figure 28



While a total of sixty-two percent (62%) of judges agreed or strongly agreed with this statement, there is no empirical evidence of a widespread systemic case management culture in Florida.⁵³⁰ In addition, when the interviewed judges were asked to rate their degree of civil case management activity on a scale of one to ten, ten being active case management, the judges generally rated themselves between seven and nine but rated their colleagues between two and three. Those that rated their colleagues more highly described case management in reactive terms as opposed to proactive terms.

The surveys from the TCAs confirm that no circuit has a widely used proactive case management system across its civil division. Trial court administrators reported that the degree of case management and what was entailed was up to the individual judges, and that hearings were largely set by attorneys on their timetable or at attorney request.⁵³¹

⁵²⁹ GREACEN, *supra* note 527, at 1–3.

⁵³⁰ *See* Figure 28.

⁵³¹ Eleventh Circuit TCA Response, *supra* note 242; E-mail from Gina Justice, Court Adm’r, Thirteenth Judicial Circuit of Fla., to Jennifer D. Bailey, Admin. Judge, Circuit Civil Div., Eleventh Judicial Circuit of Fla. (Oct. 10, 2017, 08:32 EST) (on file with the University of Miami Law Review); Eighteenth Circuit TCA Response, *supra* note 236; Sixth Circuit TCA Response, *supra* note 250; Twelfth Circuit TCA Response, *supra* note 246.

One indicator of a culture of case management is routine data distribution, so that delays can be identified. There is no state-wide systemic approach to data sharing that is evident from the responses from either TCAs or the interviewed judges.⁵³² The caseload data that is distributed varied from circuit to circuit and sometimes from county to county. According to the interviewed judges, data reports regarding time standards or other case management information such as age of pending caseload, time to disposition, or clearance rates are seldom provided to judges. In fact, several of the interviewed judges reported that no data reports are routinely issued to them.⁵³³ As most of the interviews indicated, information is frequently available upon request, but only upon a judicial officer's initiative. Most judges interviewed actively used available data, most frequently being the extensive use of a list of pending cases which enabled them to use dates of last activity to spot inactive cases, or lack of prosecution calendars. This data set and the corresponding actions all suggest the use of modest and reactive case management as opposed to proactive case management, which would prevent undue delay from inception. There are no reports distributed in any circuit that identify case types and controversy characteristics that would provide a means to triage cases and anticipate their needs in advance.⁵³⁴

The interviewed judges provided a wealth of insights about the role of institutional culture. One judge provided that "local court culture" starts the day new judges walk in the door and are "told this is how things are done, this is the way we do things. After day one, there is not a lot of thought that goes into whether that's the

⁵³² See *supra* Section IV.B.

⁵³³ See, e.g., Telephone Interview 3, *supra* note 294; Telephone Interview 9, *supra* note 288; Telephone Interview 13, *supra* note 267; Telephone Interview 14, *supra* note 282; Telephone Interview 18, *supra* note 299.

⁵³⁴ CJI REPORT, *supra* note 32, at 18–20, 31–32. The CJI Report (Recommendations 2, 3, and 10) reflects an approach to case management based on case need. The initial sorting of cases by identifiers of complexity as a triage was the subject of follow-up reports suggesting the use of technology to support human effort. See CIVIL JUSTICE INITIATIVE, NAT'L CTR. FOR STATE COURTS, CRITERIA FOR AUTOMATING PATHWAY TRIAGE IN CIVIL CASE PROCESSING (2017), <https://www.ncsc.org/~media/Microsites/Files/Civil-Justice/Automated%20Civil%20Triage.ashx>; See generally GREACEN, *supra* note 527.

most effective way to do things.”⁵³⁵ Another judge agreed, observing that “rookie judges” talk to old judges, new judicial assistants talk to old judicial assistants, which results in the old ways continuing to pass from generation to generation, “with a perception that other people run the system.”⁵³⁶ Noted across the interviews was the fact that even simply changing the day for a motion calendar can generate confusion and work, so many judges believe it is easier to just go along with the existing practices and traditions. Another judge described it as a “large bureaucracy, [where] . . . any kind of change is almost insurmountable.”⁵³⁷ Another judge noted that, since he or she began practice, “not much has changed other than the digital file,” and observed that “courts are definitely behind the private practice curve on technology.”⁵³⁸ One judge described the result this delay causes as “the institution is not as responsive to people as we should be.”⁵³⁹ This is supported by the previous research and data as the CJI Report specifically identified the need to take full advantage of technology for case management and litigant-court interaction, particularly with the self-represented.⁵⁴⁰

Many judges are reluctant to advocate for changes to a long-standing system. As Judge Posner points out, “there is even a cult of ordinariness in judging. Exceptionally able judges arouse suspicion of having an ‘agenda,’ that is, of wanting to be something more than just corks bobbing on waves of litigation or umpires calling balls and strikes.”⁵⁴¹ Several judges interviewed referenced difficulties in advocating case management or change. “[It is] very difficult as an individual judge in an individual division to change a culture that predominates throughout an area,” one judge ruefully observed.⁵⁴² Overall, judges reported that there may be implied disapproval of judges who do something different, ‘ruining the curve’ sort of thing. Many of the judges felt the idea that “that’s the way we’ve always done it” was not a good answer to any question.

⁵³⁵ Telephone Interview 3, *supra* note 294.

⁵³⁶ Telephone Interview 11, *supra* note 282.

⁵³⁷ Telephone Interview 5, *supra* note 367.

⁵³⁸ Telephone Interview 2, *supra* note 282.

⁵³⁹ Telephone Interview with Anonymous Judge 6 (transcript on file with the University of Miami Law Review) [hereinafter Telephone Interview 6].

⁵⁴⁰ See CJI REPORT, *supra* note 32, at 31, 37.

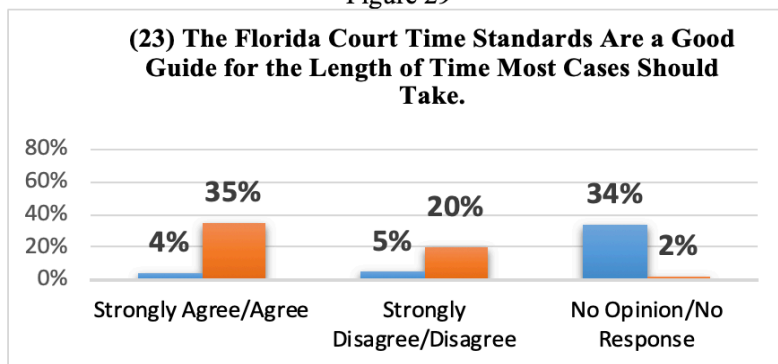
⁵⁴¹ Posner, *supra* note 429, at 4.

⁵⁴² Telephone Interview 17, *supra* note 282.

An overall theme among interviewed judges established that case managing judges were the exception, not the rule; and that judges who do case manage enjoy an exceptional reputation. Interviewed judges who case manage currently put in extra effort on their own to design their own processes and systems with their staff, without systemic support. They see the dividends personally as worth the effort, and the time investment upfront saves more time later.⁵⁴³

One judge shared a story of attending an outstanding national educational program on case management.⁵⁴⁴ Upon his return, he proposed a simple case triage system to his fellow judge, only to face total rejection. “If they had understood it, the benefits, they would have been gung ho,” he said.⁵⁴⁵ “A lot of people don’t want to hear about it. Just let me do my job and go home.”⁵⁴⁶ The judge felt that strong leadership support would be critical to widespread use of court case management.⁵⁴⁷

Figure 29



Florida Time Standards are contained in Florida Rule of Judicial Administration 2.250, which establishes a “presumptively reasonable time period for the completion of cases[.]”⁵⁴⁸ Civil jury cases should be completed within eighteen months from filing to disposition, while non-jury cases should be completed within twelve months from filing to disposition.⁵⁴⁹ Thirty-nine percent (39%) of

⁵⁴³ See, e.g., Telephone Interview 3, *supra* note 294.

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.*

⁵⁴⁸ FLA. R. JUD. ADMIN. 2.250(a).

⁵⁴⁹ *Id.* at 2.250(a)(1)(B). The time standards recognize that complex cases incur reasonable delays, which are undefined in the Rule of Judicial Administration.

judges think the Florida Time Standards are a good guide, and thirty-four percent (34%) have no opinion.⁵⁵⁰ Twenty-five percent (25%) disagree.⁵⁵¹ Because percentages of disagreement and no opinion responses total seventy-four percent (74%), it appears that roughly three-fourths of the bench are not using the time standards as a relevant performance measure. Certain data subsets expressed strong agreement with the Florida Time Standards: small circuits agreed at fifty percent (50%) and judges with three to six years of experience agreed at forty-eight percent (48%).

Interviewed judges had strong views on the time standards. The standards are, in their view, ignored without repercussion among Florida judges, which is generally consistent with the survey responses. According to the interviewed judges, lawyers are unaware of the standards despite their codification in the rules. One judge explained that the first time he raised the time standards in a crowded courtroom, the room fell absolutely silent.⁵⁵² Another judge exclaimed: “Who follows up on the time standards? Nobody! It’s representative of the problem!”⁵⁵³ Many judges throughout the interviews pointed out that if the time standards are to serve as a baseline measure of performance, then that information needs to be shared with and emphasized to the judges. Overall, the TCAs did

Id. at 2.250(a). However, the Florida Rules of Civil Procedure provide that except when good cause is shown, cases meeting the definition of “complex litigation” shall be set for trial no later than 24 months from an initial case management conference. FLA. R. CIV. P. 1.201(b)(3).

⁵⁵⁰ Figure 29.

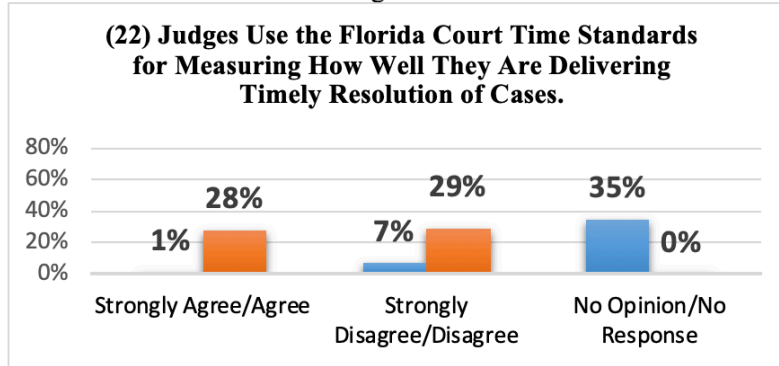
⁵⁵¹ *Id.*

⁵⁵² Telephone Interview 12, *supra* note 294.

⁵⁵³ Telephone Interview 3, *supra* note 294.

not identify this information as routinely distributed, and the interviewed judges confirmed by generally indicating that they were also not provided with time standard compliance reports.

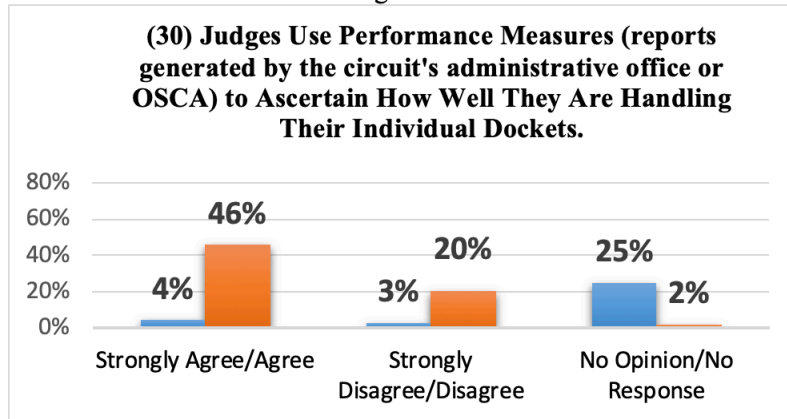
Figure 30



The results to this statement show that the judges of Florida are ambivalent about their use of the time standards.⁵⁵⁴ As reflected above, the compliance information is not generally distributed or even available to many judges. More than a third of the respondent judges have no opinion as to the use of Time Standards, which suggests these judges are not using the standards. Combined with the level of disagreement at thirty-six percent (36%), this suggests a disregard for the standards as a meaningful measure. Agreement with the time standards was strongest with judges three to six years on the bench, with fifty-two percent (52%) of those judges in agreement, and small circuits at fifty percent (50%) agreement. Most other subsets ranged between eighteen and thirty-four percent (18% to 34%) agreement. However, if only a third of the judges agree that judges use the time standards, and the balance has no opinion or does not use them as a meaningful measure, then there is little incentive to manage cases to completion by those deadlines or to rely upon those deadlines as setting public or litigant expectations.

⁵⁵⁴ Figure 30.

Figure 31



The fifty-fifty split in responses to this statement reflects the ambivalence toward the use of available data to manage caseloads.⁵⁵⁵ This also reflects the challenge of evaluating management on a docket-wide level versus a view of case management at the single case level. Because the competition for judicial resources occurs at a docket-wide level, the failure to use reports that provide a broader picture suggests an ad hoc approach to allocating time and attention, the critical judicial resources for every case. The typical judicial performance measures are age to disposition, age of pending caseload, and clearance rate.⁵⁵⁶ According to interviewed judges and the trial court administrator responses, this information is not commonly distributed to Florida's civil judges.

Court manager Aikman discussed these institutional challenges with candor:

Some judges still do not believe that the time to disposition is a concern. They see and deal with one case at a time. Their focus is substantive justice in each case, not on the days or months required to

⁵⁵⁵ Figure 31.

⁵⁵⁶ *Trial Court Performance Measures*, COURTOOLS, <http://www.courtools.org/Trial-Court-Performance-Measures.aspx> (last visited Jan. 10, 2019).

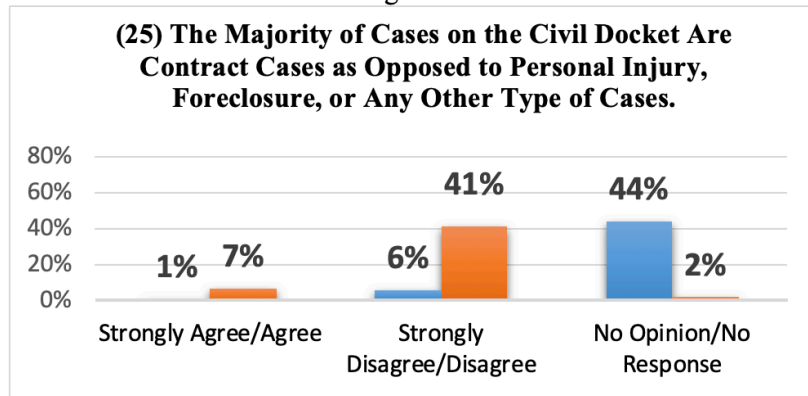
achieve that. The negative macro impact of delay occurring as a result of delay in a lot of individual cases is not apparent to them.⁵⁵⁷

As one judge stated,

Judges who are reactive view their reputation on a case by case basis—the wisdom of a ruling in an individual case, reactive, in the moment. Judges who view their reputation as their caseload or docket are thinking about how moving this case fits in with other cases and making sure each gets access, while at the same time trying to deliver identical high quality hearings—the bigger picture of access to justice.⁵⁵⁸

Aikman also noted, “[s]ome judges believe that shortening the time to disposition means they are really being asked to work harder and longer hours and they are not interested in either, as they already are working long enough and hard enough.”⁵⁵⁹

Figure 32



This statement, which I added based on the national data generated by the NCSC in its *Landscape of Civil Litigation* and *Examining the Work* studies, brought to light the judges’ lack of essential

⁵⁵⁷ Aikman, *supra* note 280, at 10.

⁵⁵⁸ Telephone Interview 2, *supra* note 282.

⁵⁵⁹ Aikman, *supra* note 280, at 10.

data regarding their own caseloads.⁵⁶⁰ There is no statewide data available in Florida on the pending civil caseload, which was not anticipated when this survey was drafted.⁵⁶¹ The data is kept by the individual court clerks at a local county level. While the number of cases filed by action type is available state-wide, as well as dispositions, pending case information is not provided, which diminished the value of the question. Therefore, the accuracy of this statement is not verifiable based on available data and the statement was admittedly not well-framed, although it still provides interesting insights.

Based on the Florida Office of the State Court Administrator (“OSCA”) data regarding filings and dispositions, contract cases seem to be the second highest case category.⁵⁶² Foreclosures still top out the filings.⁵⁶³ Between 2015 and 2016, there were 40,028 contract actions filed in circuit court, and 64,777 foreclosures.⁵⁶⁴ Professional malpractice and products liability case filings totaled 2,949 statewide, which is similar to national patterns of complexity.⁵⁶⁵ Auto negligence totaled 25,199 filings, and other negligence cases totaled 12,033 filings.⁵⁶⁶ Dispositions reflected similar patterns.⁵⁶⁷

With regard to the survey responses overall, forty-four percent (44%) of judges had no opinion,⁵⁶⁸ which suggests that nearly half of judges do not know what case types predominate their dockets. The type of cases pending has case management implications, especially given the opportunity for prompt resolution presented by most contract cases, as the parties are aware of the underlying facts due to their preexisting relationship. Although contracts cases fall in second place behind foreclosures in amount of cases filed, it is interesting that only eight percent (8%) of judges thought contract cases were dominant, as contract matters still form a significant bulk of

⁵⁶⁰ See *supra* notes 179–84 and accompanying text. See LANDSCAPE OF CIVIL LITIGATION, *supra* note 26; EXAMINING THE WORK, *supra* note 3.

⁵⁶¹ See *supra* notes 212–18 and accompanying text. FLA. OFFICE OF THE STATE COURTS ADMN’R, *supra* note 162.

⁵⁶² FLA. OFFICE OF THE STATE COURTS ADMN’R, *supra* note 162, at 4-2 to 4-5.

⁵⁶³ *Id.*

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.* at 4-12 to 4-15.

⁵⁶⁸ Figure 32.

the caseload and exceed every other case type except for foreclosures.⁵⁶⁹ Improved observation of these filing patterns could lead to smart management decisions and judicial economies. If cases are to be triaged and managed from outset, providing this information is essential.

Notably, most of the interviewed judges do not believe that judges overall have a good understanding of their caseload.⁵⁷⁰ Again, many felt this was because judges were operating at an event-by-event, case-by-case level as opposed to a docket-wide level. Interviewees felt that the breadth of the civil docket made understanding the caseload a critical case management component. “Process and procedure,” as one judge pointed out, “can vary greatly [between a] product liability case [and a] mortgage foreclosure [case].”⁵⁷¹

Figure 33



Eighty-eight percent (88%) of judges agreed with this statement, with five percent (5%) disagreeing and eight percent (8%) having no opinion.⁵⁷² This again ratifies earlier responses regarding judicial perception of value of case management.⁵⁷³ It suggests further potential recognition of the benefits of proactive case management versus reactive case management. This statement also provides insight

⁵⁶⁹ FLA. OFFICE OF THE STATE COURTS ADMN’R, *supra* note 162, at 4-2 to 4-5.

⁵⁷⁰ See, e.g., Telephone Interview 11, *supra* note 282; Telephone Interview 8, *supra* note 442; Telephone Interview 18, *supra* note 299; Telephone Interview 14, *supra* note 282; Telephone Interview 12, *supra* note 294; Telephone Interview 10, *supra* note 282; Telephone Interview 5, *supra* note 367.

⁵⁷¹ Telephone Interview 14, *supra* note 282.

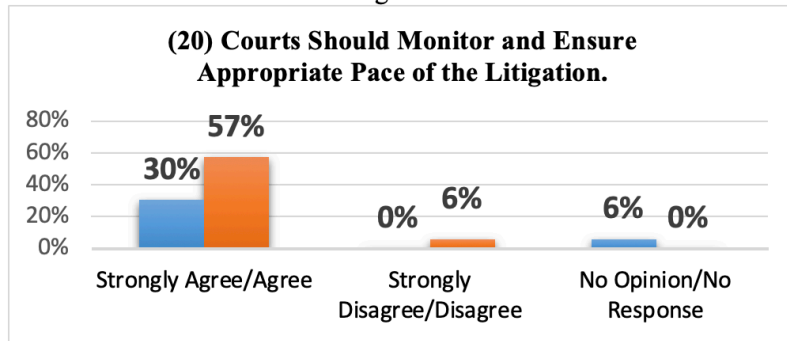
⁵⁷² Figure 33.

⁵⁷³ See *supra* Figures 10, 11 & 12.

regarding the question of the scope of case management. If the court only gets involved for enforcement purposes upon the request of the parties, then the exploitive value of noncompliance is already being experienced in the case. The only way case management can prevent exploitation is to assure prompt access at critical times and proactive prevention of delay and gamesmanship.

It is challenging to reconcile the broad support for case management expressed here with the reluctance to consider the cross-incentives reflected earlier. If judges believe parties and lawyers exploit the process, there must be some benefit to doing so, which the high “no opinion” response on cross-incentives seems to avoid.

Figure 34

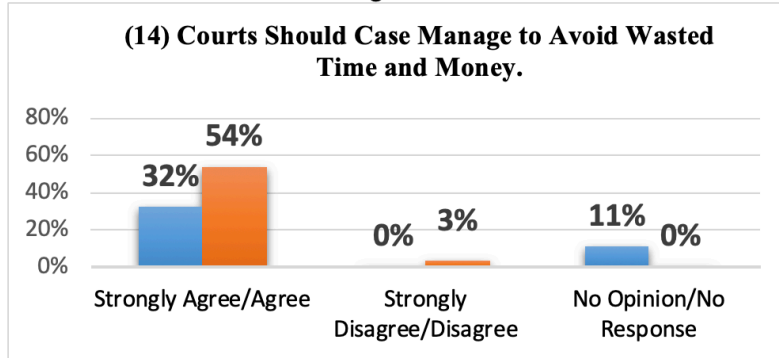


Responding judges agreed at eighty-seven percent (87%), disagreed at only six percent (6%), and expressed no opinion at seven percent (7%).⁵⁷⁴ Forty-seven percent (47%) of large circuits shows a disproportionate level of strong agreement, 17 points higher than any other circuit set. Question 13 in the survey, discussed earlier, had a twenty-three percent (23%) no opinion response,⁵⁷⁵ evidencing a lack of knowledge about when and where cases lose momentum. The strong agreement here evidences consensus on the court’s obligation to intervene where cases become inactive and to get them moving again, which is a hallmark of reactive case management. Proactive case management would envision a structure from outset with embedded deadlines that would prevent the case from falling into inactivity. This statement also speaks to scope: judges want to ensure and monitor the appropriate pace of litigation. The question is how?

⁵⁷⁴ Figure 34.

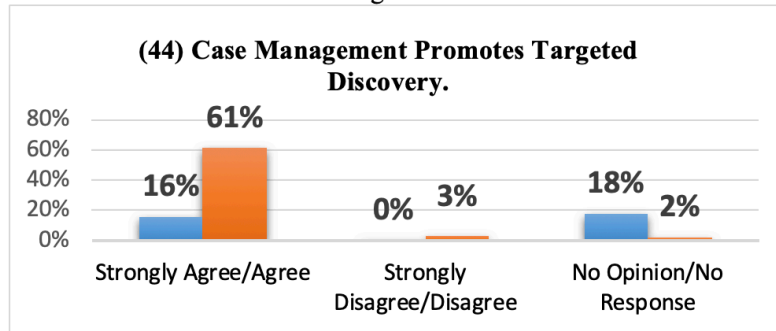
⁵⁷⁵ See *supra* Figure 17.

Figure 35



While eighty-six percent (86%) agreed with this statement, eleven percent (11%) had no opinion, and three percent (3%) disagreed,⁵⁷⁶ notwithstanding the admonition of Florida’s Rule of Civil Procedure 1.010 as to “just, speedy, and inexpensive” resolution.⁵⁷⁷ It is worth noting that one-hundred percent (100%) of small circuit judges agreed with the statement and the most significant disagreement came from newer judges, who disagreed at eleven percent (11%). This question again provides some insight on scope, there is not strong objection to using case management to achieve these goals, but there is a lack of shared vision or information as to how that is to be accomplished.

Figure 36



⁵⁷⁶ Figure 35.

⁵⁷⁷ FLA. R. CIV. P. 1.010.

This statement produced relatively higher “no opinion” responses from the judges.⁵⁷⁸ Agreement/strong agreement was consistent across the subsets, with minimal disagreement. The seventy-seven percent (77%) who agree must envision proactive case management at the beginning of the case because case management can only produce a targeted discovery if it precedes the discovery effort. The “no opinion” rate could be reflective of the limited discussion of targeted discovery or proportionality in Florida state courts, as no rule change or broad debate has occurred on discovery limits or disclosures, unlike such discussions that have occurred in connection with the federal rules and in states such as Utah and New Hampshire.⁵⁷⁹ As described by one commentator in connection with the federal process,

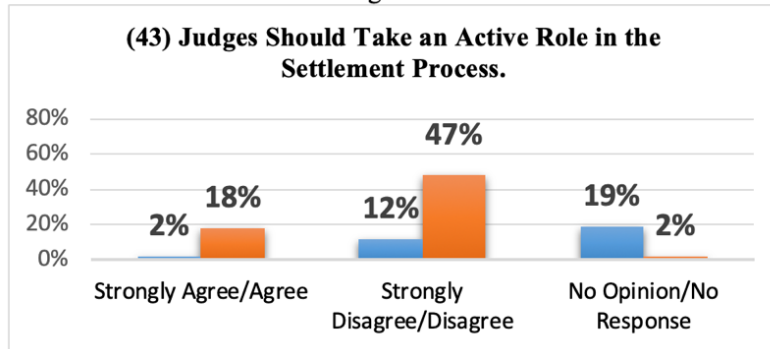
[b]ecause discovery must be tailored to fit the particulars of each case, it is one phase of litigation where the debate about active judges crystallizes: do the parties make the alterations themselves, or does the judge fashion the process? . . . Although the Rules authorize the judge to “right-size” discovery in the initial case management order, much of the scaling is typically delegated to the parties in the first instance, with the judge engaging only upon request. In our adversarial system, however, cooperation among the parties on how to configure discovery, without ongoing monitoring and assistance of the judge, is simply not realistic in many cases.⁵⁸⁰

⁵⁷⁸ Figure 36.

⁵⁷⁹ E.g., Baicker-McKee, *supra* note 109, at 358; *Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts*, NATIONAL CENTER FOR STATE COURTS, at iii-iv (Apr. 2015), [https://www.ncsc.org/~media/Files/PDF/Topics/Civil%20Procedure/Utah%20Rule%2026%20Evaluation%20Final%20Report\(2015\).ashx](https://www.ncsc.org/~media/Files/PDF/Topics/Civil%20Procedure/Utah%20Rule%2026%20Evaluation%20Final%20Report(2015).ashx); NEW HAMPSHIRE: PAD PILOT RULES, *supra* note 47, at 3.

⁵⁸⁰ Baicker-McKee, *supra* note 109, at 355–56.

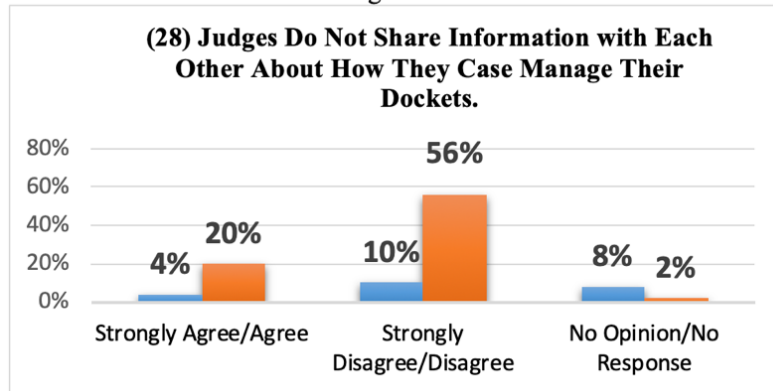
Figure 37



Advocates for court case management see an essential role for case management in addressing discovery cost and delay with a discovery plan from inception.⁵⁸¹ Generally, the interviewed judges felt early judicial intervention and prompt access made a significant difference in reducing discovery delays, costs and hostilities.

Judicial views about direct involvement in settlement seems to depend on local practice and court culture in specific areas. Based on the responses, Florida judges do not have a strong inclination to get involved in settlement.⁵⁸² The responses were consistent across circuit types.

Figure 38

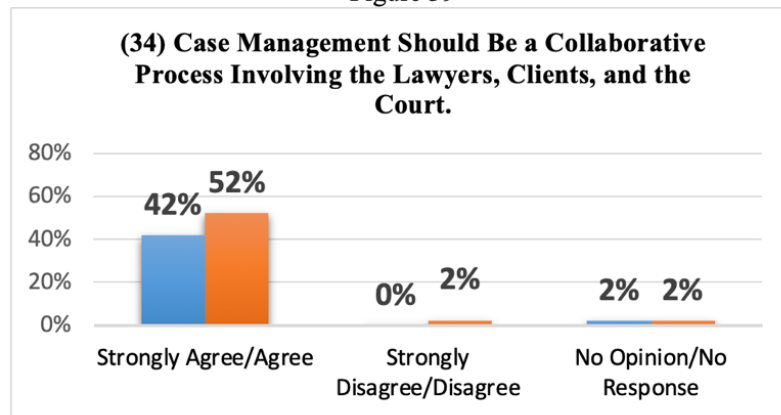


⁵⁸¹ JUDICIAL CONFERENCE OF THE U.S., *supra* note 21, at 19 (compiling an exhaustive list of studies and articles on judicial involvement with discovery abuse).

⁵⁸² Figure 37.

Judges strongly believe that they appropriately share information about case management with each other.⁵⁸³ Only twenty-four percent (24%) disagreed.⁵⁸⁴ This is in distinct contrast with the interviewed judges, as most interviewed judges felt that the case management levels across their benches was at a two to three on a scale from one to ten, ten being highest. Across the interviews, they expressed that judges who case manage enthusiastically share information, but judges who are disinclined to case manage are much less likely to share information or seek information. Smaller circuits disagreed at a ninety percent (90%) rate, perhaps because the size of the bench lends itself to informal information sharing.

Figure 39



There was strong agreement across all subsets that the ideal vision for case management is as a group effort involving all stakeholders.⁵⁸⁵ However, some of the judges interviewed commented on the lack of preparation on the part of attorneys when case management opportunities are presented.⁵⁸⁶ Judge Rosenthal and Professor Gensler have the same issue:

Our point is this: for active case management to serve as a platform for interaction, the lawyers and the parties must buy in to the scheme as much as judges. The types of live case-management interactions we

⁵⁸³ Figure 38.

⁵⁸⁴ *Id.*

⁵⁸⁵ Figure 39.

⁵⁸⁶ See, e.g., Telephone Interview 18, *supra* note 299; Telephone Interview 17, *supra* note 282; Telephone Interview 21, *supra* note 282.

advocate are not one-way events during which the judge does all the work while the lawyers simply observe. Rather, the value of these live interactions is that they are the best—and often the only—opportunity for the trial judge and the lawyers to have an informed dialogue that penetrates the surface gloss and exposes the core issues, whether those issues relate to priorities in discovery or the merits of a proposed summary-judgment motion. For these interactions to thrive, the attending lawyers must be prepared. This is so obvious that it hardly seems worth saying. Yet judges from different parts of the country continue to tell us that they schedule live Rule 16 conferences with the intention of developing a tailored case-management plan, only to have the lawyers say they didn't know what their pretrial needs were because they hadn't really thought about the subject. Judges tell us that they present opportunities for oral argument, only to have lawyers announce that they are resting on their briefs. That is a waste of everyone's time and a wasted chance for lawyers to interacting with the judge.

. . . Judges will do it only if it proves to be worth their time. The surest way to kill an emerging culture of interactive case management is for it to be a waste of time, and the surest way for it to be a waste of time is if the lawyers have nothing to contribute when called upon to do so. . . . It is again an obvious point: lawyers who want the judge to spend more time being accessible must show the judge that it will be time well spent.⁵⁸⁷

The concerns originally articulated by traditionalists, that judges could not effectively case manage because they lacked sufficient information about the case, can only be solved with engaged litigants

⁵⁸⁷ Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 22, at 873–74.

fully utilizing the opportunity case management presents.⁵⁸⁸ Additionally, courts must consider and weigh genuine concerns about necessary time frames, competing business demands, and assure sufficient access at critical junctions in the case. “Lawyers clamor for judges to take a more active role in case management, but if the lawyers do not make the effort to know their own case needs, how can they expect the judges to enter thoughtful, case-specific case-management orders?”⁵⁸⁹ Courts can and should tailor case management to the needs of the case, but critical information can only be secured from the parties and their lawyers. Where lawyers appear without adequate information about the case, without decision-making authority, without calendars, or without a vision as to how the case will be litigated, it is difficult for the court to tailor case management. Creating a performance standard for attorney preparation is easier to achieve when the system demands uniform participation and preparation as opposed to recalibrating for varying demands from judge to judge.

The need to secure appropriate information to make sure that a case is proceeding in an organized, timely fashion typically requires court attention and monitoring.⁵⁹⁰ While this should not require judicial resources, it could be undertaken by trained staff.⁵⁹¹ Interviewed judges repeatedly extolled the role that smart judicial assistants play in case management.⁵⁹² Judges uniformly reported that they would be unable to carve out the time to case manage if they did not have the active involvement of their staff providing them with the necessary monitoring and information to case manage, and reported significant time and stress benefits once the effort was undertaken and operationally ingrained.⁵⁹³

6. LACK OF TIME, STAFF, AND TECHNOLOGY SUPPORT

Interviewed judges enthusiastically endorsed the time spent in case management as saving significant time across their dockets,

⁵⁸⁸ Easterbrook, *supra* note 319, at 639.

⁵⁸⁹ Gensler, *Caught in the Crossfire*, *supra* note 73, 735–36.

⁵⁹⁰ *See* CJI REPORT, *supra* note 32, at 16–20.

⁵⁹¹ *See id.* at 29; *cf.* OPPAGA REPORT, *supra* note 203, at 18–23.

⁵⁹² *See, e.g.*, Telephone Interview 12, *supra* note 294.

⁵⁹³ *Id.*

even as they acknowledged that many judges who do not case manage do not believe that they have the time or support to case manage.⁵⁹⁴ One interviewed judge stated that “there is no question that case management saves me work” and that, while it is more effort upfront, the initial tasks are not labor intensive and they produce great results as cases get to trial and are resolved sooner.⁵⁹⁵ This view was supported by the survey results. One judge described the bench as having the “general perception that I have plenty of cases, so I will be reactive,” but went on to say that “[it’s] our fault we don’t do a better job teaching [them] how to do case management and the benefits derived from case management” both in terms of time and reputation.⁵⁹⁶ Another judge said, “[The] more [you] push cases, the more time you have. The more continuances you grant, the less time you have to deal with everything.”⁵⁹⁷ Another judge believed that case management creates more time, not less, and that, when parties have deadlines and are coming face to face with the judge, things get done and there are fewer “discovery squabbles.”⁵⁹⁸ The same judge also stated that, as a result of case management, “my calendar has opened up. I don’t have to roll over trials—either settle it or we try it.”⁵⁹⁹ Another judge was more blunt: “It’s in my personal home and life benefit to manage cases.”⁶⁰⁰ All interviewed judges agreed that a case managed docket is a less stressful docket.

These comments reflect Parkinson’s Law: “work expands so as to fill the time available for its completion.”⁶⁰¹ Judges for whom case management is a priority make the time and utilize their staff to ensure it occurs, while judges who profess to lack time to case manage overlook the time case management could save them. As Chief Justice Roberts pointed out in his 2016 report, “[a] lumberjack

⁵⁹⁴ See Telephone Interview 9, *supra* note 288; Telephone Interview 8, *supra* note 442; Telephone Interview 2, *supra* note 282; Telephone Interview 1, *supra* note 282; Telephone Interview 20, *supra* note 294.

⁵⁹⁵ Telephone Interview 20, *supra* note 294.

⁵⁹⁶ Telephone Interview 8, *supra* note 442.

⁵⁹⁷ Telephone Interview 11, *supra* note 282.

⁵⁹⁸ Telephone Interview 9, *supra* note 288.

⁵⁹⁹ Telephone Interview 9, *supra* note 288.

⁶⁰⁰ Telephone Interview 3, *supra* note 294.

⁶⁰¹ C. NORTHCOTE PARKINSON, PARKINSON’S LAW [AND OTHER STUDIES IN ADMINISTRATION] 3 (1957); Elliot, *supra* note 11, at 12.

saves time when he takes the time to sharpen his ax.”⁶⁰² The interviewed judges perceive their colleagues as chopping away with dull axes. Other judges were even less sympathetic to their colleagues: “If you want to get a job done, give it to the busiest person. If they wanted to [case manage], they would.”⁶⁰³

At the same time, each of the interviewed judges described a case management process that was highly human resource intensive. They and their judicial assistants review the reports, identify the cases, create the means of intervention, schedule the case management conferences, and prioritize the workload. Case management as currently deployed in Florida is highly dependent on judges and court staff.⁶⁰⁴ While without question, this approach produces results that benefit cases, there are legitimate questions about how scalable such an approach would be across the entire court system. One interviewed judge pointed out that case managers are far cheaper than judges, and hiring case managers would give judges much more time to judge.⁶⁰⁵ An important component of a case management initiative is to ensure that each person is used at the top level of their skills to provide the most benefit to the judicial system.⁶⁰⁶ For example, push notifications confirming upcoming hearings can replace hours on the phone by staff confirming upcoming hearings or answering whether a case “made calendar.” Courts must better utilize existing staff to assist in court case management.

⁶⁰² 2016 YEAR-END REPORT, *supra* note 46, at 7.

⁶⁰³ Telephone Interview 19, *supra* note 288.

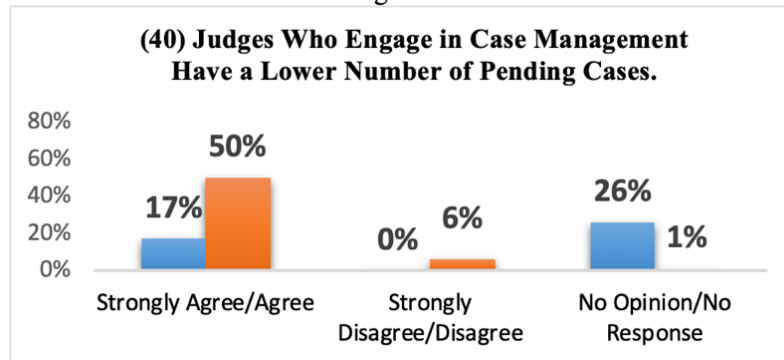
⁶⁰⁴ *See generally* OPPAGA REPORT, *supra* note 203.

⁶⁰⁵ Telephone Interview 10, *supra* note 282.

⁶⁰⁶ *Cf.* CJI REPORT, *supra* note 32, at 31–32, 37–38.

A significant omission in the discussion on case management is the role of technology. Technology, if properly deployed, could provide cost-effective systemic support for case management in a predictable and consistent process that would afford smarter utilization of human resources.⁶⁰⁷

Figure 40



This response suggests that judges have confidence that case management can reduce overall caseloads, and also provides an educational opportunity with regard to the twenty-six percent (26%) of judges who responded “no opinion.”⁶⁰⁸ Judges in very large circuits agreed at a rate twenty points higher than other circuit types. An interviewed judge pointed out that “a backlog of cases makes the system sclerotic, and backs up the entire system until cases only come to the fore with an issue or an emergency, so cases only move with crisis.”⁶⁰⁹ He went on to discuss how case management permits prioritization of the total caseload on what needs to be done and when it should be done, keeping the caseload moving instead of careening from problem to problem.⁶¹⁰ “Every case has a beginning point—a human event or crisis that starts the legal process and ultimately closes. In between, it should move in effective stages.”⁶¹¹ This is the description of proactive case management. This judge, like other judges, pointed out that the criminal justice system already has many of these structures in place.⁶¹²

⁶⁰⁷ *Id.*

⁶⁰⁸ Figure 40.

⁶⁰⁹ Telephone Interview 11, *supra* note 282.

⁶¹⁰ *Id.*

⁶¹¹ *Id.*

⁶¹² *Id.*

Many of the interviewees pointed out that the more cases that accrue, the more cases are competing for hearing time, the longer it takes to get a hearing, and the more delay and cost occurs as a result. The lack of access causes more backlog to accrue.⁶¹³ One judge described the naysayers: “Some judges don’t worry about it. Cases come in and cases go out. They just don’t really worry about numbers.”⁶¹⁴ The judge felt that the naysayers failed to understand the benefit of getting the caseload down.⁶¹⁵ As another judge observed, “if you just sit back and wait until someone asks to schedule their case, it’s still assigned to you” and not going anywhere until you deal with it.⁶¹⁶ Yet another said, “you can always sit back and let your caseload swell.”⁶¹⁷ Another stated, “you have to have the foresight and the faith and the skills to decide that life is easier because you are not rushing from crisis to crisis. You know exactly what’s coming. You are prepared for what’s coming next, and hearings are more effective.”⁶¹⁸

All interviewed judges recognized that access is essential to moving a docket and expressed dismay over the lack of access that occurs when judges don’t case manage and prioritize to guarantee timely hearings. One judge noted the following:

The major complaint is never about rulings, it’s about access. I hear more about access than brilliance in a hearing. A part of the brilliance is case management. People use judicial unavailability as an asset to gain leverage and stall a case. With some judges, it’s like searching for the Rosetta Stone to get on the calendar.⁶¹⁹

The same judge pointed out that the fact that he is available for hearings reduces the demand for hearing time, because matters resolve themselves:

⁶¹³ See, e.g., *id.*

⁶¹⁴ Telephone Interview 12, *supra* note 294.

⁶¹⁵ *Id.*

⁶¹⁶ Telephone Interview 7, *supra* note 440.

⁶¹⁷ Telephone Interview 2, *supra* note 282.

⁶¹⁸ Telephone Interview 1, *supra* note 282.

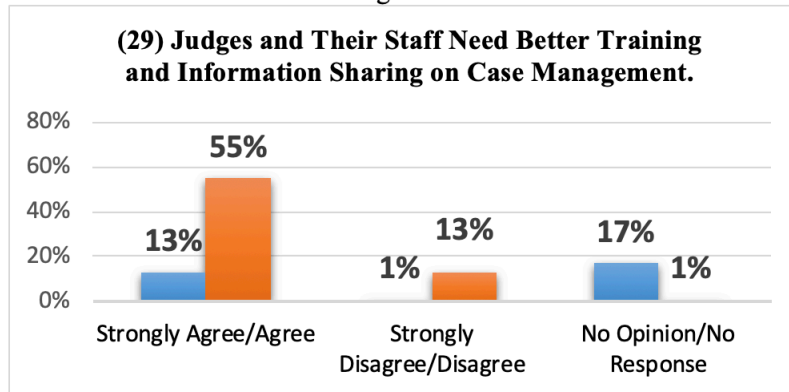
⁶¹⁹ Telephone Interview 2, *supra* note 282.

The imminent threat of seeing me beats actually seeing me,” because that deadline prompts resolution by agreed orders between parties. “The reality is you can be efficient and great, but if the lawyers have to wait two months or more for a hearing, it won’t matter as much. Lawyers put a premium on timely access beyond just a great hearing and thoughtful wise ruling.⁶²⁰

At the same time, the Federal Judicial Center notes that,

A small amount of a judge’s time devoted to case management early in a case can save vast amounts of time later on. Saving time also means saving costs, both for the court and for the litigants. Judges who think they are too busy to manage cases are really too busy not to. Indeed, the busiest judges with the heaviest dockets are often the ones most in need of sound case-management practices.⁶²¹

Figure 41

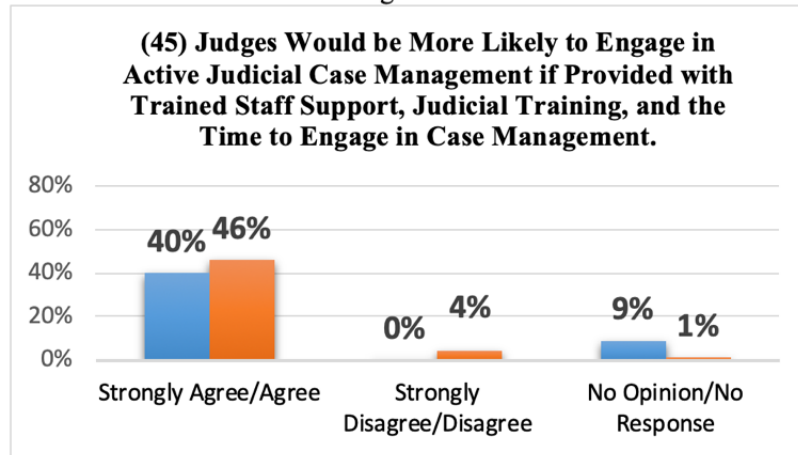


⁶²⁰ *Id.*

⁶²¹ Gensler, *Caught in the Crossfire*, *supra* note 73, at 685 (quoting WILLIAM W. SCHWARZER & ALAN HIRSCH, FED. JUDICIAL CTR., *THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE FOR JUDGES* (2d ed. 2006)).

Sixty-eight percent (68%) of judges agree that courts need better training, with modest disagreement at fourteen percent (14%).⁶²² Interestingly, the judges who expressed the least disagreement regarding greater need for more training were the most experienced (eighteen or more years of experience) with a disagreement rate of seven percent (7%), while other subsets based on level of experience ranged from nineteen percent to thirteen percent (19% to 13%) disagreement.

Figure 42



At the same time, the interviewed judges strongly emphasized the need for training both in terms of defining a common scope to the case management task, wise use of staff, and importantly from a training standpoint, use of technology.⁶²³ One judge with twenty-seven years of experience reported that he would welcome as much training as he could get on case management—and would take it whenever and wherever offered, and jump at the chance.⁶²⁴ Most line judges have not even begun to imagine the ways in which technology could improve their case handling, and yet cannot put down their cell phones. For case management to work, every level of the court system will need to engage and share information, which means that education about information sharing and common consistent and predictable systems must be created and deployed with

⁶²² Figure 41.

⁶²³ See, e.g., Telephone Interview 2, *supra* note 282.

⁶²⁴ Telephone Interview 8, *supra* note 442.

solid training on technology that is user friendly on the judicial interface as well as the public interface.

Strong consensus on this statement existed across all circuit types and experience levels.⁶²⁵ Court resources—including judges, court technology and all line staff—have to be utilized to produce forward case momentum. As several judges observed, it is not that judges do not want to case manage, but that they perceive they do not have the time.⁶²⁶ Many judges feel that they need resources to help case manage, and because they don't have those resources, they won't case manage.⁶²⁷ Interviewed judges all reported that at the beginning, case managing requires extra time and effort, but that the savings in time and effort later in the case more than compensated for the initial investment.⁶²⁸

Several interviewed judges acknowledged a significant role in case management for their secretaries, referred to in Florida as a judicial assistant or "J.A."⁶²⁹ One judge explained that there are many judges who would love to case manage, but their JA cannot do it because of the other demands on their time, and there are no other resources.⁶³⁰ At the same time, some scholars have noted that basic technology could relieve staff of burdensome tasks of scheduling, confirming, information sharing, and in many instances, assisting self-represented litigants.⁶³¹

One judge specifically pointed out the benefits of dealing with pro se litigant cases as an area where trained staff and technology could be of unique assistance.⁶³² The CJI Report also pointed out the structural benefits to the self-represented. All judges felt that many of the compliance, follow-up, and rule conformity issues inherent in case management could be appropriately delegated to trained staff

⁶²⁵ Figure 42.

⁶²⁶ Telephone Interview 9, *supra* note 288; Telephone Interview 17, *supra* note 282; Telephone Interview 18, *supra* note 299; Telephone Interview 20, *supra* note 294; Telephone Interview 21, *supra* note 282.

⁶²⁷ *See, e.g.*, Telephone Interview 17, *supra* note 282.

⁶²⁸ Telephone Interview 20, *supra* note 294.

⁶²⁹ Telephone Interview 7, *supra* note 440; Telephone Interview 12, *supra* note 294; Telephone Interview 14, *supra* note 282; Telephone Interview 17, *supra* note 282.

⁶³⁰ Telephone Interview 17, *supra* note 282.

⁶³¹ Cabral et al., *supra* note 190, at 247.

⁶³² Telephone Interview 12, *supra* note 294; CJI REPORT, *supra* note 32, at 29.

under judicial supervision. A smart judicial assistant was key to all the interviewed judges.⁶³³ Those judges who had the opportunity to work with trained case management staff felt that the additional help turbo-charged their effectiveness exponentially and rendered significant justice value at relatively minor cost.⁶³⁴

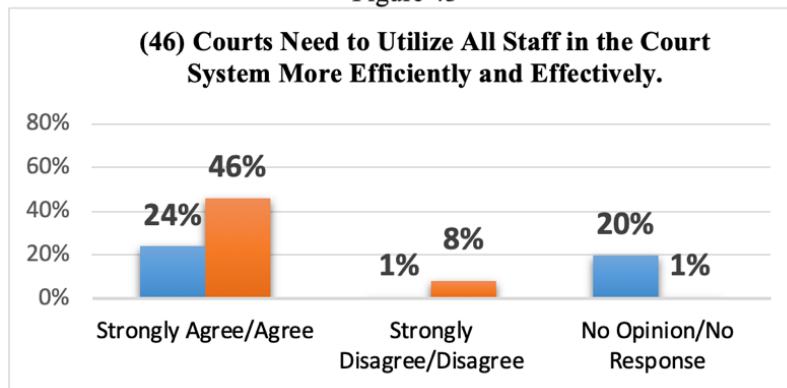
If case management is to be successfully deployed as a systemic tool against cost and delay, judges need help. It is simply not enough to give judges another job to do, particularly if poorly defined as to the scope of the task, without support. Resentment and resistance would inevitably result. In contrast, creating a supportive court case management system with the staff and technology to help would significantly reduce resistance and barriers to case management, with demonstrable benefits across the branch.⁶³⁵ A systemic response would also increase predictability, consistency, and provide standards upon which performance could be judged “apples to apples.” It would potentially increase public trust and confidence by having a plan laid out that created systemic and individual case expectations for civil justice. It would reduce waste both in fees spent trying to comply with varying individual judicial procedures as well as staff time educating parties and lawyers about individual judicial procedures and correcting noncompliance, particularly parties without lawyers. By organizing access, it would potentially reduce unnecessary delay between court events.

⁶³³ See, e.g., Telephone Interview 19, *supra* note 288.

⁶³⁴ *Id.*

⁶³⁵ See CJI REPORT, *supra* note 32, at 29.

Figure 43



This statement probably suffered due to the lack of sufficient definition regarding how to better utilize court staff, which may account for the twenty percent (20%) “no opinion” response.⁶³⁶ However, seventy percent (70%) of judges did agree,⁶³⁷ which speaks to the willingness to explore more intelligent methods of providing effective civil justice within existing resources.

Given state budgets, judges recognize overall that additional resources may be difficult and the place to start is to work smarter. As one interviewed judge said,

we could accomplish so much more for the people we serve if there were additional case management capacity [referencing both technology and staff]. Especially given the cost of a case manager versus the cost of a judge. Technology needs to play a role in monitoring, preparing and presenting information. Utilize judges for what judges are needed for.⁶³⁸

In addition, several judges pointed out that providing staff support for case management would create an opt-out system for case management in which cases and judges would receive the benefit of the structure automatically, much like criminal court. It would make civil case management the rule instead of the exception, while retaining to the judge the right to decide each case’s individual issues as needed. The non-judge jobs that judges do not think they should

⁶³⁶ Figure 43.

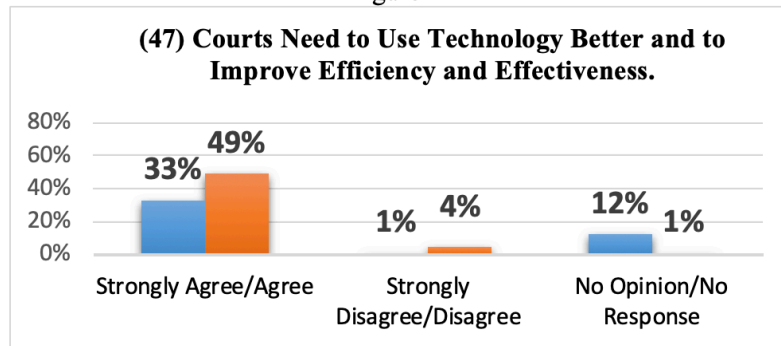
⁶³⁷ *Id.*

⁶³⁸ Telephone Interview 10, *supra* note 282.

do or have time to do could be done by trained staff. Then judges have more time for judging.⁶³⁹

Even Professor Resnik contemplated the need for necessary support staff in decrying managerial judging: “Perhaps scarce judicial resources should be conserved and employed only when judges’ special skill—adjudication—is required.”⁶⁴⁰ A judge is the most expensive and most highly trained asset in the court system. The tasks performed should be assigned according to the level of training and experience required to deal with them, which means that many case management tasks could be assigned to administrative staff, clerks, and case managers. This conclusion was also reflected in recommendation eight to the Conference of Chief Justices CJI Report.⁶⁴¹

Figure 44



Many in the court system joke that the court technology slogan is “yesterday’s technology tomorrow.”⁶⁴² The strongest agreement was from small circuits and very large circuits, at ninety percent (90%) agreement levels each. New judges with zero to three years experience agreed at a seventy percent (70%) rate, lower than any

⁶³⁹ Telephone Interview 2, *supra* note 282; Telephone Interview 13, *supra* note 267; Telephone Interview 16, *supra* note 299; Telephone Interview 20, *supra* note 294.

⁶⁴⁰ Resnik, *Managerial Judges*, *supra* note 73, at 435.

⁶⁴¹ CJI REPORT, *supra* note 32, at 29 (“For right-size case management to become the norm, not the exception, courts must provide judges and court staff with training that specifically supports and empowers right-sized case management.”).

⁶⁴² Chawn Ganguly, *Dutch Blockchain Company Aims to Update Criminal Justice*, CORESECTOR COMMUNIQUE (Dec. 22, 2017), <http://corecommunique.com/dutch-blockchain-company-aims-update-criminal-justice/>.

other data subset, but also had a significantly higher rate of “no opinion” at twenty six percent (26%), twice as much as any other subset. There was little disagreement. One interviewed judge noted,

it’s a cultural thing to establish a baseline of performance and who is closing what. There really is no way to measure how we are doing—bar polls are popularity contests, lawyers blow smoke—so you have to use statistics. You cannot teach a love of numbers or statistics, but paying attention pays a reputational dividend.⁶⁴³

Technology will build necessary transparency and accountability into the system, according to the interviews.⁶⁴⁴

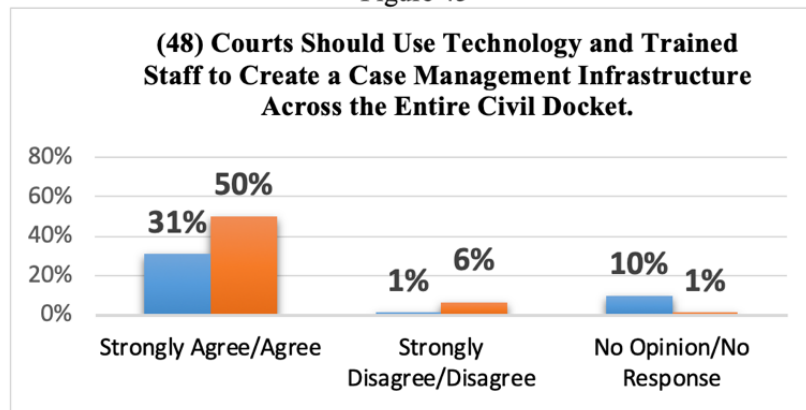
Given the slow pace of digitizing state court files, some twenty-five years after PACER revolutionized the federal docket, that comment is fair.⁶⁴⁵ As noted earlier, courts struggle with technology due to budget limitations and diffuse responsibility. Florida is particularly dysfunctional in that each county provides its court with its technology, resulting in many different systems. Some multi-county circuits are dealing with different computer systems in each constituent county. Florida courts have approached this by providing statewide functional standards, but despite best efforts, they lag far behind what is available in the private sector. Florida has only recently digitized its court files beginning in 2009, and many circuits are still transitioning some aspect of their operations. Civil dockets are generally digitized. This technology facilitates reporting on essential case management data points—if the data is captured, distributed, and understood. The case management methods currently in use in Florida among judges who case manage are significantly dependent on human review and action, as opposed to benefitting from technology advances that could assist in deadline calculation, order preparation, and compliance and status monitoring. These tasks are currently being performed by case-managing judges and their judicial assistants, according to interviews.

⁶⁴³ Telephone Interview 2, *supra* note 282.

⁶⁴⁴ *Id.*

⁶⁴⁵ *See supra* notes 123–26 and accompanying text.

Figure 45



The creation of a case management infrastructure seems to draw strong consensus, which is interesting considered in tandem with the ambivalence in regards to statements about judicial independence and case management.⁶⁴⁶ This response seems to suggest that if an infrastructure of support is built, judges are less likely to see case management as a question of philosophy, since it would not be entirely dependent on the judge, but rather would become embedded in the circuit's process. Small circuits are fully on board at one hundred percent (100%) agreement/strong agreement. There is strong consensus by most data subsets, in the eighty to ninety-six percent (80 to 96%) range, with two outliers: judges with zero to three years experience only agreed at seventy percent (70%), and judges with twelve to eighteen years of experience agreed at seventy-three percent (73%). New judges also expressed a disproportionate disagreement, at thirteen percent (13%), more than double any other subset.

New technology provides a unique window of opportunity, particularly as new judges are added from the private sector who react with disbelief to the state of court technology.⁶⁴⁷ The RAND study described specific examples for binary case management actions in 1996, much of which could be monitored and addressed by technology today: monitoring for service and answer deadlines and taking action where deadlines are missed; monitoring for signs of early termination of the case and capturing that resolution; and initiating a case management schedule when an active case is identified with

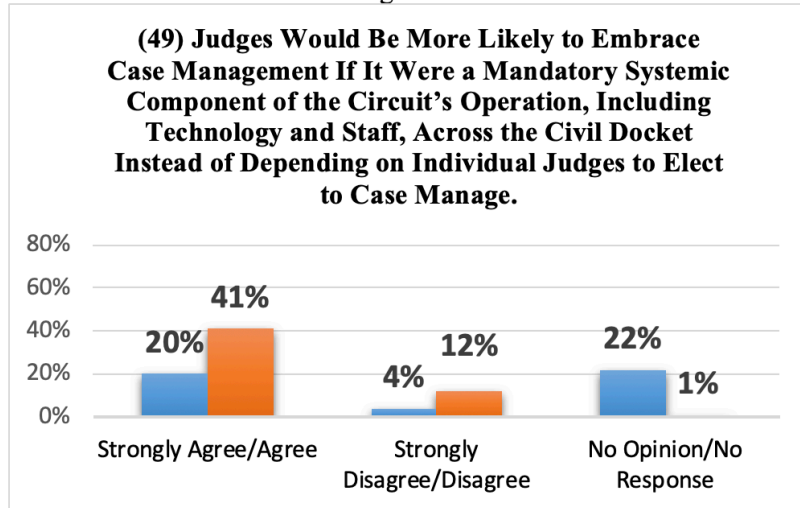
⁶⁴⁶ Figure 45.

⁶⁴⁷ See, e.g., Telephone Interview 7, *supra* note 440.

scheduled cutoff time for discovery and a firm, appropriate, trial date.

For cases that do not yet have issue joined, have a clerk monitor them to be sure deadlines for service and answer are met, and begin judicial action to dispose of case if those deadlines are missed. Wait a . . . month, to see if the case terminates and then begin judicial case management. Include setting of a firm trial date as part of the early management package, and adhere to that date as much as possible. Include setting of a reasonably short discovery cutoff time tailored to the case as part of the early management package.⁶⁴⁸

Figure 46



Following the prior statement, support dropped once the system was described as mandatory.⁶⁴⁹ While small circuits remained almost completely on board at ninety percent (90%) agreement, from medium circuits dropped to fifty-two percent (52%), large circuit support stood at fifty-seven percent (57%), and very large circuit support was at seventy-six percent (76%). A similar drop in enthusiasm was evidenced across the experience subsets. “No opinion” responses doubled, as did disagreement. This response evidences the

⁶⁴⁸ KAKALIK ET AL., *supra* note 79, at 28.

⁶⁴⁹ Compare Figure 46, with Figure 45.

strong sense of independence that judges possess, and the overall dislike of mandates.

That said, most of the judges that were interviewed felt that if a system were made available, the benefits would become clear in short order to attorneys and the judges, and a combination of peer pressure and self-interest would result in adoption.⁶⁵⁰ Interviewed judges felt that external structure would assist deployment of civil case management, as referenced earlier in the repeated comparisons to criminal court.⁶⁵¹ Molot suggests formalizing case management and standardizing across judges for uniformity: “One could imagine a regime designed to vary from case to case but not from judge to judge.”⁶⁵² Civil case management faces the unique problems of a lack of uniformity and a variety of enforcement levels as it currently exists. “Using technology and case management systems would bring in judges who wouldn’t do it on their own, and they would be able to see the impact and the benefit on their docket. If they knew that case management was part of the system, and they had to do it, they would do it,” said one judge who served in an administrative capacity.⁶⁵³

Judges also emphasized accountability and consequences. “If we measure things, it changes behavior.”⁶⁵⁴ They also emphasized the need for the systemic support: “If we want it to happen, it cannot be another unfunded mandate from the Supreme Court. Judges need resources to case manage. Currently, we don’t have the data management tools and don’t have the case management tools.”⁶⁵⁵

One judge described the lack of systemic civil case management with a classic television analogy: the episode of “I Love Lucy” at the chocolate factory, where the heroine desperately attempts to keep up with an accelerating assembly line of chocolates by shoving chocolates in her pocket, in her mouth, and dropping them on the floor as candy goes everywhere—instead of choosing to simply unplug the machine, resetting and reorganizing the speed and the task, and making sure the line proceeded at a consistent and effective

⁶⁵⁰ See, e.g., Telephone Interview 4, *supra* note 166.

⁶⁵¹ See, e.g., Telephone Interview 7, *supra* note 440.

⁶⁵² Molot, *supra* note 108, at 89–90.

⁶⁵³ Telephone Interview 20, *supra* note 294.

⁶⁵⁴ Telephone Interview 18, *supra* note 299.

⁶⁵⁵ *Id.*

speed.⁶⁵⁶ “It’s easy to manage,” said the judge, “if you have a good system.”⁶⁵⁷

At the same time, interviewed judges emphasized their interest in tailoring case management to meet case needs, as every case does not need the same level of case management.⁶⁵⁸ Case management systems needs to be flexible and compliant with the rules and procedural fairness standards. They also felt that it was important to create buy-in among judges to demonstrate that case management on the front end produces less work and effort and better results on the back end,⁶⁵⁹ winnowing down cases that need judicial time, and not spending time on cases that don’t need judicial resources.⁶⁶⁰ One strong judicial supporter stated that,

The only true resolution for case management is a uniform system imposed on all, with tailoring permitted, required to be followed. If you leave it in the judge’s hands, you will get all different directions. Justice should not depend so significantly on which judge you fall in front of. We need uniform standards and uniform requirements with the necessary support to make it happen. Judicial case management is changing and becoming a part of court culture, especially with legislative emphasis on accountability and performance measures.⁶⁶¹

Implicit in all the discussions were overriding basic justice values. The emphasis on working more efficiently cannot compromise the positive values of public justice. In other words, creating systems in addition to measures assures that innovation comes packaged with the necessary precautions to preserve the justice mission, as opposed to simply creating a new generation of judges obsessed with numbers.

⁶⁵⁶ Telephone Interview 12, *supra* note 294.

⁶⁵⁷ *Id.*

⁶⁵⁸ Telephone Interview 4, *supra* note 166; Telephone Interview 17, *supra* note 282; Telephone Interview 19, *supra* note 288.

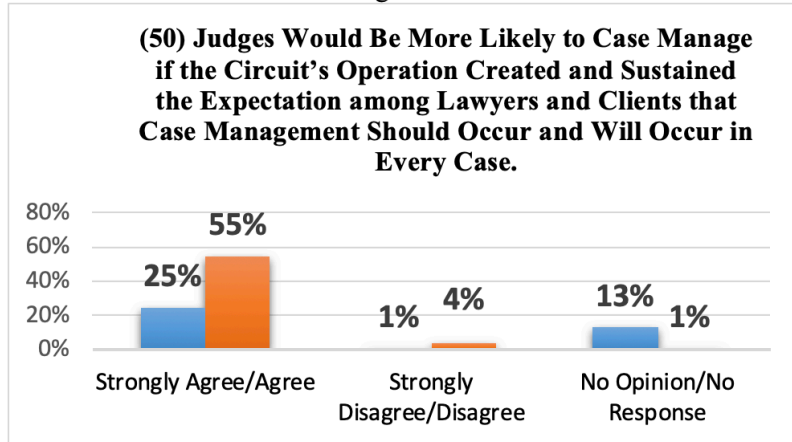
⁶⁵⁹ Telephone Interview 10, *supra* note 282.

⁶⁶⁰ Telephone Interview 4, *supra* note 166; Telephone Interview 17, *supra* note 282; Telephone Interview 19, *supra* note 288.

⁶⁶¹ Telephone Interview 4, *supra* note 166.

As one judge simply concluded: “If you put together a civil case management system and place it in the judge’s lap, most judges would say, ‘Sure, I’ll do it.’ Just make it easy for them to do it.”⁶⁶²

Figure 47

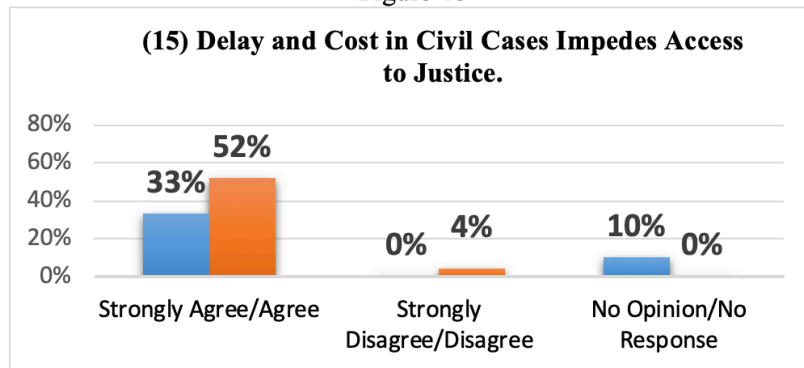


Three quarters of judges responding felt that creating an expectation of case management would encourage case management, in other words, changing the culture and overcoming institutional inertia.⁶⁶³ There was minimal disagreement, except for judges with nine to twelve years of experience who disagreed at ten percent (10%) but also had a “strong agreement/agreement” rate of eighty-three percent (83%). Small circuits again expressed enthusiasm at one hundred percent (100%) agreement.

⁶⁶² Telephone Interview 3, *supra* note 294.

⁶⁶³ Figure 47.

Figure 48



Eighty-five percent (85%) of judges agreed with this statement, with ten percent (10%) “no opinion”—a relatively larger amount than in other statements.⁶⁶⁴ Ninety-five percent (95%) of judges in small circuits agreed/strongly agreed while judges from very large circuits seemed the most skeptical with only seventy-eight percent (78%) agreeing/strongly agreeing.

As one judge pointed out, civil is the last division to adopt active case management—criminal has had it for decades and the family division has had it for more than twenty years.⁶⁶⁵ An interviewed judge felt that case management would not be widely adopted until there is strong leadership from the state supreme court on down.⁶⁶⁶ “Even if judges have to be dragged kicking and screaming,”⁶⁶⁷ there has to be accountability and enforcement if judges want to sit in a civil assignment. “One of the weakest aspects of our branch is very little accountability for judges—it’s totally opposite of the ordinary corporate or military environment.⁶⁶⁸ The best way to get rank and file judges engaged is through peer pressure and setting expectations—that is what good judges do.⁶⁶⁹

As judges rotate through assignments, they come to expect and accept case management as a responsibility, but the challenge of adequately defining and executing the task remains. As one former Chief Judge recommended,

⁶⁶⁴ Figure 48.

⁶⁶⁵ Telephone Interview 14, *supra* note 282.

⁶⁶⁶ Telephone Interview 3, *supra* note 294.

⁶⁶⁷ *Id.*

⁶⁶⁸ Telephone Interview 11, *supra* note 282.

⁶⁶⁹ *Id.*

Most judges are motivated to do a good job, and almost every judge agrees that we gotta get it right—no matter if it's a multi-million dollar lawsuit or a landlord-tenant case. Timeliness is a very important part of getting it right, because you need the right answer at the right time. There needs to be a 'vivid conversation' with fellow chief judges. Judges have to embrace the concept that case management is part of the job. So you take their best intentions and surround it with resources and commit everyone to the process, allowing judges to be creative and innovative, and come up with a process that works for the majority—and let peer pressure deal with the minority. Harness the distinct legal culture to your advantage.⁶⁷⁰

Another judge noted that case management has become more critical with public pressure to improve the process: "We have an obligation to learn as we go and to find better ways to work."⁶⁷¹

CONCLUSION

This research attempts to understand why, in the face of years of advocacy and demand, judges in state civil courts do not case manage. The survey was designed to identify attitudes and the role of various factors on that decision. In evaluating the impact of these factors, there were measurable differences in the level of influence. The factors focusing on individual judge perspectives were less influential: lack of awareness, judicial philosophy, view of the task as administrative versus judicial function, and cross-incentives. Other factors focused on the broader systemic issues. The research overall evidenced that the systemic factors were more important than the individual factors.

With regard to individual factors, the traditionally-touted concerns about lack of awareness of case management, philosophical opposition, or "not my job," were only modestly evident in the surveys and rejected by the majority of respondents, and sharply rejected by interviewed judges. There was little evidence of cloistered

⁶⁷⁰ Telephone Interview 14, *supra* note 282.

⁶⁷¹ Telephone Interview 1, *supra* note 282.

ivory-tower intellectual rejection of the job. Equally, most judges do not view case management as the responsibility of non-judge court administrators.

Assessing the role of cross-incentives as a factor is more challenging. Taken at face value, thirty-six percent to fifty percent (36% to 50%) of surveyed judges had no opinion about the cross-incentives in considering case management.⁶⁷² Therein lie the challenges in examining the cross-incentive factor. Many judges don't want to even acknowledge the existence of self-interest that might be implicated. Additionally, it is difficult to gauge whether these concerns are actually valid in light of the strong assertions by interviewed judges that lawyers and clients who experience fair, predictable, and reliable case management like it, as well as the plethora of surveys in which attorneys request active judicial engagement. While survey responses here suggest that judges ignore cross-incentives, comments by the interviewed judges suggest "wishful thinking." The internal inconsistencies revealed by the survey would suggest that additional research on cross-incentives would be very beneficial. However, one of the challenges inherent in trying to measure attorney and litigant resistance is the diverse and individual nature of judicial approaches to case management. One judge may impose unreasonable and arbitrary deadlines as a function of case management, and another may build a collaborative case management plan with the parties that gets them the essential information to resolve the case as early as possible, or to take it to trial within a reasonable period. Comparison, as well as public acceptance, is challenging with variation.

The results reveal that the most influential factors affecting judicial case management engagement are institutional: lack of definition of the case management task,⁶⁷³ institutional inertia,⁶⁷⁴ and lack of time and support.⁶⁷⁵ These are factors that are closely related and can be significantly affected by resource allocation and process choices that are within the control of court leaders. The survey established that judges clearly recognize that case management is an

⁶⁷² See *supra* Figures 22–27.

⁶⁷³ See *supra* Section IV.C.2.

⁶⁷⁴ See *supra* Section IV.C.5.

⁶⁷⁵ See *supra* Section IV.C.6.

essential component of the judicial task.⁶⁷⁶ Judges see the need but do not engage in case management. This research suggests that judges are open to the task of civil case management, and see its potential value, but do not have a starting point.

Court leaders would be wise to tackle the task of defining case management first. The variety of approaches was evident in the interviews as well as in the survey results. Disarray was reflected in the conflicting responses. Defining the task is essential. If judicial case management is to be an effective tool within this lifetime, then state justice leaders should consider simplifying this long-standing debate into a process designed to give trial judges clear guidance about the case management task: what it is, how to do it, and the expected benefits. The research summarized here demonstrates that the lack of a clear definition of case management has reduced the effectiveness of efforts at deployment.⁶⁷⁷ A judge said, “Case management is so generally misunderstood by the rank and file judges and is used only sporadically or improperly by judges who don’t understand and then question the benefit.”⁶⁷⁸ The need for clarity in the case management task and the need for accountability was a strong theme in the interviews.

It is also important to understand that adoption can be a process. Very few judges expressed any opposition to reactive case management, which would be among the easiest and least controversial systems to deploy to prevent case inactivity and access issues.⁶⁷⁹ Court leaders may be wise to begin systemic deployment with a supportive framework for reactive case management as a bridge from old approaches to new approaches, which would produce tangible and relatively immediate results.

The importance of defining the task was encapsulated in a recent article:

Someone once said the difference between a vision and a hallucination is simply how many people see it. Thus, court leaders need to provide a comprehensive vision for their court that a significant number

⁶⁷⁶ See *supra* Figure 8.

⁶⁷⁷ See *supra* Figure 46.

⁶⁷⁸ Telephone Interview 8, *supra* note 442.

⁶⁷⁹ See *supra* Figures 33 & 34.

of judges and other court staff will embrace and buy into. Setting and communicating a leadership vision statement is a critically important and deeply strategic activity that many court leaders fail to do adequately. . . . [and] judges and court staff must see how the . . . [vision] direct[s] the daily work they carry out.⁶⁸⁰

At the same time, “organizing and mobilizing judges and court staff members around court improvement is a process requiring attention, patience, and compromise . . . the idea that the few can consistently command the abiding support of the many is a dubious expectation.”⁶⁸¹ These comments capture the effect of the institutional inertia challenge.⁶⁸² State courts face challenges due to institutional inertia from the sheer number of judges, court staff and lawyers to be convinced, the wide variation in local court cultures, technology shortfalls, and funding, accountability, and transparency issues. These are all significant barriers that must be addressed to diminish restraints preventing case management. But building underlying system architecture based upon a framework of court case management would significantly reduce the drag of resistance, and would provide the evidence needed to map the path forward.

The judges who are the strongest proselytizers for court case management believe that it will not occur unless court leaders require court case management, cheerlead for court case management, and measure compliance with accountability consequences.⁶⁸³ In order to support civil case management, judges need to understand that leaders are not asking them to do more work, they are being asked to work differently—to work “smarter” not “harder.”⁶⁸⁴ Courts need to make conscious design choices in creating a system to provide

⁶⁸⁰ Ostrom et al., *supra* note 25, at 80; *see also* VICTOR E. FLANGO & THOMAS M. CLARKE, REIMAGINING COURTS: A DESIGN FOR THE TWENTY-FIRST CENTURY 163–65 (2015).

⁶⁸¹ *Id.*

⁶⁸² *See supra* Section IV.C.5.

⁶⁸³ *See, e.g.*, Telephone Interview 18, *supra* note 299.

⁶⁸⁴ *See generally* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., WORKING SMARTER NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES (2014), http://iaals.du.edu/sites/default/files/documents/publications/working_smarter_not_harder.pdf.

direct incentives for appropriate behavior. RAND outlined the path to court case management in 1996: “Studies of change in the courts and in other organizations provide some guidelines for improving implementation. They include: clearly articulating what the change is to accomplish and generating a perceived need for it; a governance structure and process that coordinates individuals’ activities and assigns accountability for results; and meaningful performance measures to help both implementers and overseers gauge progress.”⁶⁸⁵ One judge stated the following:

The only true solution for case management is a uniform system imposed on all, required to be followed by all. If you leave it in the judge’s hands, you will get all different directions and variations. Justice should not depend so significantly on which judge you fall in front of. We need uniform standards and uniform requirements with the necessary support to make it happen. Judicial case management is changing and becoming a part of court culture, especially with legislative emphasis on accountability and performance measures.⁶⁸⁶

Another significant factor that court leaders can control is the level of support in terms of staff and technology.⁶⁸⁷ Judges need to do judicial work and those tasks which do not require judicial decision-making need to be moved to appropriately trained support staff and technology. Much of case management involves assessing compliance and status information. As pointed out in the interviews, many of these questions do not have to be resolved by a judge. An appropriately trained and supervised staff person, much in the way law firms have relied on smart legal secretaries and paralegals over the past sixty years, can handle these tasks. Using staff and technology support effectively was a significant component of the CJI recommendations eight, ten, and thirteen,⁶⁸⁸ and given state budgets, is

⁶⁸⁵ KAKALIK ET AL., *supra* note 79, at 30.

⁶⁸⁶ Telephone Interview 4, *supra* note 166.

⁶⁸⁷ See *supra* Figures 43 & 44.

⁶⁸⁸ CJI REPORT, *supra* note 32, at 29 (“Recommendation 8: . . . Courts should partner with bar leaders to create programs that educate lawyers about the require-

likely to be essential for successful use of proactive case management in state civil courts. With regard to the original debate of the traditionalists and the case management advocates, pushing the administrative end of case management to staff resources is likely to leave judges with more time to engage in traditional adjudicatory functions, in addition to obvious cost-effectiveness.⁶⁸⁹ One judge who had rotated out of a specialty assignment with proactive, structured case management sighed, “[w]hen you are used to a case manager, and then no longer have that support, you feel naked.”⁶⁹⁰

Encouraging civil court case management requires consensus building across the entire court system. The interviewed judges demonstrate leadership by example in which the tangible benefits of case management can be identified, counted, and captured. There are judges like them across the country, but court leadership will have to reach out to identify them and ask them to help preach the benefits to their colleagues and courts. Leaders will have to overcome a general resistance to change on the part of the bar and the bench: the fear of the unknown; threats to competence of judges, court staff, and attorneys by requiring new tasks and responsibilities; altered relationships between the court, counsel, and the clients; and the risk of a sense of loss of control over relationships that judges traditionally craft on an individual basis. Leaders would be wise to keep all judicial audiences in mind: the self-represented, the jurors, the injured, the insurance companies, the business community, the lawyers, as well as the judges with whom they directly correspond. Judges are motivated by others’ assessments of their performance. Protecting constitutional rights provides a public good reason why criminal cases must be handled as soon as possible. Leaders must articulate the public good reason that will be advanced by judicial civil case management. As one judge said, “Judges think there is good reason why criminal cases need to be resolved ASAP—a public good reason.” He went on to note that if courts seek to ensure

ments of newly instituted case management practices.”); *id.* at 31 (“Recommendation 10: Courts must take full advantage of technology to implement right-sized case management and achieve useful litigant-court interaction.”); *id.* at 37 (“Recommendation 13: Courts must take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services.”).

⁶⁸⁹ *Id.* at 4.

⁶⁹⁰ Telephone Interview 20, *supra* note 294.

widespread support for case management efforts, “there has to be a public good reason articulated for civil case management, inherent evident benefit that can be articulated and emphasized for the civil docket.”⁶⁹¹ Those reasons come down to access, cost and delay, and the continued relevance of the civil courts as a matter of public trust and confidence. People cannot be forced to change. They can be led to accept that change will occur and to adjust to its consequences.

The good news from this research is that removing barriers is key, as the most significant impediments to judicial case management are factors that are within the control of institutional leaders. Transparency—an inevitable result of technological improvements, and legislatures and a public that want to understand the branch—could result in more interest in case management as judicial performance is measured. In order to build case management into the system and eliminate institutional inertia as an impediment to judicial case management, judicial case management must become an institutional keystone. Leaders need to build case management into the civil court system, as much as it is an institutional bedrock in criminal divisions across the country.

Court leaders are in the position to create frameworks which define the task of judicial case management; provide the necessary training, education, and information about judicial case management; as well as the organizational support for implementation in terms of technology and staffing. Courts can design and build systems, through choice architecture, that support case management and make a clean, monitored process with a tangible end date as the default process, with flexibility and tailoring as appropriate for the case. The broad use of reactive case management suggests that creating a means of attacking cases that have not progressed and preventing cases from stalling out, may be the easiest place to start and a good way to quickly demonstrate the value of a case management system.

Additional research needs to be done, with empirical measurement.⁶⁹² The results of civil case management can be measured

⁶⁹¹ Telephone Interview 16, *supra* note 299.

⁶⁹² It can be done. Miami, my home jurisdiction, served as a site for a national pilot project to test civil case management team approaches in 2017. Notwithstanding significant operational challenges including Hurricane Irma, the Miami project reflects an early reduction of pending caseloads of sixteen to twenty-two

when definitions and metrics are adequately established. Courts should measure these projects to assure they are meeting the delay reduction goals. Research about attorney and litigant experiences in cases with and without case management would determine which practices are most beneficial. Evaluation of which events or time points in a case generate a need for court access would enable courts to block preset hearing times over the life of a case with confidence. There should also be a closer look at pro se, minimally contested and uncontested matters, in terms of case management impacts. Another area of research should examine whether the effect of cross-incentives differ based on judicial selection methodology; for example, where judges are appointed or retained once in office without risk of direct opposition. An examination of what drives those judges who see case management as an essential element of judicial excellence might help normalize case management in other judges' choices. Finally, the role of choice architecture in creating case management systems that judges would opt-out of instead of opt-in to may prove of benefit to court leaders who wish to integrate court case management into the business process of civil courts.

Better results cannot be measured simply by speed of process or even reduction in cost, even though these are the easiest data points. This change must be consistent with core values: it must deliver better justice. Cost and delay cannot be improved at the expense of fair and just results. How parties experience court in terms of procedural fairness cannot be sacrificed for swiftness or efficiency. At the same time, current processes that handle cases in crowd settings, with only moments for each case and litigants, deserve rethinking. The overwhelming response from the interviewed judges established that they viewed case management as essential to delivering better justice, because they could spend more time judging and less time juggling, with the luxury of paying appropriate attention to each matter's needs. As one interviewed judge stated, "[c]ase management is the ultimate delivery system for fairness and efficiency."⁶⁹³

percent (16%–22%) at twelve months compared with a non-case management control group. For an example of more recent empirical research, see LYDIA HAMBLEN & PAULA HANNAFORD-AGOR, NAT'L CTR. FOR STATE CTS., CIVIL JUSTICE INITIATIVE: EVALUATION OF THE CIVIL JUSTICE INITIATIVE PILOT PROJECT (CJIPP) (2019).

⁶⁹³ Telephone Interview 6, *supra* note 539.

In the end, courts are being asked to engage in fundamental behavioral change in the way judges handle civil cases. This research indicates that rather than face burdens of persuasion, the challenge for court leaders is to eliminate the barriers that prevent judges from case managing. Given the limited carrots and sticks available to court leaders, creating a solid scope and definition of case management, providing judicial training, and reengineering staff positions, are much easier and cost-effective prospects than the inevitably unsuccessful task of trying to force judges to conform. These barriers in the way of civil case management are significantly under the control of Chief Justices and Chief Judges, and can be the subject of objective measurement likely to encourage legislative budget support. One judicial interview reflected on limited court resources: “Currently we allow parties to demand and allocate judicial resources instead of the court. If we are to work smarter in this era of tight budgets, we have to take control of our resources and make sure we are using them wisely, and the most expensive and essential resource in the judicial branch is the judge.”⁶⁹⁴

When an individual can choose from hundreds of thousands of products on a website, buy their selection with a click, and then track its delivery from seller to doorstep in 48 hours, and the only information a litigant can access is a court docket listing pleadings and events, the disconnect between courts and their customers is evident. Any idea that the court system can continue with its current opacity bodes poorly for the continued relevance of courts, and if transparency provides a window into how cases move through the court system, interest in better case management will likely result from judges seeking to deliver great justice—or protect their reputations. Doing nothing risks obsolescence.

The critical motivation for civil judicial case management is public trust and confidence in the ability of our state courts to fairly, timely, and cost-effectively resolve our disputes.⁶⁹⁵ Judges repeatedly expressed concern that the traditional creaky and flawed systems currently in place will not meet twenty-first century demands. Many acknowledged the need to be more transparent and accountable. All interviewed judges made reference in one way or another to the public’s expectation of timely, cost-effective, fair justice that

⁶⁹⁴ Telephone Interview 1, *supra* note 282.

⁶⁹⁵ *See supra* Section IV.C.2.

every judge should honor, and they all believe civil case management is an important tool to meet that expectation. Some judges, particularly those who had served in judicial branch leadership positions, also pointed out broader public concerns. As one judge pointed out,

time is valuable to the justice system. It's not just working harder, it's working smarter with our resources. Some judges see themselves as efficient just by giving access and hearing cases, equating hard work with what is needed; but there are ways of working that are so much more effective. Case management helps by setting reasonable goals and defining expectations. . . . Some judges think, 'I can't handle anything else,' but this gets you more time, less stress for everyone—it's good for the parties, it's good for the lawyers, it's good for the judges, and it's good for the system. Case management is a tool that makes life better in so many ways. Business people know how they can plan for the future. It enhances public trust and confidence in every way.⁶⁹⁶

If the problems in our justice system evidenced in these survey results are this clear to judges, how can we guarantee justice to litigants who must navigate these flawed processes in seeking solutions to their problems in court? Courts and court leaders have to confront the disconnect that is evident throughout the survey responses: judges don't think the system works and they don't think the parties can manage it, but judges aren't taking action on it. A challenging element of the change process is providing motivation.⁶⁹⁷ In terms of effecting change, the judicial branch has few resources and little means to incentivize changes in judicial behavior. Many judges, once the scope of the case management task is defined, may be motivated by the same mission that animated the interviewed judges: a simple dedication to excellence and to the people we serve. Other, more self-interested motivations, should also be explored: better use

⁶⁹⁶ *Id.*

⁶⁹⁷ See generally John P. Kotter, *Leading Change: Why Transformation Efforts Fail*, HARV. BUS. REV., Mar. 1995, at 59, 60.

of and less frustration for staff, particularly when dealing with pro se litigants; less waste of judicial time; and less stress as reflected in the interviews.

Most citizen experience with the judicial branch comes through the doorway of their community state courthouse. This is where America's reputation for justice is built or destroyed, where justice is delivered face-to-face. If lawyers and litigants do not see the state courts as being able to deliver timely, cost-effective, and fair justice, then state courts will continue to lose customers and disputes as controversies shift to other private-sector options, or are simply abandoned. A diminishing role for courts, particularly the state courts which handle the vast majority of the peoples' problems, has significant consequences for democracy. As Alexander Hamilton wrote in Federalist No. 17,

There is one transcendent advantage belonging to the province of the State governments . . . [By which] I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is that which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government.⁶⁹⁸

Another judge described the challenge of case management in personal terms. He is the only active case managing judge in his area. His colleagues ask him: what's the point? He replies with a uniquely Floridian response: "You walk on the beach and see starfish left by the departing tide all over the beach, dying on the sand. You pick them up one by one and throw them back into the water. People say you can't save them all. But you know, it made a real

⁶⁹⁸ THE FEDERALIST NO. 17 (Alexander Hamilton).

difference to that starfish I threw back.”⁶⁹⁹ That’s the difference he sees case management making case by case to the litigants, and with enough cases, to the entire justice system.⁷⁰⁰

“Great reform movements require the fuel of a pressing social need, the oxygen of optimism, and the spark of a great idea.”⁷⁰¹ America needs effective state courts. This research shows that judges understand the need, but not the solution. The type of case management that has a real chance to make a material difference in civil litigation is not dependent on the philosophy, resolve, or workload of any individual judge, but is built into the court system. Systemic, structured court case management can use the rules, guarantee access and prompt high quality and accurate rulings, avoid waste and delay, and limit unnecessary process-imposed costs. If court leaders wish to improve use of case management as a tool to improve the reputation of state civil courts as a place to solve problems, to attract a diverse caseload representing all sectors of our society and economy, and to allow the law to fully reflect the diversity of American life, then they must understand how to get judges engaged. This Article hopes to fill a gap in the literature regarding what we know about judicial attitudes towards civil court case management today, how it can help, and further identify what potential next steps should be taken to make civil case management part of the mechanics of civil case processing. Experts for years have advocated for case management as essential to public trust in state civil courts to resolve their disputes effectively. This Article hopes to add clarity to that effort.

⁶⁹⁹ Telephone Interview 6, *supra* note 539.

⁷⁰⁰ *Id.*

⁷⁰¹ Tidmarsh, *Pound’s Century*, *supra* note 1, at 587.