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A New Model for Civil Case Management: Efficacy Through Intrinsic Engagement

David Prince

Most trends in reforming our civil litigation system in recent decades have been based on a “high tech” paradigm—reformers assume the system will be more efficient if we create enough self-executing procedures that issues are resolved automatically and people are kept away from the courthouse. The paradigm is akin to an automated system for answering the telephone at a busy company; just push the right button and you will automatically be transferred to your destination. This article suggests an alternative “high touch” approach¹ that applies the principles of procedural justice to achieve more efficient “distributive justice” (a fair and just result). The testing experience of a seven-year pilot program and the behavioral science research underlying procedural justice are consistent with the following thesis: A civil case management system should achieve greater efficiency, participant cooperation, and participant satisfaction by eschewing the modern trend of dispute suppression and pre-fab case management in favor of a philosophy that, informed by the behavioral sciences, is based on disputant engagement that tailors case management to the individual needs of the case. Put more succinctly, effective civil case management is tailored to the individual needs of the participants. While a controlled evaluative study is needed, the pilot testing and the existing behavioral science research tell us that the goal of civil case management should be giving each civil case the degree of management it needs (whether greater or lesser) through early, hands-on, and individualized engagement of the judge with the disputants. To continue the telephone analogy, rather than an automated telephone-answering system, a live, knowledgeable, and engaged receptionist will be more effective for the company and the customer, more satisfying for the customer, and more economical and efficient for all.

Civil litigators, parties, and judges have long been dissatisfied with civil case management. In 2006, a group of experienced civil litigators and trial court judges assembled to launch an experiment in civil case management. Our goals were modest. We did not have the ability to change the existing rules of

civil procedure, so we sought to work within them. Our collective instinct was that the trend of rule-based, automated management of civil litigation impaired rather than improved the delivery of distributive justice. We also suspected that the automation approach exacerbated rather than resolved the problems in civil litigation. We wanted to make the path to dispute resolution more efficient and trim away the most common distractions to let everyone involved focus their resources on the core of the civil dispute. Our suspicion was that a “high touch” approach of active and engaged case management would be more effective. We started a pilot as a test bed for experimenting with different techniques.

What we learned was that this modest goal leads to revolutionary realizations in civil case management. The lessons we learned reduced one participating judge’s civil caseload by 58%. While a more rigorous quantitative study involving control groups is needed, this bespoke approach appeared to reduce substantially the judge-time required per case—reaping the double benefit of a lower caseload as well as less time required per case.

We started our project by surveying the various procedural approaches used around the country to improve civil case management. We looked at the rocket docket,² differential case management,³ motions dockets,⁴ trial-setting tripwire,⁵ and many others. Fortunately, we had reflective people with real-world experience in each of the approaches that could assess firsthand the benefits and shortcomings of these approaches. We quickly realized we were trying to start our journey from the destination. We took a conventional step back and asked what drives the *problems* in civil litigation. We realized this was also too myopic. We stepped back further and asked what drives *civil litigation*. Once we answered that question, a new approach revealed itself. However, we then had to start our experiment to realize that the true foundation lay in asking what drives *human behavior*. Over time, the pilot project revealed that the solution to the problems in civil case management lay, not in defining specific procedures, but in adopt-

Footnotes

1. The concept of “high touch” vs. “high tech” is drawn from *Mega-trends* by futurist John Naisbitt (Warner Books, 1982).
2. For example, the United States District Court for the Eastern District of Virginia. For information, see <http://www.leclairryan.com/files/Uploads/Documents/Rocket%20Docket%20EDVA%20FAQ.pdf>.
3. For example, the United States District Court for the Northern District of Ohio. For information, see Local Rule 16.1 at http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/Rule161.pdf.
4. For example, the presentment process in the United States District Court for the Northern District of Illinois. For information, see Local Rule 5.3 at http://www.ilnd.uscourts.gov/_assets/_documents/Rules/LR2012.pdf.
5. The trial tripwire can take many forms ranging from an early deadline for all cases to set trial or prohibiting a trial setting until the case is fully prepared and certified as ready for trial. For one example, consider the trial-setting process in the state courts of Colorado stated in Colo. R. Civ. Pro. 16(b)(4).

ing a new philosophy of civil case management by pursuing individualized engagement based on what academics call an “intrinsic motivation” model.

The key building blocks to achieving both efficient and effective case management define a philosophy of civil case management. These three foundational blocks can be summarized as follows:

- Procedural Justice Matters—*How One Charts the Course Is as Important as the Course*
- The Verdict Is Not the Goal—*One Must Determine the Destination to Chart the Course*
- The Lawyer Is the Judge’s Ally—*Work with the Crew, Not Against Them*

A philosophy built on these three principles, in turn, leads to four core strategies:

- Bring ‘Em In and Engage, Engage, Engage
- Ask Why
- Streamline and Customize Case Management
- Engage Disputes to Eliminate Distractions

Implementation tactics for an individual judge will then be driven by a combination of these principles, the local legal culture, and the judge’s skills and experience.

This philosophy and these strategies evolved over time through the test bed of the pilot. But as the individualized-engagement model evolved, anecdotal observations indicated it was remarkably more successful than the mainstream model of remote rule-based case management. A review of the latest research from the world of the behavioral sciences explained and confirmed the anecdotal observations and apparent results achieved in the pilot’s field experiments. The ultimate proposal of this article is that future civil-case-management reform should follow the paths pioneered in the problem-solving courts; specifically, it should be informed by, and based upon, the empirical data now available explaining human behavior and motivation.

Section II of this article will provide the reader with a brief overview of behavioral and management research advances relevant to civil case management. Then, we will examine the primary existing model for civil case management with the aid of this research and the reader’s experience with the mainstream existing model. If the idea of reading about behavioral science research is too soft and fuzzy, skip to sections III and IV. There, this article will propose a new model to inform future civil case management based on this research and, more importantly, real-world experiences. After discussing the philosophies and strategies of a new engagement-based model for civil case management, this article will delve into the nuts and bolts of implementation tactics through a case example in section V. Section VI then provides some thoughts on a path forward.

By the conclusion, you will know the strategies necessary to revolutionize your approach to civil case management. Instead of devoting your time to litigating the litigation, you will be able to clear away the distractions and focus your time on providing effective, productive court services to the parties. You

can focus the bulk of your judicial civil time and attention on the meaty analyses requiring a judge rather than on the endless review of briefing on distracting issues. The lawyers in your case will also be able to streamline their work. In the end, your approach to civil case management will yield more effective, more efficient, and more satisfying solutions to your community.

Project management challenges the manager to move a group of people to accomplish a goal

PROCEDURAL JUSTICE AND DEVELOPMENTS IN BEHAVIORAL SCIENCE

A. JUDGES AS PROJECT MANAGERS

In 1986, the Administrative Conference of the United States adopted recommendations for addressing perceived problems in our litigation procedures. The adjudication process was believed to suffer from delays, excessive expense, and unproductive legal maneuvering. This, in turn, was seen as interfering with achieving substantive justice. The Conference called for judges to take away from the lawyer control of case management. The Conference noted that “many judges, informed scholars and other experienced observers now cite lawyer control of the pace and scope of most cases as a major impediment” to the litigation process.⁶

Moving a civil dispute through the litigation process to conclusion is an exercise in project management. The mid-twentieth-century view of the litigation process assigned the judge a passive role, if any, in that project management. The judge’s role was to provide fair and impartial decisions of disputes (distributive justice) brought to the judge, and little else. As indicated by the Conference report, a major shift began several decades ago when the judge was increasingly expected to provide active management of the litigation. As the Conference observed in 1986, “[i]n the federal judicial sphere, and increasingly in the state judiciary, a consensus is developing that efficient case management is part of the judicial function, on par with the traditional duties of offering a fair hearing and a wise, impartial decision.” Once the judge was assigned the role of project manager, a managerial philosophy had to be selected.

Project management challenges the manager to move a group of people to accomplish a goal. In addition to identifying the tasks required, project management requires influencing behavior, gaining compliance, and achieving acceptance of the manager’s authority. How one approaches these tasks is based on the managerial philosophy of the manager.

B. TWO MODELS OF MANAGEMENT PHILOSOPHY

Those who study management and human behavior tend to identify two broad types of managerial philosophy or management models. The language varies by author, but they often differentiate between a traditional management model of extrinsic command and control and an emerging model of

6. Recommendations of the Administrative Conference of the United States, 1 C.F.R. § 305.86-7.

Tom Tyler . . . has spent more than two decades studying the question: Why do people obey the law?

autonomy or intrinsic motivation. In the context of analyzing civil case management, the traditional command-and-control or “extrinsic” model would describe a model of civil case management based on automated and self-executing generic case-management rules. The judge’s role in the extrinsic model is to drive the

participants through the rule-defined path and enforce those rules through sanctions. The model of autonomy or “intrinsic” motivation would describe the individualized-engagement model advocated in this article.

Two sample authors in these fields that are accessible to a law-trained audience are Tom R. Tyler and Daniel H. Pink. Tyler is closely connected to the field of law, while Pink’s relevant work focuses on business management.

Tom Tyler is the founder and leading exponent of the procedural-justice movement. He is a psychologist who has spent more than two decades studying the question: *Why do people obey the law?* In his work, *Psychology and the Design of Legal Institutions*, Tyler explains our two models in the context of designing credible and effective systems of law.

Tyler describes the traditional model as one based on “social control” of human behavior through use of extrinsic rules that create a system of punishments and rewards for compliance with those rules.⁷ He often refers to this as a “deterrence”-based model for directing the behavior of individuals.⁸ He observes that this model is heavily dependent on an extensive system that allows leaders to monitor or surveil the behavior of individuals to distribute proper rewards and punishments based on rule compliance.⁹ This surveillance component is a necessary foundation for an extrinsic system because the success of a deterrence model is largely dependent on the individual’s belief that he or she is likely to be caught and punished for breaking the rules.¹⁰ For example, I sit at the red light without moving because I expect something bad will happen if I run the light. Through a review of the existing research, Tyler demonstrates that the deterrence model is ultimately resource intensive and relatively ineffective in securing individual compliance and cooperation.¹¹ If there is no traffic around, I do not expect to be caught, and the light is particularly long, I may run the red light.

Tyler explains that the social-control model’s reliance on punishment for violating rules results in participants being less likely to follow the rules when they are not under surveillance. The control model “create[s] an adversarial relationship,” which leads the participants “to grow less compliant” with the

rules and “less willing to help” (*i.e.*, less cooperative).¹² As the rules under a control model are simply imposed on the participants without their input or consent, the participants also see those rules as lacking legitimacy.¹³ This, in turn, contributes to a reduction in compliance. Any young associate that has had to face an experienced and obstreperous opponent “alone” in the confines of a telephone conference to negotiate a deposition date or document production will recognize Tyler’s academic explanation of the experience. Tyler concludes that the deterrence model “is a very high cost strategy [because of the implementation and policing resources required] that yields identifiable, but weak, results.”¹⁴

Tyler describes the second model as one based on “legitimacy and morality.”¹⁵ By “legitimacy,” he means a system that strives to win the consent, compliance, and cooperation of the participants through involvement. By doing so, the leader/manager gains authorization from the participants to lead and make decisions. “Legitimacy, therefore, is a quality possessed by an [individual], a law, or an institution that leads others to feel obligated to obey its decisions and directives.”¹⁶

By “morality,” Tyler means that the standards or rules governing conduct are internalized by the participants as private values—as their own feelings of responsibility and obligation.¹⁷ Once this internalization is achieved, the participants self-regulate to comply with those standards.¹⁸

If I understand and accept that my community has decided that we should have a traffic light at this intersection because it is a dangerous blind curve and a fast heavy truck could be coming at any moment without warning, I accept the rule that we must stop when the light is red. I internalize this rule and believe honoring it is part of being responsible. I tend to honor the requirement to stop even when it makes me late and I cannot see a reason to stop on this particular night. As a result, I am more likely to stay stopped at the red light even if I am sure I will not get ticketed for running it and doubt I would get hit if I ran the light this time. Tyler explains:

Self-regulation can occur based upon legitimacy, morality, and/or both.

The police and courts, as an example, depend heavily upon the widespread voluntary compliance of most of the citizens most of the time. This compliance presumably allows authorities to focus their attention upon those individuals and groups whose behavior seems to be responsive only to threats of punishment. The legal system would be overwhelmed immediately if it were required to regulate the behavior of the majority of citizens solely through sanctioning or the threat of sanctioning.¹⁹

Morality and legitimacy are achieved, Tyler argues from the research, through following the precepts of procedural justice.

7. TOM R. TYLER, *PSYCHOLOGY AND THE DESIGN OF LEGAL INSTITUTIONS* 9 (2008).

8. *Id.*

9. *Id.* at 11.

10. *Id.*

11. *Id.* at 12.

12. *Id.* at 17.

13. *Id.* at 22-27.

14. *Id.* at 12.

15. *Id.* at 21-22.

16. *Id.* at 23.

17. *Id.* at 29.

18. *Id.* at 28.

19. *Id.* at 32-33.

The key dimensions of procedural justice are as follows:²⁰

- **Voice:** The participant must feel heard in the proceedings;
- **Neutrality:** Decision-making must appear unbiased and principled;
- **Respect:** The participant must believe he or she was treated with dignity;
- **Trust:** The participant must believe the decision-maker is taking into account the participant's needs and sincerely trying to address the litigants' needs. The label "trust" for this parameter can be a miscue to one with a law degree. One researcher has referred to this parameter more descriptively as "helpfulness" rather than "trust."²¹

Even Tyler's elements of procedural justice can be boiled down to the simple ideas that a person will be more satisfied and likely to cooperate with decisions made by an authority if that person believes the decision was fair. The research tells us that the single most important factor in determining whether the person believes the decision was fair is not the decision itself. Instead, it is whether the person believes he or she had a chance to speak and be heard in the decision process.²²

Interesting research by Lind, Kanfer, and Earley examined this point.²³ The researchers used the scenario of giving work assignments to personnel. Participants were given three approaches to handing out work assignments. In the first scenario, the participant was simply given an assignment. In the second scenario, the participant was told of a tentative schedule and then asked for feedback. The schedule was then adjusted to come closer to that proposed by the participant. In the third scenario, the researcher handed out the work schedule and stated it would not be changed. However, the researcher then asked for opinions from the participants. After receiving the opinions, the researcher stayed with the initial assignments. Predictably, the scenario in which participants were allowed to provide their input before the decision was made was viewed as the fairest (which, in turn, means it was the most likely to be followed). The surprising result for many is the perception of fairness for the third scenario, in which participants were told the schedule would not be changed, were then given a chance to provide input only after the decision was made, and then basically had all their input rejected when the researcher confirmed the original decision. This third scenario was still viewed as substantially fairer than the first, when no "voice" was permitted. Thus, even an admittedly "sham" opportunity to provide input makes a person substantially more likely to follow rules and procedures than simply imposing them on the person with no chance to speak.

In summary, Tyler concludes that a rule-making system (which is analogous for our purposes to a system for manage-

ment of a civil lawsuit) is dramatically more likely to achieve acceptance, compliance, and efficiency through cooperation by using a fair system to allow the individuals being ruled (the disputants in our analogy) to participate in shaping those rules so that they will internalize the standards as their own. Tyler's 2006 research reveals that an individual's belief in the legitimacy of the rules at issue is five times

more important to their decision whether to follow those rules than their perceived risk of punishment for breaking them.²⁴ His research further reveals that what he calls the "morality" factor is 15 times as important to compliance as the risk factor.²⁵

Our second author is Daniel Pink. He is a respected writer on issues of interest to the business world such as organizational management. In his 2009 book *Drive: The Surprising Truth About What Motivates Us*, he labels the two management-philosophy models as Motivation 2.0 based on Type X behavior and Motivation 3.0 based on Type I behavior. For simplicity, this article will refer to Type X (think "X" for "extrinsic") and Type I (think "I" for "intrinsic"). Pink draws a now-familiar distinction between the models. "Type X behavior is fueled more by extrinsic desires than intrinsic ones. . . . Type I behavior is fueled more by intrinsic desires than extrinsic ones."²⁶

Type X is the traditional model of management that has dominated business management for a century. In business management, Type X assumes that people will not do their work unless closely controlled, monitored, and driven by their manager. It assumes that employees are motivated through a system of providing rewards for desirable behavior and punishments for undesirable. Simply put, Type X-based management seeks to define the path for the employee to follow in detail and then rewards desirable behavior and punishes undesirable behavior to achieve a smooth-functioning employee "machine."²⁷ Advanced research on Type X-based management explains that rewards are substantially more effective than punishments in achieving results.²⁸ Type X-based management is an alternative description of the same "extrinsic motivation" principles described by Tyler as a "social control" or "deterrent" model.

A classic example of Type X-based management is a traditional twentieth-century manufacturing assembly line. The employee is placed at a station on a factory floor overlooked by a manager's window. The employee is given detailed instructions based on a time-and-motion study of exactly how to insert tab A into slot B. The employee must conform strictly to

Daniel Pink . . . is a respected writer on issues of interest to the business world such as organizational management.

20. Kevin Burke & Steve Leben, *Procedural Justice: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007).

21. Michael Rempel, Research Director at the Center for Court Innovation, presenting *The Role of the Judge* at the Annual Conference of Colorado Drug Court Professionals (April 10, 2012).

22. See Burke & Leben, *supra* note 20, at 12; Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 28 (2007).

23. E. Allan Lind, Ruth Kanfer & Christopher P. Early, *Voice, Control*

and *Procedural Justice*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990).

24. TYLER, *supra* note 7, at 31.

25. *Id.*

26. DANIEL H. PINK, *DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US* 75 (2009).

27. *Id.* at 17.

28. *Id.*

Like Tyler in reviewing research on the rule of law, Pink reviews the available research from the fields of business management and behavior.

requirements defining when she arrives, what she wears, when she can take a bathroom break, when she can speak, etc., to allow the assembly line to move rapidly and consistently. The employee has given no input into any of this and no explanation of why the third finger on her left hand must be held at such and such an angle. The employee is always under observation, and every deviation from the defined path is

sanctioned.

Like Tyler in reviewing research on the rule of law, Pink reviews the available research from the fields of business management and behavior. He concludes that Type X-based management is generally unsuccessful for most modern business environments and can make employees underachievers, as well as more likely to pursue unethical behavior.²⁹

One of Pink's more intriguing findings is that paying bonuses for meeting specified goals actually harms the performance of an employee or group of employees over time when they perform work that requires more than rote repetition of defined steps.³⁰ This finding was based on pioneering research by Harlow and Deci.³¹ Deci pursued a research model testing different ways of getting people to form various patterns with certain puzzle-like pieces. He divided them into two groups: one that was paid based on their level of performance and one that was not paid. He had the two groups assemble certain patterns over a three-day period. He ultimately found that the unpaid group performed markedly better than the paid group. Pink's Type I model explains why.

In a related finding, Pink concludes that goals imposed on people are frequently deleterious, while goals the person helps to set for his or her own reasons can be remarkably effective.³² In short, he concludes that Type X-based management applied to any situation comparable to the tasks of civil litigation is counterproductive.

Pink explains Type I-based management as relying on the employee's own intrinsic motivations to achieve the manager's desired results.³³ While he uses different language, his explanation of the research on this form of management is remarkably similar to Tyler's procedural-justice concept. Pink identifies three elements of Type I-based management: autonomy, mastery, and purpose.³⁴

Pink explains that the human being's natural state is to be autonomous and self-directed. Consequently, the more autonomous and self-directed a person can be, the more productive the person will be. While a manager must ultimately

direct the goal for the benefit of the organization, the employees should retain as much autonomy as possible over what they do, how they do it, and when they do it.³⁵ As in the workload research regarding voice by Lind, Kanfer, and Earley, that autonomy can be minimal: it may be as little as an opportunity to be heard on the rules and production targets being set.

For his second element, Pink explains that motivating an employee most effectively requires a manager to recognize the individual's desire to be fully engaged. Human beings need to feel that they are making progress in their work. This feeling is a substantial motivator. Pink refers to this feeling of progress as "mastery."³⁶ People want to feel that they are honing their own skills.

In the context of civil case management, mastery may be served by giving the lawyers the chance to explain and, when appropriate, try their ideas on how best to take the case to conclusion. I once had one of those dozen-lawyer initial case-management conferences in a mechanics-lien case. One lawyer stepped forward to explain a system they had used in another case for streamlining the claims process and some suggested refinements. The other lawyers found the ideas intriguing. We discussed the process and implemented it for our case. Viewed through Pink's lens, this was a courtroom version of working with the participants' needs for mastery. More commonly, mastery for us will merge into the other two of Pink's elements. Even the example given could also be characterized as serving autonomy or purpose.

For his final element, Pink states that "[h]umans, by their nature, seek purpose—to make a contribution and to be part of a cause greater and more enduring than themselves."³⁷ Despite the high-sounding language, the "purpose" need not be to save the world; "purpose" need be only something beyond the individual's personal interest. For our purposes, "purpose" can be seen simply as involving the participants in defining the goals for the litigation and the steps in its management. The element can be served by discussing why any particular procedure, deadline, or page limit has been set where it is in this particular case (for example, "We set the deadline for supplementing disclosures on this date because of the parties' respective accounting cycles and the need to accommodate the accounting experts' tax-season schedules.").

One study reviewed by Pink illustrates the concept of "purpose."³⁸ He notes that one of the most underutilized words in management is "why." Adam Grant, a University of Pennsylvania psychologist, researched call-center employees—not the first group of employees that comes to mind when one thinks of jobs with a higher "purpose." He divided the employees into two groups. One group worked as normal. The other group read articles about the benefits and overall value of the work they would be doing. The group given a "purpose" for their work performed substantially better than the other group.³⁹

29. See *id.* at 31, 56-57.

30. *Id.* at Chapter 2.

31. *Id.* at 5-9.

32. *Id.* at 35-38.

33. *Id.* at 75-79.

34. *Id.* at 219.

35. *Id.* at Chapter 4.

36. *Id.* at Chapter 5.

37. *Id.* at 223.

38. *Id.* at 137-38.

39. *Id.*

To return to the assembly-line analogy, recall the American automotive industry in the late 1980s and early 1990s. That factory floor was effectively the example of extrinsic management previously described and had been since Henry Ford perfected it. By the 1980s, there was considerable discussion of changing management philosophies in the American automotive factory to mimic those in a Japanese automotive factory. The “revolutionary” changes were to engage the line workers in discussions of how the assembly line was organized and the sequencing of the work and to get their input on the best ways for them to do their work. Managers were to have line workers identify ways each could better contribute to the final product. They were to treat each employee as a highly skilled master at their task rather than a disposable cog. Managers were to focus everyone on the need for high-quality work to keep the factory in business as well as the need for line workers to provide a product in which they could take pride. A key symbolic act was authorizing any person on the factory floor to halt the assembly line to fix a problem. Viewed through the prism of Pink’s paradigm, these developments all focused on Type I motivation, serving the worker’s need for autonomy, mastery, and purpose.

In considering Pink’s discussion of “purpose” and Tyler’s discussion of “voice,” I am reminded of the Continental Army drillmaster “Baron” von Steuben, who famously complained about American soldiers:

You say [to a Prussian soldier], “Do this” and he does it, but [in America] I have to say, “This is why you ought to do that,” and *then* [the American soldier] does it.⁴⁰

The Baron, despite deriding it, was actually far ahead of his time in management philosophy.

While each approaches the issues from a different perspective, Tyler and Pink reach the same conclusion after reviewing extensive research into human behavior. Both conclude that, whether designing a legal system or a management system, one will achieve substantially more efficient, effective, and rewarding results by designing the system based on intrinsic rather than extrinsic motivation.

C. THE TWO MODELS APPLIED TO CIVIL CASE MANAGEMENT

1. Extrinsic-Model Civil Case Management

Decades have passed since the Administrative Conference of the United States observed that our litigation systems suffered from widespread dissatisfaction and procedural problems that were ultimately impeding the judiciary’s core function of delivering just results. The primary recommendation of the Conference was for the judiciary to undertake the role of project manager to move litigation through to conclusion.

Court systems have largely accepted this new obligation to be project managers. In civil litigation, court systems have generally approached this task by adopting rules aimed at creating a more defined path for civil litigation. Rules adopted at the jurisdiction level and at the local level set timelines for each phase of litigation. Generic deadlines were established for fil-

ing briefs, as were standardized page limits. In the 1990s, perceived abuses of discovery were addressed with limits on the number of the various discovery tools that could be used. Also, affirmative-disclosure rules were added to move the cases down the path. Later, codes of prohibited deposition conduct were developed. Some of these codes managed the very words to be spoken during the deposition at certain points of conflict. Limits were placed on the numbers and length of depositions. Some courts set prerequisites to setting trial dates. Others set aggressive trial dates and then applied a formula to set other deadlines based on that trial date. A system of sanctions for straying from the defined litigation path has also evolved over time. Development of Rule 11 was the initial approach. The affirmative-disclosure model was accompanied by a prohibition (which evolved to be rather porous) on use at trial of information not timely disclosed. Fee shifting based on frivolous and groundless litigation was developed and expanded. Many jurisdictions also expanded the judge’s power to impose sanctions in discovery disputes on a largely discretionary basis. Some courts developed “fill in the box” forms for summary-judgment motions that narrowly restricted presentation of such motions. More recently, discovery has continued to be trimmed back, and a focus is developing on restricting or eliminating expert witnesses as a cost-saving measure.

Each of these trends has followed the theme set by the Conference in 1986. They each focus on reducing participant control, reducing flexibility, and reducing direct involvement between the judge and the participants to yield a more automated management system. In the terminology of Pink and Tyler, they primarily seek to reduce participant autonomy and voice.

As explained by Tyler and Pink, the management model the courts have been using is the same management model that has dominated American governance and business management for a century: the extrinsic model. The dominant approach to civil litigation management has relied on what is essentially a set of boilerplate timelines and limitations backed up by extrinsic sanctions for violation and, to a lesser extent, a degree of incentives for compliance. Our approach has been very much like Henry Ford’s factory floor. The approach casts the judge in the role of drover herding the case and participants down a generically defined path of gates and chutes from as remote a position as possible.

Tyler and Pink’s research would predict that the dominant model applied to civil case management would result in poor self-regulation by participants, extensive time spent on sanc-

[T]he management model the courts have been using is the same management model that has dominated American governance and business management for a century: the extrinsic model.

40. CHRISTOPHER HIBBERT, REDCOATS AND REBELS 217 (1990).

Too frequently, the community has tasted the civil court's pudding and rejected it.

tioning non-compliance, extensive resources devoted to some form of surveillance system, and widespread dissatisfaction with the system of management as well as the results. More pointedly, they predict that our standard civil-case-management model would encourage unethical behavior. The reader can

evaluate the validity of these predictions.

The reader's own experience should be sufficient to detail the shortcomings in the extrinsic model for civil case management. Any time judges assemble to discuss civil case management, someone will inevitably observe that "there is nothing civil about civil litigation." This observation will be followed by a period of telling horror stories about egregious behavior by lawyers in civil cases. A similar assembly of civil litigators will yield similar tales of obstreperous behavior by opposing counsel. The litigators will add to these stories disturbing tales of arbitrary restrictions and timelines imposed on them by autocratic judges or court systems that all but barred them from any reasonable opportunity to present the merits of their case. An assembly of sophisticated civil-litigation clients will yield these categories of stories as well as considerable discussion about the staggering costs of these frustratingly ineffective experiences.⁴¹

The original cliché was that the proof of the pudding is in the eating. The steady trend for several decades now has been civil disputants increasingly turning to "alternate dispute resolution." That trend has many positives, but the judiciary must be mindful that in turning to other fora, the disputants are turning away from the courts. They do not reject our civil courts in favor of other fora because of their overriding satisfaction with our quality and credibility. Too frequently, the community has tasted the civil court's pudding and rejected it.

The body of work on human behavior exemplified by Tyler and Pink also explains some of the reasons for the dissatisfaction with the existing system. The participants are given no voice and no autonomy. Participants are given no role in defining the purpose of the proceedings. Paths, deadlines, limits are generically set with no accommodation (or, rarely, very little) for the unique needs of the participants.

Tyler notes that such an extrinsic-compliance model requires that the participants be certain they will be sanctioned for violating the rules and rewarded for compliance. This, in turn, requires an extensive and heavily resourced system of surveillance. Civil litigation management systems at the courthouse, however, have limited mechanisms for direct surveil-

lance and ever-dwindling resources. The "surveillance" in civil litigation is usually the report of the opposing lawyer ("Moving counsel failed to comply with the duty to confer before filing the current motion, and it should be stricken for that reason alone")—and compliance or violation can be highly subjective at times ("I attempted to confer with opposing counsel but could not obtain a response; opposing counsel is the one in violation of the duty to confer"). Consequently, our civil management systems devote substantial time to exchanging adversarial and counterproductive letters that are meant primarily to shape the "record" that may be presented to a judge someday. Moreover, in practice, our sanction system is relatively toothless and the reward system relatively illusory. Consequently, even accepting the limits that can be achieved by an extrinsic system, widespread criticism and dissatisfaction exists with what is, in reality, a poorly executed and poorly resourced extrinsic system.

2. Intrinsic-Model Civil Case Management

This article proposes pursuit of the intrinsic model, a model based on active engagement with the participants, using the principles of procedural justice. The cornerstone of modern developments in behavioral and management research, exemplified in this article by Tyler and Pink, is that a leader will achieve substantially more by engaging on an individualized basis with those to be led and giving the participants as much input as reasonably possible. The research predicts that an engagement-based model of case management will require fewer resources than the existing model and will result in the participants having greater satisfaction with and trust in our court system.

One does not need the research to predict this result, however. Common sense and life experience make the same prediction. Anyone reading this article has likely already reached the conclusion that the dominant model for civil case management of the last few decades is unsatisfactory. Life experience demonstrates that being treated like a number and being herded through the line at the archetypal Department of Motor Vehicles makes people less cooperative, less compliant, and less satisfied with the results they receive.

Applying this research to court systems is not new. Intrinsic-management models, specifically in the form of procedural justice, have now been used for a considerable time in the drug-court model (including problem-solving courts, treatment courts, and collaborative courts). Because of their usual model of grant funding, drug courts have been particularly well vetted by empirical research. That testing research confirms the predictions of greater cooperation and compliance with court direction when case management is based on an

41. In fact, there have been a number of surveys that confirm the widespread dissatisfaction among members of the bar as well as their clients. See, e.g., FINAL REPORT OF 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 2 (2009):

In short, the survey revealed widely-held opinions that

there are serious problems in the civil justice system generally and that the discovery system, though not broken, is badly in need of attention. Judges increasingly must serve as referees in acrimonious discovery disputes, rather than deciding cases on their merits. From the outside, the system is often perceived as cumbersome and inefficient. The emergence of various forms of alternate dispute resolution emphasizes this point.

intrinsic model.⁴² The intrinsic model is also gaining adherents in the realm of domestic-relations cases.⁴³

Our pilot program provided a real-world laboratory to identify mechanisms for implementing this engagement model to civil litigation. While a controlled experiment and further study is required, our observations of those mechanisms in action suggest the promised rewards are real. More importantly, taming the process allows the participants and the judge to stop litigating the litigation. In turn, this allows participants to focus on resolving the core disputes and allows the judge to spend her or his time on improving the court's delivery of distributive justice—that fair and just result the community needs. The remainder of this article shares the practical lessons our pilot taught us in trying to implement an engagement model.

THE PHILOSOPHICAL FOUNDATIONS

For those readers that skipped the section giving the high-altitude view of developments in behavior research, the ultimate lesson is easily summarized and is supported by common sense as well as the research. Your child needs an important medical procedure, but it is unusual and you are not sure of your family's health-insurance coverage or if any prerequisites to coverage must be addressed. Do you want to call the insurance company and get (a) a prerecorded voice telling you to push 1 or 2 to select among options that seem to have no application to your problem, (b) have a live person answer the phone in a hurried voice only to say "please hold," return after several minutes, distractedly ask, "what department?" with the sound of a clicking keyboard and multiple other voices in the background, and then transfer you without explanation before you even complete a sentence only to find you have been transferred to voicemail for watercraft claims, or (c) have a live person answer the telephone in a pleasant and professional voice, ask you how they can be of help, demonstrate that they are listening to you and understanding what you are seeking, explain to you who they think can help and why, give you that person's name, title, and direct-dial number, and then offer to transfer you to the person? If you answered (c) and you can follow the "golden rule" of applying that answer when others come to you with their cases, you can save reading all those research studies. The philosophical foundations of an engagement-based model of civil case management are described in this section.

A. PROCEDURAL JUSTICE MATTERS—HOW ONE CHARTS THE COURSE IS AS IMPORTANT AS THE COURSE

Tyler is the founder and leading exponent of a movement known as procedural justice. For our purposes, the procedural-justice movement can be summarized as teaching the lesson that litigants care as much (and, proponents would argue, more) about whether they were treated fairly as whether they win.⁴⁴ This research also tells us that the single most important factor in increasing compliance, cooperation, and satisfaction with court rulings is the quality of the judge's interaction with the participants.⁴⁵ A successful civil-case-management model must address the need for a quality interaction between the participants and the judge.

Tyler and Pink identify the elements needed to ensure a model that will promote quality interaction between leader and team. Tyler defines them as voice, neutrality, respect, and trust. Pink defines them as autonomy, mastery, and purpose.

In the context of a civil-case-management model, we can focus on Tyler's elements of voice and trust as well as Pink's elements of autonomy and purpose. For this discussion, these are all ultimately different aspects of the same idea. Every person (read lawyer or client, depending on the stage of the proceeding) has an ingrained need to feel heard and addressed as an individual. Voice acknowledges that the individual wishes to have a chance to speak *and be heard*.⁴⁶ Trust acknowledges that each individual has unique needs, one of which is to feel those needs are being addressed.⁴⁷ Pink adds that people need to feel that they have some input on what is being done and that there is a purpose to what they are being asked to do. The less these aspects of an individual's need to be acknowledged are addressed, the more dissatisfied, uncooperative, and non-compliant the person will be.

Tyler states that his research specific to court systems demonstrates that the converse is also true. The more the individual participant's need to be acknowledged is served, the more the person is satisfied.⁴⁸ This increased satisfaction remains robust *even when the person does not get the outcome wanted*.⁴⁹ The result is that the single most effective tool in get-

In the context of a civil-case-management model, we can focus on Tyler's elements of voice and trust as well as Pink's elements of autonomy and purpose.

42. Burke & Leben, *supra* note 20, at 6.

43. See, e.g., Gene C. Colman, *Procedural Fairness and Case Conferences*, 20 CANADIAN J. FAM. L. 379 (2004) (discussing procedural-fairness principles applied to family-law proceedings).

44. Burke & Leben, *supra* note 20, at 6. See also Brian Bornstein & Hannah Dietrich, *Fair Procedures, Yes. But We Dare Not Lose Sight of Fair Outcomes*, 44 CT. REV. 72 (2007) (discussing importance of outcome and disputing contention that procedural justice is more significant factor in predicting satisfaction than distributive justice).

45. See SHELLI B. ROSSMAN ET AL., THE MULTI-SITE ADULT DRUG COURT

EVALUATION: THE IMPACT OF DRUG COURTS (Shelli B. Rossman et al. eds., 2011); M. SOMJEN FRAZER, CTR. FOR COURT INNOVATION, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER (2006); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW (2002); Burke & Leben, *supra* note 20, at 6.

46. Burke & Leben, *supra* note 20, at 12-13.

47. *Id.*

48. *Id.* at 7.

49. *Id.* at 6.

Civil case management should be crafted to give the parties an effective resolution (distributive justice) as efficiently as possible.

ting compliance with court requirements is for the participant to be heard as an individual. The perceived fairness of the procedure used to reach the decision is seven times as important as the perceived fairness of the decision (the outcome) to predicting participant acceptance.⁵⁰

This behavioral science research confirms that high

touch works better than high tech for some issues. Realizing that procedural justice matters leads inevitably to the second philosophical pillar for our model: To serve participant needs, one must understand the participants' purpose.

Think of the civil-litigation judge as an itinerant small-cargo-ship captain where the ship's crew is supplied by the owner. During the litigation, the judge has the ultimate authority and control over the ship. However, the owner is the one that decides whether a cruise will take place and determines the destination. The owner hires and fires the crew. The owner is also paying the expenses of the ship, and the crew's ultimate loyalty follows their paychecks. The wise captain consults the owner and crew about the timetable, destinations, and course. He also consults the crew about any specific needs they may have. That owner and crew will be much more cooperative and satisfied with the captain if they have been consulted and their needs addressed.

B. IN LITIGATION, THE VERDICT IS NOT THE "PURPOSE"—ONE MUST DETERMINE THE DESTINATION TO CHART THE COURSE⁵¹

With this philosophical pillar, Pink's research and model more directly address the point. One of Pink's elements for an intrinsic model of management is "purpose." The person or persons being managed must feel that the work they are doing has a purpose and that it is a purpose they accept as theirs. A person that sees no purpose in his or her actions or has a different purpose than the manager will lead to difficulties. An effective civil case manager will take into account the need to provide purpose.

Ask the low-level lawyer why she is litigating a case, and she will say, "That's my job." Ask the middling lawyer why he is litigating a case, and he will exclaim, "I'm in it to win it." Ask the wise lawyer why she is litigating, and she will say she is serving her client's goal; she will then explain what that goal is and how the litigation serves that purpose, as well as how she and her client plan to achieve the goal in the end. A friend of mine used to put it another way: "a lot of lawyers chasing judgments are like dogs chasing a car—they don't know what to do with

one if they catch it or why they chased it in the first place." Surprisingly few lawyers seem to understand that winning a verdict is almost never the party's purpose in pursuing civil litigation. The party's purpose, the client's purpose, is to solve a problem—to achieve a specific goal. The purpose of the litigation needs to be to help solve that problem—to serve the client's ultimate goal.

The goal of the business client may take many forms, but it usually boils down to profitability. The goal in the neighborhood dispute is usually each party's version of quiet enjoyment of the party's property. The goal of the real-estate litigant is a title that is clear and usually marketable, which is most likely serving, in turn, another concrete goal such as sale or financing. The goal of the personal-injury plaintiff is to address his or her perceived needs resulting from the accident. In some cases, the client's goal is purely a matter of vanity. Getting a judgment is only one step, and far too often a pyrrhic step, toward the client's actual goal. The party's actual goal is what drives litigation, not winning a verdict. Understanding this basic truth is the ultimate keystone to achieving efficient and effective civil litigation management. For if the litigation is driven by the clients' goals, civil case management should also be given the purpose of serving the collective legitimate goal of the parties.

This basic concept is also expressed in the procedural-justice movement. As noted above, one dimension of procedural justice is called "trust" (and can be described as "helpfulness" for our purposes). This term refers to the need of the participant to believe that the court has an interest in serving the participant's needs.⁵² To achieve "trust," the court must seek to address actual, individualized purposes rather than assume a ubiquitous purpose of a favorable verdict.

To return to our mythical question of why litigation participants do what they do, ask the judge for the purpose of civil case management and most will say "to reach the end." Consequently, civil case management under the traditional model is too frequently designed like the automated telephone system—designed to get people to the end of the telephone call with as little effort from the entity receiving the call as possible. Like that caller, far too many people get nothing out of the litigation experience so managed—at least, nothing beyond termination of the call after a great deal of frustration and a very large telephone bill.

However, under an intrinsic model, the purpose of the litigation drives its management. Civil case management should be crafted to give the parties an effective resolution (distributive justice) as efficiently as possible. If the goal is to provide parties with the most effective resolution available, the judge must attempt to determine the goals of the parties—the purpose of the litigation. Identifying the goals of the participants to the litigation—even if only the goals that participants are willing to reveal—can allow the judge to identify an effective

50. See generally *id.* at 12-13 (noting that higher satisfaction leads to higher compliance).

51. For simplicity, the term "purpose" is used in this article to reference both the desires and the needs of the participant. The two are often different. Depending on the circumstances and the relative

practicality of the participant's desires and needs, either may be the dominant factor driving the judge's actions.

52. See Burke & Leben, *supra* note 20, at 6 (discussing the "trustworthy authorities" dimension).

resolution that is within the court's ability to provide. That, in turn, allows the judge to define the purpose of the litigation. When necessary, the judge can also re-set participants' unreasonable expectations to the kinds of resolutions the court can actually provide. Moreover, identifying an effective and available resolution can allow the judge to identify the most efficient path to that resolution—if you don't know the destination, you cannot chart the course.

Civil case management can learn valuable lessons from its colleagues in criminal and domestic case management. As referenced earlier, these fields are seeing rapid growth in what they call "problem-solving" courts or "collaborative" courts. While one can debate at length the specifics of these courts, their foundational insight is irrefutable. The problem-solving-court movement is based on the realization that a person's participation in a court case is usually a symptom that is driven by an underlying problem. If that problem can be addressed effectively, everyone is better served. Additionally, as long as that problem is not addressed, the person will continue to consume court and community resources.⁵³ The same general concepts apply to civil litigation, though hopefully with considerably fewer substance-abuse and mental-health issues.

A critical first step in a problem-solving-court case is for the participants to articulate collectively the goal. Having recognized a goal, the participants then identify (as best they can) the issues that prevent the client from achieving that goal.⁵⁴ Problem-solving courts follow this method on the macro and the micro levels. Again, the same conceptual approach is highly effective in civil case management. Whether focused on the litigation as a whole or an individual issue that has arisen, the civil judge that takes a few minutes to have a "live" discussion with the participants to identify the current goal and the impediments will find his or her cases running substantially smoother and requiring remarkably few court resources.

In summary, civil litigation is driven by trying to achieve a client's goal. Effective and efficient civil case management is driven by recognition of those goals and identifying the impediments to achieving them. While the parties' goals will be highly varied, the goal is rarely as simple as paying the full "sticker price" for litigation and winning a verdict after trial. Consequently, a justice-delivery system should strive to provide its customers with effective and efficient resolutions addressing their goals or, at the least, their needs. Systems that ignore their customers' goals will continue to generate more dissatisfaction and wasted resources than justice. They will also continue to undermine public confidence in the judiciary as a credible method of resolving disputes. A civil court should be seen as a problem-solving court rather than a verdict assembly line.

To revisit the analogy of the itinerant cargo captain, the captain cannot assume delivery by the fastest course is always the goal. The owner may need a particular sequence or market

timing to serve other obligations. If the captain does not learn of the owner's goals, the captain will not likely be successful in delivering the most efficient and effective service to those goals.

C. THE LAWYER IS THE JUDGE'S ALLY—WORK WITH THE CREW, NOT AGAINST THEM

Pink notes that at the heart of the traditional model of business management is a view that the worker is the enemy and, if not closely supervised, will accomplish nothing. A similar premise about lawyers underlies the dominant model of civil case management. The Conference observed in 1986 that lawyer control of case management was the problem. The Conference's goal was to take control away from the lawyer—the apparent enemy. Also as noted, a common complaint today is that "there is nothing civil about civil litigation." At the heart of the traditional models of civil case management is a view that the lawyer is the root of the problem.

However, in an intrinsic-motivation-and-engagement model, the lawyer is a key participant in effective and efficient case management. This can be one of the greatest leaps of faith a judge interested in an engagement model must take. However, years of experimenting with this model in our pilot courtrooms suggest it works. Tyler and Pink's research not only predicts that it will work, it also explains why it works.

The effectiveness of this strategy is again rooted in the principles of procedural justice and serving participant needs and goals. The secret for the judge seeking efficient and effective case management is to realize that the individual lawyer is as much a participant in the process as the party. In fact, for many of the most distraction-prone issues in the litigation, the lawyer is the primary participant. Thus, procedural-justice research is as applicable to the lawyer as to the client. The judge can achieve considerable results by recognizing the value of serving the lawyer's needs for voice and trust. Despite the stereotype that popular media and much of the legal profession have built, even civil litigators are human beings that respond positively to being treated respectfully and individually. And, like other human beings, they respond poorly to being smothered with boilerplate and ignored.

This is a philosophy that is easy to test and implement. In the modern era of civil litigation, face time with the judge is extraordinarily rare. The growth of the bar and technology make face time between lawyers relatively uncommon as well. This isolation and modern digital communication leads to a degree of false courage and hyper-partisanship. These factors give the judge considerable power to leverage his or her time

A civil court should be seen as a problem-solving court rather than a verdict assembly line.

53. See generally WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 1-10* (2011) (discussing reduction in new case filings and reduction in other public services resulting from problem-solving courts).

54. See generally Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L.J.* 1055, 1085 (2002) (discussing behavioral contracting and the need to tailor systems to individual circumstances, which, in practice, is done by identifying the individual's goals and obstacles to be addressed in achieving those goals).

[T]he most precious . . . gift one can bestow upon another person is one's . . . undivided attention.

to resolve issues dividing the lawyers. The simple expedient of the judge meeting in person with the lawyers and demonstrating that the lawyers have the judge's full attention is a remarkable elixir.⁵⁵ Disputes that can consume dozens of hours of expensive attorney time as well as dozens of pages of dense legal briefs begin to melt away.

In a very different context, Father Mike Surufka discussed the challenges of addressing difficult and debilitating problems with his parishioners. He described the “transformative power” of simply listening as follows:

[T]he first step is always to listen, to see what is actually happening in the life of this person. That has more transformative power than just about anything. For somebody really to know that they were heard at a very deep level.⁵⁶

The truth is that in the modern world (in and out of court), the most precious and persuasive gift one can bestow upon another person is one's genuine and undivided attention.

One cannot be too Pollyannaish. We must recognize that, whether consciously or unconsciously, the lawyer's goals are not always the same as the client's. The judge must be mindful of this distinction in working with the lawyers. A useful tactic is to require the lawyer to articulate the client's goal at every interaction. This exercise helps keep the client's goals foremost in the minds of all and helps the individual lawyer as well as the judge prioritize those client goals.

Returning to our ship captain, the captain may be in charge of the ship, but the crew does the bulk of the actual labor. In our example, the captain gets a new crew with each ship, and the crew members are more loyal to the owner that pays them than a single-voyage captain. Working with that crew and communicating with them to earn their trust may not always be the key to surviving the trip, but it will always be the key to an efficient voyage with a cohesive crew.

THE STRATEGIES

These philosophical foundations point to a better model of case management, a model with an engaged judge pursuing effective and efficient individualized case management. This case-management philosophy can be implemented by following four simple strategies.

A. BRING 'EM IN AND ENGAGE, ENGAGE, ENGAGE

As noted earlier, face time with the judge is exceedingly rare

today and, as a result, is one of the most powerful tools available to the judge. The whole idea of the engagement model and the core lessons from Tyler and Pink require direct engagement with the participants to provide voice and define purpose. This need not be a lengthy and involved exercise, either. The research from drug courts tells us that a judge need spend only three minutes with a defendant to satisfy the desire for voice. In civil litigation, the time requirement will vary significantly by the issue being addressed, but the judge should not assume he does not have time to engage. Based on the experience in the pilot, the judge will gain time. Bring the participants into the courtroom for a live discussion as early in the case as possible, and then bring them in when any issue seems to be developing. Engagement simply cannot be achieved through documents—and a few minutes of face time can avoid hours of reading unnecessary briefs and seeking clarification.

The judge should use every interaction with the participants to demonstrate that she is engaged with their case. The judge should use each interaction to foster a culture among the team of collaborative problem solving. Through the judge's interactions, she will set the expectations of the participants as well as demonstrate the elements of procedural fairness. She will, thereby, gain the participants' cooperation, compliance, and ultimate satisfaction with the result.

A “bring 'em in” strategy requires the judge (in person or through trained staff) to maintain engagement by monitoring the developments in the case shown by the pleadings. If briefing on a legitimate substantive issue is unclear, avoid the distraction of a misunderstanding in a ruling or unclear further briefing by spending five minutes in person or by telephone with the lawyers to get clarification. Making time to squeeze in a live interaction with the relevant participants on an expedited basis before the judge drives home or during lunch will pay substantial benefits to his schedule in the long run.

A few years ago, I had a civil case filed by a prisoner challenging an administrative decision by the prison officials. Having a status conference that involves a pro se prisoner can be a logistical challenge and unpleasant. So, I disregarded our engagement philosophy and followed a more mainstream approach. The case raised some complex issues, and the briefs were like ships passing in the night on some issues. I thought I could decipher the issues, and I ruled on the briefs without ever having direct contact with the participants. The plaintiff prisoner appealed my ruling. The appellate court followed the same philosophy I had, ruling on ambiguous briefs without ever having direct contact with the participants to resolve those ambiguities. The appellate court deciphered the briefs dramatically differently than I had. The appellate court remanded the case to my court with instructions that were indecipherable to me based on my understanding of the case. At this point, I realized I was caught in the fallacy of trying to

55. See NAT'L DRUG COURT INST., THE DRUG COURT JUDICIAL BENCHMARK 51-52 (Douglas B. Marlowe & William G. Meyer eds., 2011) (discussing the importance of the court's interaction with participants to reinforce perceptions of equitable treatment); Douglas B. Marlowe et al., *The Judge Is a Key Component of Drug Court*, 6 DRUG CT. REV. 1, 1-34 (2004) (discussing the value, if any, of frequent

status hearings and judicial intervention).

56. See *id.*; see generally Heidi Glenn, *As Social Issues Drive Young from Church, Leaders Try to Keep Them*, NAT'L PUB. RADIO (Jan. 18, 2013), <http://www.npr.org/templates/transcript/transcript.php?storyId=169646736>.

achieve efficiency by avoiding engagement. Before either side could file a motion or a brief, I issued an order to set a status conference and identified the issue to be addressed as clarifying the parties' understanding of the issues on remand. Despite my experience, I was a bit worried about the procedural havoc a sophisticated pro se prisoner plaintiff could cause if given the opportunity. As I took appearances for the telephone status conference, I could hear similar concerns in the form of aggressiveness from the prison's attorney. As the pro se party was the plaintiff, I took a deep breath and gave the prisoner the first chance to give his view of the issues. He spoke for less than three minutes. At the conclusion of the three minutes, we were all on the same page and could see clearly the path forward.

At this point, the case was about one and a half years old. The case had occupied time and resources in my court as well as the appellate court. The case had occupied prison and attorney-general resources. The case had also occupied the prisoner during that time. Much of that one and a half years of litigation was wasted and could have been avoided by me investing those few minutes for the status conference at the beginning. We quickly packaged more clearly the key legal issue for appellate review (which was what would be necessary for the needs of both sides in the case). We later received a well reasoned and helpful appellate opinion resolving the novel legal issue. Given the unique history and issue in the case, I held a further status conference. I was rewarded with strong expressions of satisfaction with our legal system from both the prison lawyer and the pro se prisoner—as well as a stipulated concrete end to a case that could have spanned several more years.

B. ALWAYS ASK WHY, OR, KNOW THE GOAL TO SET THE PURPOSE

As noted, the purpose of the civil litigant in pursuing litigation is not the goal of obtaining a verdict. Instead, civil litigation is driven by the goals of the parties to the litigation. The closer the judge⁵⁷ can get to understanding the civil-litigation participants' separate goals (their reasons for pursuing the litigation), the more efficiently the judge can guide the litigation to an effective resolution. Do not misunderstand this as converting the judge into a counselor of some kind. The judge's job is not to be a therapist, business consultant, or mediator. Neither should one confuse the judge understanding the participants' stated goals with adopting those goals as the purpose of the litigation. To serve procedural justice and intrinsic motivation, the judge need only demonstrate appreciation and reasonable accommodation of the parties' separate goals in setting the judge's purpose for the case. The judge's job is to identify the most effective resolution that is proper for a court to provide and then reach that resolution as efficiently and productively as possible. Identifying the participants' stated goals

serves only to inform the judge in accomplishing this task. Resolving the lawsuit often will not resolve the parties' competing goals. The litigation is only one aspect of that contest, and the judge is only responsible for resolving the litigation dimension of the problem. However, the more the judge understands the participants' underlying goals, the more the judge can identify what the courthouse can legitimately provide to the participants that will be productive. Once the judge identifies what the courthouse can provide, the judge can get the case focused on an efficient and effective path to that resolution.

Put another way, Pink refers to the word “why” as the most underutilized word in business.⁵⁸ It is also the most underutilized word in civil litigation. A judge should frequently ask the participants “why.” Why is your client pursuing this litigation? Why are you filing that motion? Why does your client want to oppose that motion? Why do you want additional time? Why do you oppose granting additional time? Why does your client want that discovery? Why does your client want to resist that discovery? Why will trial take that many days?

By way of example, if the parties truly need a trial, they usually only need the trial on a small number of central disputes. The judge can streamline the discovery and the pretrial proceedings to focus the proceedings on those genuine issues and get the trial done as quickly as possible. If the parties need an appellate ruling on a narrow question of unsettled law for the benefit of their industry, the case can be structured to get to the ruling without wasting resources on any more ancillary issues or discovery than absolutely necessary. If the real goal of the side that will pay is to put off the payment until the next quarter, and this is practical for the receiving side, the case can be managed to do as little as possible until the next quarter and then ramp it up rapidly if needed. If the goal of one party is to delay the inevitable inappropriately, the case can be put on a rocket docket and aggressively policed for delaying tactics. In the same vein, if the party's goal is not legitimate or not available through the courthouse, the judge can disabuse that party of that illegitimate goal or, if unsuccessful, manage the case to a quick resolution.⁵⁹

The judge should also keep in mind that the first answer to the question is often not truly the answer to the question. A rule of thumb popular among business-management consultants is that a leader must ask herself why she wants to pursue a policy five successive times to get down to the real purpose. Only then, when she has peeled back the layers to the core rea-

Once the judge identifies what the courthouse can provide, the judge can get the case focused on an efficient and effective path to that resolution.

57. The closer the *lawyer* gets to understanding his or her client's true goal (and/or needs) and how to achieve it, the more effective, the wiser, and the more successful the lawyer will be.

58. PINK, *supra* note 26, at 137.

59. I can recall more than one early case-management conference in which I asked what a party's goal was, only to hear a goal utterly

unrelated to the litigation. I would then ask how the lawsuit would accomplish the stated goal. Some cases largely ended as a result of asking that question, though a few weeks might have been required before that happened. On rare occasion, I found myself explaining to a party what issues a court could and could not address in the lawsuit.

The Swedes have a concept called “lagom,” [that] means neither too little nor too much.

son, can she effectively communicate to her organization a purpose that can become a shared goal. A judge need not necessarily put the question to the participant five times, but she should be willing to ask a follow-up “why” one or more times to get to the core purpose.

The strategy of asking why works on the micro level of each individual procedural or discovery issue as well as, if not better than, it works at the macro level of the overall path to resolving the litigation, and it is considerably easier to implement. This is particularly true for the judge with limited experience with civil clients and the nature of their true goals. The good news for the judge with limited civil experience is that substantial gains in docket efficiency can be achieved by focusing primarily on the micro level, the level at which every judge has sufficient experience and knowledge to apply these principles.

This strategy is also well suited for simple and low-risk tests of the overall civil-case-management approach proposed in this article. Pick an isolated issue or case and give this approach a trial run. The test need be no more sophisticated than asking each side to identify its goals and its concerns in a real-time discussion—ask each “why,” and then ask again. With surprising frequency, a path to resolution will reveal itself almost immediately without any further action by the judge. The speed with which that path to resolution can be accomplished will also be surprising when compared to the time needed for the judge to digest all those briefs and attachments filed under an extrinsic-model, management-by-boilerplate system.

C. STREAMLINE AND CUSTOMIZE, PURSUE “LAGOM”

For courts, we now exist in a world of continuing resource scarcity and rising productivity demands. Courts must work smarter in case management. Unfortunately, most current trends among judges in civil case management assume that generic and remote case management (management by boilerplate) promises reduced courthouse workloads. This promise is illusory and, in practice, usually counterproductive. This philosophy equates more prepackaged case management with less work for the judge. This philosophy emphasizes the “fire-and-forget” rules that are billed as self-executing and are said to require no involvement from the court. The approach creates a rigid path (or, in differential case management, a small selection of paths) leading to trial and is said to free the judge of any involvement other than conducting the trial. The promises made by this self-executing approach to heavily prepackaged case management are an alluring temptation to overworked judges. The extensive body of research supporting the procedural-justice movement and intrinsic-motivation model directly refutes this premise, demonstrating that boilerplate justice reduces compliance rather than raising it.⁶⁰

If one talks to the lawyers doing the actual litigation, they

report that an inordinate amount of their expensive time and their clients’ resources is spent on navigating (both through and around) those “self-executing” rules. Those lawyers also reveal that they frequently ignore those complex layers of rules and simply resort to self-help. If one talks to the judge in a candid mood, the judge will quickly reveal that he or she spends a great deal of time administering those “self-executing” rules, much like the parent negotiating with the three-year-old about how many peas satisfy the requirement that the child take one bite.

If one spends a few minutes reviewing the discovery motions filed in a court that embraces the self-executing-rule philosophy, the misnomer will become readily apparent. Inevitably, pages and pages of briefing are devoted to disputing the meaning, application, and exceptions to those extensive rules that were supposed to be self-executing. One is inevitably put in mind of the old speaker’s cliché that the rules of golf are but a few pages while the decisions interpreting those rules occupy volumes.

The judges do not like these process disputes, the lawyers do not like these process disputes but feel forced into them, and the clients always know that process disputes are a waste of their money and resources. The model of ever-deeper layers of boilerplate and ever-less individual engagement of the judge with the participants is counterproductive. The model simply promotes litigating the litigation instead of pursuing a productive path to a credible resolution.

Moreover, experience teaches that these elaborate procedures frequently prove unnecessary. Returning to discovery disputes (the bane of the civil judge’s docket), many judges have experimented with elaborate requirements and limitations. Compliance requires at least an hour of attorney time on one side for the narrowest and simplest of disputes. However, in most instances, a five-minute telephone call between counsel and the judge could resolve the issue. Ultimately, efficiency is achieved by *eliminating*, not multiplying, the unnecessary.

The research behind the procedural-justice movement should teach us that serving the participant’s need for individualized treatment increases court productivity while ignoring that need increases court workload. Civil litigation is driven by the goals of the participants; civil case management should be as well.

The Swedes have a concept called “lagom.”⁶¹ The term means neither too little nor too much. Lagom is a standard that is reminiscent of Goldilocks evaluating porridge, chairs, or beds. The judge interested in efficient and effective case management should strive to achieve lagom in the time and resources he or she devotes to each case. The judge should also seek lagom in the time and resources of the parties that are consumed. Also, the judge should seek lagom in the degree of disruption to the wider community resulting from the pendency of the litigation. The question is not how many trials have been held, how many cases have been resolved, or how many experts retained; the right questions are whether the court has given the parties resolutions needed, whether the

60. See Burke & Leben, *supra* note 20, at 7.

61. See Posting of Hanne to LexioPhiles, <http://www.lexiophiles.com/>

english (execute a search for “what lagom really means”; then select the second search result) (Sept. 19, 2011).

parties have accepted and used those resolutions, and how efficiently those resolutions were provided.

D. ENGAGE THE SMALL DISPUTE TO ELIMINATE THE DISTRACTION

This strategy shares a common root with streamlining but addresses more directly the judge's attitude toward dispute resolution. Many court systems faced with rising caseloads and fed up with seemingly endless and picayune squabbles over discovery and other pretrial motions erect substantial barriers between the lawyers and the judge—the court's version of that automated telephone-answering system. Effectively, this type of system is designed to suppress disputes rather than resolve the issues. Rather than dispute suppression, the judge should pursue a policy of engagement.

Dispute suppression is neither efficient nor effective case management. These efforts often backfire on the judge by intensifying and multiplying the disputes when they finally reach the boiling point. Also, dispute suppression is fundamentally unfair to the parties. In most disputes, one side will be working from a position of relative weakness. If the court's goal is simply to suppress disputes so that issues will not be brought to the courthouse, one side is likely to have a substantial advantage in the court's absence.

Instead, the judge should affirmatively engage the discovery and procedural disputes. Doing so quickly and efficiently eliminates them as distractions and focuses the resources of the parties and the court on the core issues in the case. Eliminating these distracting side trips quickly and efficiently keeps everyone on the central path to resolution.

Consider the example of a typical discovery dispute. The lawyers exchange a request and an objection about a discreet set of records. The lawyers then craft letters under a local rule requiring them to confer, letters that primarily serve a posturing role. Due to that false courage that results from the lawyers interacting digitally, the letters drive them to harden their positions. The lawyers are moving quickly by litigation standards, and these opening exchanges consume only a few weeks. One side then files a motion, pouring pent-up agitation and frustration onto the pages and consuming hours of research and crafting time. The opposing lawyer receives the opening motions and stews on it. The discovery dispute is sufficiently central to the overall discovery effort, and the rhetoric is heated enough that all other discovery halts as a result of the dispute. The opposing lawyer submits a response brief at the deadline, typically about three weeks after the motion was filed. The lawyers confer with their clients. Each has a conscious or unconscious eye toward justifying to their clients the bill for the time spent on the discovery dispute and explains how obstructionist the other party/lawyer has become in the case. The moving lawyer then prepares and files a reply brief, raising the level of animosity yet again and adding other complaints about the opponent's behavior to strengthen the motion. This, in turn, leads to a side trip from the discovery distraction to a dispute over whether a sur-reply brief will be permitted.

These various motions drone on for weeks, sometimes months, consuming substantial party resources. The judge notices the rising tide of discovery and procedural pleadings.

But, overwhelmed by a daunting caseload and schooled in the idea that such disputes are little more than ego-driven jousting between civil lawyers, keeps shuffling them to the bottom of the priority list. As the lawyers receive silence from the courthouse, they fill the void with more pleadings and an ever-spiraling level of animosity. When the judge finally decides to tackle the pile of pleadings, she must devote hours to reviewing and re-reviewing the dense briefing. The briefing is so distracted by battles between the lawyers, her primary chore is separating the wheat from the chaff. The question inevitably on her lips throughout hours of reviewing these briefs is “what is the issue they actually want me to decide?” The judge's frustration grows as her scarce time ticks away, and she ends up issuing a relatively rushed ruling. While legally correct and adequate, the ruling gives little explanation and demonstrates little analysis of the individual case. Given the length of briefing, the abrupt and minimalist ruling leaves both lawyers dissatisfied with the result and complaining loudly to their clients about the broken civil litigation system.

Consider how this all-too-typical discovery issue is handled under an engagement strategy instead of a suppression strategy. The court has a rule prohibiting the counsel from filing a discovery motion until first getting the court's permission at a live status conference. A corollary of this rule is that the judge makes herself available to the parties within two business days of being requested. The lawyers exchange a discovery request and objection. The lawyers then connect by telephone. As they cannot resolve their dispute, they jointly call the judge's clerk. The judge's clerk works them in during the lunch break in the ongoing jury trial the same day. The two lawyers appear as scheduled. The judge asks each lawyer what the lawyer is trying to accomplish and to identify the lawyer's concerns. The lawyers nearly always reach a resolution at that stage. If they do not, the judge may have to ask more pointed questions. If no agreement is then reached, the judge nearly always has enough information to issue a ruling immediately. The dispute has interrupted the litigation path to resolution for a matter of days once the objection was issued. The dispute has occupied less than 10 minutes of the judge's time. The dispute has consumed minimal party resources. The dispute has generated no meaningful hostility or impediments to relations between the parties or the lawyers.

More importantly, the handling of this dispute has established a culture of cooperative problem solving in the case. Future distracting disputes have largely been eliminated for that case and, to a degree, for other cases involving the same participants. The court is also established as a credible means of resolving disputes.

This example is not theoretical. This example unfolded countless times during the last seven years of the engagement-based civil-case-management project in our court.

A VIEW OF THE REALIZED MODEL

Tactics for implementing these strategies must be individualized to the local legal culture and the judge's strengths. Some-

Dispute suppression is neither efficient nor effective case management.

Efficient and effective case management through judicial engagement means less judge time devoted to the civil caseload rather than more.

times, the tactics must be individualized to the personalities of the participants or specific issues within a case. The more experience the judge has in an engagement model of civil case management, the larger the judge's toolbox of tactics available. The point of this model of case management is that each case must be approached as an individual set of challenges. Thus, each case is unique and will require its own mix of tactics.

In the most general of terms, the engaged judge should

- convene a case management conference with all participants as early as possible,
- establish a culture within the case of a team approach to resolving problems as quickly as possible,
- identify how (or whether) the litigation will serve the goals of the participants,
- evaluate the management needs of the case with the participants, and
- streamline the discovery-and-procedural-motions process.

What follows is a description of a sample implementation of the model.

Phase Implementation by Case Issue Rather Than Case Type. First and foremost, the judge must decide where to start. One of the advantages of the management-by-engagement approach is that implementation can be scaled to the judge's individual needs and resources. If the judge is nervous about a full-scale implementation, she can define a scope of implementation to fit her comfort level. However, manufacturing complex systems for diverting types of cases for implementation should be avoided. In other words, the judge should not create an *automated* system of rules to implement his *engagement* model. One should learn from the mistakes made in our pilot program. We learned that, in the long run, time spent on defining types of cases for implementation will be wasted and often generate unnecessary opposition.

We started our civil-case-management pilot project with the premise that a judge simply does not have time to apply an engagement approach to all cases. This is also the most common objection raised by judges hearing about this model for the first time—"I don't have time for this." Consequently, our pilot followed the lead of many civil-case-management projects. We spent considerable time researching, negotiating, deciding, and defining what cases would be included in the pilot and what cases would be excluded. Our goal was simply to divert what we thought would be a manageable number of cases from the general pool of cases. However, defining the scope of cases in a pilot inevitably involves one in hotly contested political battles between segments of the bar. This con-

sumed considerable time and expended substantial blood-pressure points. Anyone reading this article has likely observed similar undertakings. This article does not describe the specific design or operation of our pilot because, in hindsight, all that work was unnecessary and, worse, counterproductive. To the extent engaging in those discussions had any impact, they made the success of the project more difficult by generating unnecessary angst over distracting and political side disputes between segments of the bar.

Once I had experience with our pilot and learned the case-management approach described in this article, I found that our organizing principle had been wrong. Efficient and effective case management through judicial engagement means *less* judge time devoted to the civil caseload rather than *more*. The trick is applying the judge's time at the right point in the case and in the right way—a stitch in time saves nine. Consequently, I expanded beyond our pilot population and applied these philosophies to my entire civil caseload.⁶² The result was a lower caseload and less time required for each case. I saw my civil caseload drop by 58% once I started managing by engagement.

The easiest and most effective means of implementing management by engagement is to start by case issue. The judge must train his staff to find discovery motions as soon as they are filed. Upon the filing of such a motion, the judge should have his clerk contact the lawyers and "bring 'em in" on an expedited basis. As the judge gains comfort with an engagement approach, he should start bringing cases in for early case-management conferences. If the judge does not feel he can call all newly filed cases in, he should choose any method convenient under his administrative system for identifying cases and bringing them in—even a random system would be fine. As the judge gains experience, he will quickly learn that finding time to bring in all his cases produces a net gain in time available for civil cases.

Many judges handling civil dockets have limited experience with civil litigation and are reluctant to pursue management at the macro level. Experienced and inexperienced civil judges have concerns about trying to manage the overall case to the perceived legitimate goals of the parties. The good news is that a judge can reap the vast majority of the benefits of civil case management by engagement without ever expanding beyond the micro level—applying it simply to scheduling, procedural, motions, and discovery disputes. Management by engagement at the macro level carries a greater risk of moving in the wrong direction or overstepping the proper bounds of the judge's role. Management at that level is also rarely needed. Thus, a judge should rarely engage in it unless the circumstances are crystal clear, and it should be discouraged until the judge is fully comfortable with engaged management at the micro level.

Upon Case Filing. Once a judge has decided to apply the model to an entire case, the model starts from the day the case is filed. The more aggressive devotees of the extrinsic model would trigger an exhaustive form case-management order at the outset of the litigation to lay down the ground rules. With

62. However, I did exclude the routine collection cases such as credit-card collection cases that regularly ended with a default judgment.

I "engaged" with those cases only when a defendant entered an appearance.

an engagement model, the judge also needs to set the tone from the outset. As the authority figure, the judge will be building a culture within the community of that case, whether she realizes it or not. That culture will determine how participants approach issues in the future. At the outset of the case, the judge should start reflecting that this case will be guided by an actively engaged judge. Instead of responding to a filing with silence or with an automated extrinsic-model boilerplate case-management order, the judge should issue an order directing the plaintiff's counsel to set an initial case-management conference within a relatively brief deadline. The order should also note briefly that participants should be prepared to address the issues in the case and set a schedule for resolving them. I would require the conference within 45 days of the filing, knowing that I may or may not have all defendants by that time but also knowing that if I didn't, that would be an issue to address rather than a reason to delay the conference. Remember, under the engagement model, the judge is taking affirmative, even aggressive, control of the management of the case—the judge is just going to use the tools of procedural justice and intrinsic motivation to facilitate that control.

Avoid Lengthy Boilerplate Case-Management Orders. Remember that “perfect” boilerplate initial case-management order? The idea is to have the participants in each case feel as though they are being treated individually. Nothing invalidates that effort faster than receiving an order that is reminiscent of a cell-phone service agreement. No matter how uniform the judge's case-management approach, the judge should make her written case-management orders look as short and individualized as possible.

I started civil case management with a standard order that had checkboxes so I could quickly use one form to address nearly any issue likely to arise in a case. I would just check the applicable box and send out the order. It was a very efficient system for issuing orders, but this efficient tool worked against the efficiency of the overall system. Each party received several pages of order even if the applicable portion was but a single sentence. I found a low familiarity with the substance of the orders I issued. Like that cell-phone service agreement, nobody was bothering to read my efficient boilerplate orders. I switched to an order that still drew from a list of standardized phrases, but the actual order issued to the parties eliminated everything other than the truly applicable language. Most orders went from a few pages to a couple of sentences. As predicted by the procedural-justice research, familiarity and compliance with the streamlined orders rose noticeably.

Better yet, the judge should address case-management standards in person at the initial case-management conference. People are inundated by documents these days, and most of them are boilerplate with little application, so they do not get read. A judge will be more effective if she explains in a live discussion the procedures used in her courtroom rather than to try and issue a tome that will only be checked later to argue a violation. Consider the irony of a common order used today that explains at length what qualifies as a genuine, good-faith satisfaction of the obligation of counsel to confer before bringing a dispute to the court. The order usually explains that a live conversation is required between the lawyers, rather than an exchange of voicemails, emails, faxes, or form letters. The

irony is that this mandate of effective live communication is communicated through a boilerplate form, the very means of communication being banned due to its inherent ineffectiveness. The judge should leverage her time; she should invest a little face time to explain the process and reap the benefits of a smoother case down the road.

The Initial Case-Management Conference. The most significant and productive 15 minutes of work by the engagement-model judge is the initial case-management conference. In the conference, the judge sets the standards to which the participants will rise or fall. The judge establishes the tone and culture of the case. (Silence from the bench will also set a tone and culture for the case—one that is contrary to the interests of the judge and the community.)

The judge should start the “live” conference by taking appearances and making sure any clients are introduced. The judge should greet each person by name, specifically including clients if present. The judge should briefly explain the philosophy he plans to pursue in management of the case. Assuming the judge has adopted the approaches to motions described below, those processes and their reasons should be explained. The judge should explain his commitments to the case as well as what he expects of the lawyers. He should explain that most cases, no matter how complex, usually boil down to just a couple of key issues to be addressed. He might also explain that these issues may or may not include an issue for resolution by the court. The judge should state his goal for the conference of having a candid discussion to identify the critical path for the litigation to reach a resolution of value to the parties. If the judge feels the need, he should also try to set the lawyers at ease by explaining that the session is intended for brainstorming and that statements will not be considered admissions or binding unless a party explicitly states it is agreeing to be bound.

Next, the judge should turn to each side and ask them to explain the two or three core issues they think the case boils down to. He should ask any follow-up questions to help him understand, and he should not hesitate to reveal any confusion he may have. The judge should demonstrate his attention and engagement in the discussion. As part of this discussion, the judge will be asking the “why” questions and trying to determine the parties' goals and reach consensus on a “purpose” for the litigation.

Next, the judge should build on the purpose defined for the litigation to start charting the course. Depending on the information revealed so far, the judge will want to ask about anticipated motions, discovery needs, expert needs, any potential obstacles to timely completion, and what is needed to make settlement discussions productive. The flow of these discussions will vary depending on the case. The judge should always ask the participants to identify as specifically as possible the steps they plan to take, keeping in mind the value of asking “why” when appropriate and getting consensus on the

The most significant and productive 15 minutes of work by the engagement-model judge is the initial case-management conference.

I learned to ask the lawyers to propose target dates before I offered dates. I was consistently surprised how frequently they agreed on trial targets sooner. . . .

purpose and/or value of any step. The judge should then ask when the party can take the step and when the other side can take a responsive step. Throughout these discussions, the judge is honoring the participants' needs for voice, helpfulness, autonomy, mastery, and purpose. These discussions should then be brought to conclusion with specific timelines—noting that the timeline may include a date for deciding on a future

step if setting the date for a potential future step is premature.

In most initial status conferences, the path will be sufficiently clear that the judge can go ahead and determine a closure plan for the litigation. Frequently, this will be the trial date, discussed below.

With practice, an initial case-management conference on a standard personal-injury case with lawyers new to the model takes only 15 minutes. With lawyers that have been schooled in the model on both sides, it can literally be done in as little as 5 minutes. In the spirit of *lagom*, a complex case may take an hour and may require more than one setting as parties are joined and issues evolve.

Trial/Closure Dates. The classic wisdom of judges from time immemorial is that nothing resolves a case like a near and certain trial date. The problem-solving-court model disagrees, emphasizing that the conclusion must be reached when the defendant is ready and that times will vary significantly by person. Here, our experience suggests the traditional approach to civil case management is the more effective path. A firm trial/closure date is important as a symbolic end date. The firm trial/closure date is important under an intrinsic-motivation model for two reasons.

First, communicating to the participants that the litigation process will have a definite end serves the procedural-justice element of engendering trust. In the current environment, the participants need to know the court is sensitive to the limits of their resources and the need to conclude litigation. At this time, participants generally do not have this impression of the civil-litigation process.

The second reason is more foundational. Too few judges and litigation participants appreciate that every litigation involves a silent partner, the community. The community has a fundamental interest in having an effective and credible mechanism for resolving disputes peacefully. Maintaining the credibility of the court system for resolving civil disputes is critical. A court system that permits—or worse, encourages—Sisyphusian endless litigation does not provide its community with a credible means of peaceful dispute resolution and thereby destabilizes that community. Charles Dickens did not describe the *Jarndyce v. Jarndyce* lawsuit in *Bleak House* as an ode to the credibility of the English Court of Chancery. He used this example of protracted and self-consuming litigation as a scathing indictment of the court system and the damage it did to the community.

Judges managing civil cases must remain mindful that they not only owe a duty of effective and efficient resolution of cases to the direct participants, they owe the community a duty of maintaining the availability to all of a credible means of resolving disputes, whether large or small. Ultimately, this is the role of the courts. The courts provide a safety valve to a community by providing a credible method of resolving individual disputes peacefully. A community that does not have a credible institution for resolving disputes peacefully is not sustainable.

Therefore, the judge should set a trial/closure date as early in the case as possible. The procedural-justice variation on this guidance is that the judge must give the participants voice in the setting of the case schedule and trial date (or other procedural closure date if a trial is not required). More importantly, the judge must make sure the participants felt heard in the setting of the schedule, even if their proposal was not adopted.

To satisfy procedural fairness, the judge should conduct the trial/closure-date selection live when the schedule for the case is set. I started on the bench with a very experienced clerk. She had a host of rules and tactics to deal with traditional telephone trial settings and approached them as a battle of wills. (Never give a trial date beyond X months. Never give more than three trial dates. Know that they will always take the last date given. At the first sign of a problem, threaten them with involving the judge. After X follow-up calls or Y days, make them talk to the judge or pick a date for them.) She was usually a gentle and persuasive “closer,” yet she still spent considerable time on the chore of setting trial dates. I then spent considerable time on the disputes or requests to reset that followed. We shifted to a procedural-justice approach to trial settings, and I handled them live at the initial status conference. Suddenly, the process reduced to a few minutes of my time and mere seconds for my clerk. Eventually, I learned to ask the lawyers to propose target dates before I offered dates. I was consistently surprised how frequently they agreed on trial targets sooner than I had planned to force on them. I remember one contract dispute where they agreed to set trial in two months at a conference held one month after the case was filed.

Once the trial date is selected, the judge faces an often nerve-wracking challenge. Nearly every court is required to set a trailing trial docket, which creates a tension between keeping trial dates and the knowledge that only one case can be tried at a time. The principles of intrinsic motivation tell us that a forthright and candid discussion with the participants at the outset is the right approach. Statistically, a judge could set as many as 20 cases for trial on a given day and still have high confidence that only one will need to go to trial. We usually set eight per trial day. I would then explain to the participants that the court would move heaven and earth to give them their trial date, to include finding another judge if available at the last minute. I then explained, truthfully, that after six years handling a civil docket, I had never once continued a civil trial for lack of judicial resources to try it on schedule. I went on to explain that because of volume, continuing a trial would inevitably happen someday. I then explained how I would decide which case would be continued (greatest need would go, not oldest) and why I could not make that decision until the last moment. Motions to continue trial dates all but disappeared. Calls to my clerk asking, “where do we stand?” on the

trial docket also largely disappeared. The research behind procedural justice likely explains why.

Subsequent Case-Management Conferences. At the conclusion of the initial case-management conference, the judge must decide if scheduled follow-up conferences will be needed. If a critical piece of information is expected from a third party or a largely dispositive motion is to be resolved by a certain time, the judge should consider setting a status conference just after that key date to help keep the case moving. While a useful tool, relatively few civil cases will actually require these. However, the offer alone from the bench helps define a culture of engaged problem solving.

Ban Written Discovery and Procedural Motions. At the initial case-management conference, the judge should explain that no party may file a discovery or procedural motion until conferring live with the other lawyer(s) and then collectively conferring with the judge. The judge must then commit to be available for such a call quickly, say within two business days of getting it. The strategies section includes a discussion of this approach. The following is a transcript of a typical discovery conference.

Judge: Counsel, how can I help you today?

Jones: I have not received financial records we requested, and we cannot proceed with our expert's work without them. With our schedule, we need those records by next week.

Smith: The request was dramatically overbroad and seeks highly sensitive and irrelevant records.

Judge: Ms. Jones, why does your client want these records?

Jones: We need to know what business they've actually been doing over the years.

Judge: Why do you need *these* records? What specific information are you seeking?

Jones: We need to confirm their claim that they did \$1 million in business through six orders with Company X. My client does not trust the disclosure, so we need to see the P&L to be sure they are telling us everything. Judge, this is a damages and credibility issue, and the records are clearly within the scope of discovery.

Judge: Mr. Smith, why is your client opposing this discovery?

Smith: We have given them everything they are entitled to in disclosures, and we've told them about the orders. They are asking for our entire financial records, and that is highly confidential information. They are in direct competition with us, and we're not willing to provide that information.

Judge: Ms. Jones explains that her client wants to confirm the disclosure made in the pleading with original records. If you have already disclosed it, would those records still be confidential? Why wouldn't your client provide that confirmation?

Smith: We don't oppose giving copies of confirming source documents. But, judge, they asked for our P&L. The P&L doesn't even show the individual orders. And it obviously shows the overall economics of our company, which is confidential and not within the scope of discovery.

Judge: Does your client have documents such as work orders, invoices, and payment records that would confirm the disclosure in the pleading?

Smith: Yes, and we can make those available.

Judge: Ms. Jones, would that get your client the information he needs?

Jones: Judge, we don't trust that they will give us everything, but that would be a good start. These parties were partners, and there is a great deal of bad blood between them. We'd want to verify if they told us the sun rose in the morning.

Judge: Ms. Jones, is there someone at defendant's operation that your client does trust?

Jones: My client trusts Ms. Donaldson in accounting.

Smith: I'm sure my client would agree to have Ms. Donaldson do the search and gather the records for production. She could also provide an affidavit attesting that these are all the transactions with Company X.

Jones: That would get us what we need.

Judge: When can we get this done?

Smith: By Friday.

Jones: That would be acceptable.

Judge: Thank you, counsel, for your work resolving this issue.

At the conclusion of the initial case-management conference, the judge must decide if scheduled follow-up conferences will be needed.

Whether procedural, discovery, or even substantive law, these conferences follow a simple formula. The judge should plan to get the participants together live for a "real time" discussion rather than by filings. The judge should find out the purpose behind each side's action, whether it is a request or an objection. Usually, a solution presents itself to the participants. On rare occasions, an issue will have to be decided by the judge. In most cases, the judge will have sufficient information to make the decision right then. If not, a narrowly tailored schedule can be set to get the judge any information or materials needed to allow a decision.

Expand the Ban to Substantive Motions. Once the judge has established that no discovery or procedural motion may be filed until after the movant has consulted with the other side and discussed it with the judge, the judge should consider expanding that procedure to all motions. The substantive briefing that results will be much more focused and useful to the judge.

Re-Purpose the Duty to Confer and ADR Obligation. At the initial case-management conference when the judge discusses her motions procedure, the judge should use the chance to re-iterate her expectations of a collaborative approach to managing the case. She should explain that the participants are required to confer before bringing any issue to the court. In her usual explanation that a live discussion is required, the judge should go one step further to explain the *purpose* of the obligation to confer. She can explain that this obligation to confer is expressed in two ways. First, the lawyers must discuss any disagreement before asking the

The goal of this article is to change fundamentally our entire approach to litigation management.

court to help. Second, the named parties must pursue some form of alternate dispute resolution. She should explain that these should not be seen as requirements that people compromise. Instead, they are requirements by the court that the parties refine, narrow, and understand their disputes so they can be efficient in bringing them to the court for resolution. The judge should impose these obligations for

purely selfish reasons, to cut 50 pages of briefing down to the core 6 pages actually needed.

The judge must also help each party see the discussion obligation for the purely self-interested value it offers. These discussions are an opportunity for each participant to refine and understand their dispute. Discussing the potential summary-judgment motion with the opponent allows the lawyer to understand which elements are really in dispute, what the other side's arguments are, and how best to structure his own brief and argument. The cost of that briefing may easily be cut in half by a thorough discussion with the opposing side. More importantly, the effectiveness of that briefing may be increased exponentially by the same discussion. Mediation should be seen as an opportunity to test each side's arguments with an experienced neutral and refine that argument based on the feedback received. If these discussions result in an acceptable and economic settlement of the issue or case, all the better.

Young lawyers and parties new to the court system find these explanations particularly insightful and helpful. What they often see as a requirement based on the judge's desire to avoid making a decision and an inappropriate effort to force the parties to compromise suddenly becomes a valuable opportunity.

Trial-Management Conference. The judge should conduct a live trial-management conference shortly before the trial. The judge should use her intrinsic-motivation tools to define the issues and flow of the trial as well as to establish the procedures for the different aspects of trial.

Finally, Set Standards for Yourself as Well. Succeeding in effective and efficient case management is not merely a matter of setting and maintaining expectations for the lawyers; the judge has to have high standards as well. First, the judge must commit his staff to answering the telephone whenever possible and returning messages within one business day in all other cases. A common complaint among lawyers in many states is that the court's telephone is never answered, and voicemails are not returned for several days. If the judge expects the lawyers to be responsive to his team, the judge's team needs to be responsive to the lawyers. Second, the judge must commit to resolving the distractions on an expedited basis and carving out time to do so even when inconvenient—short-term pain for long-term gain. The judge must also commit to ruling on fully briefed issues on a timely basis.

We published a standard order advising all counsel that if an

issue had been fully briefed and no ruling was received within 30 days, the movant was directed to contact the division clerk to advise us, as well as to file a pleading. This was done to demonstrate a commitment to timely rulings and to relieve the angst felt by lawyers with a need for a ruling debating whether to risk the wrath of the judge or clerk by calling to ask for one. While I was annoyed the first few times a law office called four days after 150 pages of briefing had closed asking for a ruling, I soon realized it was a compliment that we had the docket running so efficiently that experienced lawyers actually expected rulings from this division that quickly.

A PATH FORWARD

For those readers that skipped section II because the behavioral-sciences discussion sounded too soft and fuzzy, now is the time to go back and read it. The goal of this article is not just to provide the judge with yet another package of case-management tactics that sound vaguely promising. The goal of this article is to change fundamentally our entire approach to litigation management. For decades, judges, litigators, and commentators have approached civil case management as an exercise in subduing spiraling costs and incivility. The dominant paradigm is that extrinsic control is the answer. This paradigm has largely been based on the instincts of a control-based culture (the law) akin to Hobbes' *Leviathan*. The surface-level purpose of this article is to propose shifting from an extrinsic-control philosophy of litigation management to a philosophy of self-regulation based on an intrinsic model of management and the principles of procedural justice.

The more fundamental purpose of this article is to propose that future civil litigation management should be based on research that explains human behavior—and how to manage it. Over the last several decades, litigation-management reform efforts have been based largely on instincts and anecdotes.⁶³ When empirical data have been referenced, it has generally been symptomatic research rather than root-cause research: Litigation expenses and delays were studied and tactics were developed to suppress those unwanted symptoms. However, litigation managers have rarely looked beyond unwanted symptoms to the behavioral sciences to understand causes. Only by looking to core causes can a system achieve meaningful progress in improving the process of litigation as well as enhancing the quality of the substantive result (distributive justice). Our colleagues in problem-solving courts have pointed the way to a new path to conflict management and resolution by stepping outside the lore of the law and gaining insights from the solid research of behavioral science and insights from that analogous world of enterprise/project management. The core hypothesis of this article is that future civil-case-management reform should be based on empirical research explaining human behavior first and accounting studies of the litigation process second.

Two potential bridges exist between the old approach to litigation management and the approach proposed here. First is the problem-solving-court movement. Problem-solving courts

we turn to the behavioral sciences for enlightenment.

63. Admittedly, our pilot project also originated from this same core. Only later, as we sought to understand what was happening, did

have evolved dramatically in the last decade and are on the edge of becoming mainstream approaches to substance abuse in many spheres. These courts have more than a decade of experience in applying the knowledge of the behavioral sciences to the court system. Judges and other personnel in problem-solving courts have worked through the challenges of applying the concepts of procedural justice to the real world. Many of these judges have also learned how to digest material from the very different world of behavioral science. More importantly, the political and social interest in criminal-justice progress has meant extensive, well-funded studies have been done of what works and does not work in problem-solving courts. Any judge interested in making meaningful progress in any form of litigation management should seek the insights offered by our colleagues in the world of problem-solving courts.

The second bridge is the current trend in the dialogue about civil case management. In this article, I have used the word “trend” in the statistician’s sense of the word, a tendency or direction shown over time or data points—in this case, the pursuit of an extrinsic-control model in various forms over several decades. However, the term also has a pop-culture meaning of the very latest idea being discussed—what’s hot. What’s hot among many commentators on civil case management is a budding movement called “proportionality.” The proponents of “proportionality” advocate the need to focus the litigation at the outset through active judicial involvement. They also promote the need to eliminate distracting litigation steps that have become rote and serve little productive purpose. Additionally, the Rule 1 project of the Institute for the Advancement of the American Legal System (“IAALS”) calls for empirically based efforts to improve the civil justice system. IAALS is a vocal proponent of proportionality.

Proportionality’s focus on an engaged judge that tailors discovery to individual case needs could serve as an excellent training ground for judges. Proportionality is, nonetheless, merely a means in service of a larger end. If the end being pursued is creating a new tactic serving an extrinsic model that seeks only to make litigation a faster and cheaper road to trial, it will achieve little more than the “rocket docket” or “differential case management” have achieved. To use Daniel Pink’s taxonomy, we need to move to Motivation 3.0 rather than just refine the existing model to Motivation 2.1.⁶⁴ If proportionality is viewed as a stepping stone to gain the skills needed to implement a genuine intrinsic-motivation model (Motivation 3.0) as discussed here, it can be the pathway to dramatic improvements in litigation management and gains in community confidence in our court system.

Every litigation involves a silent partner: the community. The community has a fundamental interest in having a mechanism for delivering dispute resolutions. This mechanism must be credible. For our purposes, that community credibility has two components. First and foremost, it must be effective—meaning that it is accepted by the participants and the community as a fair result that actually resolves the issue. Second, it must be delivered efficiently—if justice is only available to a well-funded few or after interminable delay, the delivery

system is not a credible mechanism for the community.

Judges managing civil cases must remain mindful that they not only owe a duty of effective and efficient resolution of cases to the direct participants, they owe the community a duty of maintaining the availability to all of a credible means of resolving disputes fairly, whether large or small. Ultimately, this is the role of the courts. The courts provide a safety valve to a community by providing a credible method of resolving individual disputes fairly and peacefully. A community that does not have a credible institution for resolving disputes fairly and peacefully is not sustainable.

A pernicious result of the decades-long drift in our civil litigation system is the corrosive effects of large numbers of clients settling cases based exclusively on the costs of litigation. When expense—rather than the merits of a dispute—is consistently the driving motive in dispute resolution, the system ceases to function as a credible mechanism for the community to resolve disputes. Without a credible means of reaching peaceful dispute resolution, the community must eventually cease to function.

The converse is also true. If the system’s primary focus becomes cheap-and-fast resolutions where perceived justice and fairness suffer, the system again lacks credibility. If cheaper and faster are the primary goals, one might as well install a computer terminal using a random-number generator to resolve civil disputes.

The strong trend in recent decades to move civil litigation to alternate-dispute-resolution systems is the greatest claxon calling us to change our approach. Arbitration is the most common alternate, and it is a system with few procedural or substantive protections for achieving distributive justice. Also, the degree of quality one gets in arbitration is heavily influenced by one’s economic resources—not a healthy trend in a nation founded on the goal of equal access to justice for all. People are not flocking to the benefits of arbitration; they are fleeing the negatives of our current litigation process.

I do not believe these are signs of a dispute-resolution system that is structurally wrong—i.e., that our adversarial system is the wrong model. My confidence in the basic design of our court system has never been stronger. Instead, I think they are signs that our approach to managing the human beings in our court system suffers a basic philosophical flaw—the pursuit of an extrinsic-command-and-control model instead of an intrinsic-motivation model. Reform cannot focus merely on reducing the costs and delays of delivering distributive justice; it must do so while serving the participants’ need for procedural justice, or it will continue to suffer a systemic lack of credibility. The path ahead is the intrinsic model.

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64. See PINK, *supra* note 26, at 75.

CONCLUSION

Criticism of the inefficiencies and delays within the current civil litigation system is widespread. Many tactics have been tried in recent years to ameliorate the perceived negative characteristics of our litigation system—suppress distracting discovery and motion disputes as well as uncivil conduct by lawyers while pushing cases to move faster to trial. Nonetheless, dissatisfaction with civil litigation remains widespread in the community as well as among participants. Prior civil-litigation-management efforts have clung to a traditional enterprise-management philosophy based on extrinsic command and control. A new approach is needed.

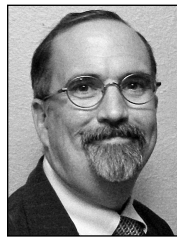
Many have recognized that the time is ripe for a significant change in how we manage civil litigation. For example, a primary reason IAALS exists is to improve our system. The Conference of Chief Justices adopted a resolution in late 2011 encouraging pilot projects to improve civil case management. The question is what will drive the next revision to civil case management.

Civil-litigation-management reformers should take their cue from their colleagues in the problem-solving-court movement. They should look beyond the traditions of the legal sector for insights. They should move beyond asking what parts of the current civil litigation system we want to suppress and ask the broader questions of what drives human behavior and how we can use that knowledge to make our litigation system work better. They should look to the empirical data available in the behavioral sciences. That data, most accessible to the legal professional through the procedural-justice movement,

tell us that we should move to an intrinsic model of litigation management.

An intrinsic or engagement-based model will eliminate or minimize distractions, reduce resources required for each case, reduce caseloads by achieving faster resolutions, and free judges to provide more thoughtful and well-crafted rulings. An intrinsic model will also increase participant acceptance of and satisfaction with the resolution ultimately reached.

By engagement through an intrinsic model, judges can achieve efficient and effective case resolutions that still deliver just results. Moreover, management by engagement will increase the parties' satisfaction with the case results and, correspondingly, increase the public's confidence in our court system. So, engage today.



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