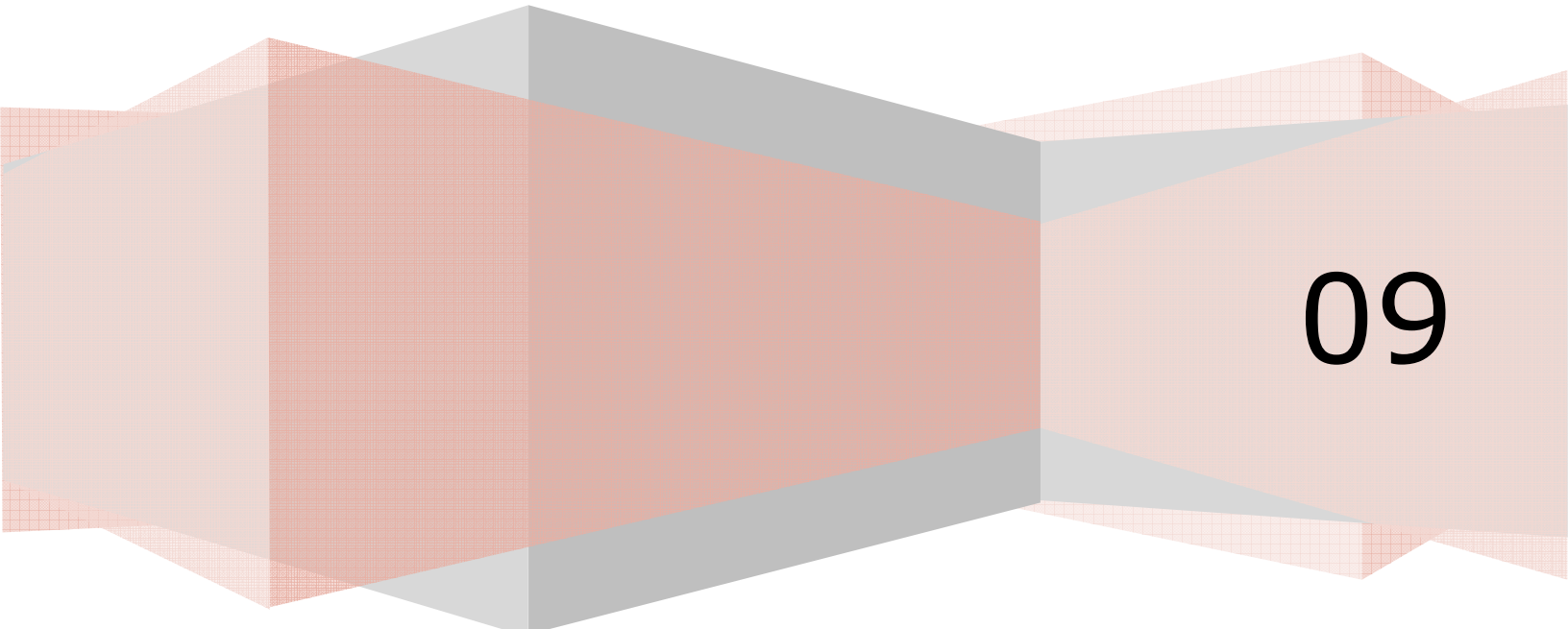


United Arab Emirates - Ministry of Justice

Papers of the Court Case Management Forum

Dubai

3 October 2009



09

IN ASSOCIATION WITH:

Commission européenne pour l'efficacité de la justice
European Commission for the Efficiency of Justice



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THE UNIVERSITY
OF QUEENSLAND
AUSTRALIA

CONTENTS

Program	5
Speaker Biography - Judge Francis M. Allegra	8
Paper - The Use of Electronic Database Programs to Aid Case Management	10
I. Key Ways in Which Electronic Databases Can Facilitate Case Management	12
II. Some Examples of Database Programs Used by U.S. Courts in Managing Cases ...	16
III. Some Concluding Thoughts	22
Speaker Biography - James C. Moore, Esq.	25
Paper - Case Management in U.S. Courts – Practitioner Perspective	26
Courts or Arbitration in U.S.	26
Overview of Structure of Judicial Systems within U.S. as it Relates to Case Management	27
Responsibilities of Judges and Attorneys in Connection with Case Management	28
Principles of Case Management	30
Role of Mediation and Arbitration in Civil Disputes	31
Speaker Biography – Judge François Paychère	33
Paper – Case Management	34
Is there a way to ensure a fair trial within reasonable time?	34
Introductory remarks	34
Time requirements of the European Convention on Human Rights	35

The European Human Rights Convention	35
A European response towards a fair trial within reasonable time.....	40
A daily application within a Court or how to deal with case management in order to cope with the case-law of the European Court of Human Rights	41
Concluding remarks	48
 Speaker Biography – Prof. Dr. Tania Sourdin	 50
Paper –Timing, Directions and Cost Efficiency	51
Terminology	51
Case management time lines	56
Caseload	59
Cost Efficiency	60
Evaluating case management processes	62
Performance standards	64
Case Management and Alternative Dispute Resolution (ADR)	66

PROGRAM

UAE MINISTRY OF JUSTICE CASE MANAGEMENT FORUM

Aims of the workshop:

1. To define 'case management' and explore the use of case management in various Courts.
2. To offer practical illustrations and examples of case management processes and techniques.
3. To illustrate and discuss the potential application of case management within the United Arab Emirates and to discuss the role of the Judge in isolating issues and assessing disputes for appropriate case management interventions.
4. To identify practical problems from a judicial and practitioner perspective and discuss technological advances and management techniques that can assist the judiciary and senior judges receive responsive feedback regarding system operation and individual case processing.
5. To evaluate and discuss individual case management approaches and techniques that are of practical benefit to Judges and to highlight how Judges may further their own knowledge and understanding of this area to ensure that case management approaches are responsive to the needs of the Courts and litigants.

3 OCTOBER 2009

10.00 am – Opening and Welcome

10.30 am – 12.00 – Presentations – Case Management

Panel - Attorney James C. Moore, at Harter Secrest & Emery LLP, NY; Hon. Justice Paychere European Commission for the Efficiency of Justice; Honourable Judge Allegra, US Court of Federal Claims; Professor Tania Sourdin, University of Queensland (Chair).

Topics –

- Case Management – Philosophical Underpinnings – Judge Allegra
- Case Management – Recent Directions in Europe – Judge Paychere
- Case Management – Timing, directions and cost efficiency – Prof T Sourdin
- The art and practice of Case Management - a practitioners perspective - James Moore

12.00 – LUNCH BREAK

13.00 – 13.30 Discussion and question Sessions

Summary by Panel.

13.30 – 14.00 – Issues in Implementing Case Management – the experience of other jurisdictions – Prof T Sourdin.

14.00 – 14.30 – Responding to case management plans and costs of case management – James Moore.

14.30 – 15.20 – Technology and Case Management – Presentation and video on
Technology – Judge Allegra

15.20 – Questions

15.30 AFTERNOON BREAK

15.30 – 16.00 Time Standards and Reporting in Case Management – Judge Paychere

16.00 – 16.30 - Using case conferences and ADR – Prof T Sourdin and Mr Moore

16.30 – 17.30 Ideas about how to introduce case management in UAE civil, commercial and criminal cases. Facilitated by Panel – Discussion with audience on topics such as:

- Legislative changes
- Timing
- Pilot programs
- Objectives
- Introducing Case Management – Ensuring that litigants and lawyers understand the requirements.

17.30 – Panel Discussion – Observations and questions on case management

18.00 - Close

SPEAKER BIOGRAPHY - JUDGE FRANCIS M. ALLEGRA
U.S. COURT OF FEDERAL CLAIMS

Judge Allegra was appointed to the United States Court of Federal Claims on October 22, 1998. He graduated from Borromeo College of Ohio, receiving a B.A. degree in 1978; he then attended Cleveland State University, receiving a J.D. degree in 1981.



Judge Allegra formerly was a Deputy Associate Attorney General at the United States Department Justice from 1994 through 1998, where he worked with the Antitrust and Tax Divisions, as well as with the National Economic and Domestic Policy Councils at the White House. In his fourteen-year career at the Department of Justice, he also served in various positions in the Tax Division, where he was Counselor to the Assistant Attorney General and an appellate litigator.

Judge Allegra is a member of the Information Technology Committee of the United States Judicial Conference, and serves on several Judicial Conference working groups. He is also a lecturer at the Federal Judicial Center, particularly on topics involving electronic discovery and the use of technology in judging. Judge Allegra is an adjunct professor of law at the Georgetown University Law Center.

PAPER - THE USE OF ELECTRONIC DATABASE PROGRAMS TO AID CASE MANAGEMENT

JUDGE FRANCIS M. ALLEGRA

UNITED STATES COURT OF FEDERAL CLAIMS

WASHINGTON D.C.

[T]he judicial role is not a passive one . . . it is the duty of the judge alone . . . to step in at any stage of the litigation where intervention is necessary in the interests of justice. Learned Hand wrote, “a judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert.”¹

While there are differences, to be sure, among the world’s legal systems, the best among them share certain core values. These include respect for the rule of law, a need to ensure the independence of judges, promoting appropriate access to the courts, and ensuring that all litigants are treated equally and fairly. In the United States, several of these values are embodied in Rule 1 of the Federal Rules of Civil Procedure, which states that all the procedural rules in the United States courts “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and

¹ Judge Alvin B. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 Just. Sys. J. 136 (1978).

proceeding. To achieve this goal, virtually all agree that judges must manage the litigation process.²

The federal judiciary [in the United States] is committed to, and believes in, sound case management to reduce unnecessary cost and delay in civil litigation.³ As noted in a manual that guides judges on the use of case management techniques, this belief is based on the view:

*Managed cases will settle earlier and more efficiently and will provide a greater sense of justice to all participants. Even in the absence of settlement, the result will be a more focused trial, increased . . . comprehension, and a more efficient and efficacious use of our scarcest institutional resource, judge time.*⁴

Federal courts in the United States, in fact, employ a wide range of case management techniques – some of which are employed consistently throughout the nation, others of which represent more unique adaptations to local practice and custom.

But, beyond the rationale to act as case managers lies the need to ensure that there are adequate resources available to support this judicial role. And that requires access to critical case information – information that is increasingly being captured and kept in electronic form. Whether on a national or a local scale, the implementation of case

² William W. Schwarzer, Alan Hirsch, *The Elements of Case Management: A Pocket Guide for Judges* 1 (Federal Judicial Center 2d ed. 2006) (hereinafter *APocket Guide*).

³ Judicial Conference of the United States, *The Civil Justice Reform Act of 1990: Final Report* 10 (1997). The Judicial Conference of the United States is a body of judges appointed by the Chief Justice of the United States that establishes policies for the administration of the U.S. Courts.

⁴ Judicial Conference of the United States, *Civil Litigation Management Manual* 1 (2001), available at http://www.fjc.gov/library/fjc_catalog.nsf (hereinafter *ACivil Litigation Manual*).

management techniques has been increasingly facilitated by the use of electronic database programs & computer programs that allow for the creation, tracking and reporting of electronic court records. These programs allow the courts, the litigants and the public-at-large to monitor the progress of individual cases and groups of cases & with the latter including everything from small clusters of related cases to the entire docket of a given court or court system. Those computer programs have become so helpful and pervasive as to be now viewed as an essential aspect of the proper management of all courts in the United States.

I. KEY WAYS IN WHICH ELECTRONIC DATABASES CAN FACILITATE CASE MANAGEMENT

A variety of techniques are employed to manage cases in the United States. Among these are: (i) differential case management & the screening of cases soon after they are filed and designating them to fit into certain categories or tracks;⁵ (ii) early judicial management & as the phrase implies, processes that anticipate the early intervention of the judge into the management of a case;⁶ and (iii) the continuous monitoring and control of complex cases & a process that often requires the parties to file detailed plans that control particular aspects of the litigation and more frequent status reports.⁷ Various studies have confirmed that

⁵ John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 Ohio St. J. on Dispute Resol. 81, 89-90 (2008) (hereinafter ALande@).

⁶ Lande, at 94.

⁷ These and other case management techniques used by Federal judges in the United States are described, in detail, in the Civil Litigation Manual.

these techniques, if properly employed, not only reduce the time to case disposition and the direct costs of litigation, but also the amount of time and resources that the court must dedicate to the case.⁸ Indeed, on the latter count, it is well-recognized that [a] small amount of a judge's time devoted to case management early in a case can save vast amounts of time later.⁹

Experience over the last decade or so suggests that the increasing use of electronic databases has tended to meld and, ultimately, transform these traditional case management techniques, for several reasons. For one thing, the availability of such computer programs allows the court more readily to tailor its case management techniques to fit the needs of a particular case, incorporating features as necessary and altering litigation plans as the case progresses. Second, the availability of electronic databases allows the court to retrieve easily detailed information for every case on its docket as a matter of course, making it less important to develop special data requirements and tracking procedures for particular case. The question has become less what information is captured by the courts and more how that information may be analyzed and employed. And, finally, certain case management techniques, the continuous monitoring and control of cases, for example, have become so woven into the fabric of modern electronic case management systems as to be viewed now as standard operating procedure. In other words, for courts that employ these electronic system, the carefully tracking of individual cases is now the norm.

⁸ See, e.g., Rand Institute for Civil Justice, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, at 49 Ala. L. Rev. 17 (1997); Civil Litigation Manual, at 2.

⁹ Pocket Guide, at 1.

Viewed in this fashion, it makes more sense to consider the impact of electronic databases not so much as promoting a given case management technique, but as supporting, more broadly, various phases of a judicial process that incorporate effective case management. Consider the following:

CREATING AND PRESERVING AN EASILY-ACCESSED CASE RECORD. Electronic database programs can provide for either the filing of electronic documents or, at a minimum, the electronic storage of paper documents that are scanned into the system. In terms of case management, the ability to distribute immediately such documents allows the court and the litigants to react more quickly to case developments. Where publicly available, such electronic records also add transparency to the judicial process, increasing confidence in the integrity of the system.

ALLOWING JUDGES TO IDENTIFY READILY CASES THAT REQUIRE ATTENTION. Case management features in existing databases provide a ready means for generating reports that identify cases that are languishing, experiencing other procedural difficulties, or otherwise need immediate judicial attention. Electronic systems that allow for the electronic filing of orders also allow courts to manage cases in a matter of minutes by affording judges the ability to respond to motions or status reports within hours, if not minutes, of receiving the filings from the parties.

ASSISTING JUDGES IN PROMOTING SETTLEMENTS AND RENDERING DECISIONS. The need for case management does not cease when it comes time to settle or decide a case. To the contrary, the whole purpose of that management is to ensure that case resolution comes at the soonest, most efficacious, and least costly moment in every

case.¹⁰ Database programs promote this goal by providing judges easy access to the factual and legal information they need to promote settlement or render a decision. Such systems allow not only for the cataloguing of materials filed by the parties, but also for the organization of research and drafting conducted by the judge and his staff. They also allow for these materials to be highly portable – allowing, for example, a single computer file on a laptop computer or a USB flash drive to contain all of the materials needed for the judge to render a decision. There is no doubt that the availability of this technology is accelerating the resolution of cases.

FACILITATING APPELLATE REVIEW. Most appellate decisionmaking, including that in the United States, requires multiple judges to access simultaneously the record and file information. Electronic database systems assist in the management of these processes in several ways. For example, such programs facilitate the transfer of records from a trial court to an appellate court – a process that, in the past, required the clerk’s office of the trial court to assemble and index a paper record and ship it to the appellate court now can be accomplished in a matter of minutes. Electronic database programs also afford appellate judges benefits similar to those afforded to trial judges – for example, the ability to receive electronically-filed briefs (increasingly containing hyperlinks to relevant authorities) that are simultaneously accessible to several judges who may be in different locations.

¹⁰ Civil Litigation Manual, at 2.

ALLOWING FOR THE IDENTIFICATION AND TRACKING OF OVERALL CASE

TRENDS. Sound case management, of course, focuses not only on individual cases, but on the court's entire docket. It is important, for example, to prioritize the handling of certain cases in comparison to others, or to identify, for common treatment, related cases or at least cases that have related management issues. And, increasingly, it is vital to be able to generate statistics that are used both in assessing the effectiveness of particular case management techniques and, more globally, in measuring the efficiency and workload of particular courts. Such statistical reports can be essential in identifying resource needs where, for example, a lack of personnel is slowing down the decisional process or where additional funds should be expended.

II. SOME EXAMPLES OF DATABASE PROGRAMS USED BY U.S. COURTS IN MANAGING CASES

A centralized administrative office for the Federal judiciary, the Administrative Office of U.S. Courts, is responsible for developing, testing and deploying the electronic database programs that are used by Federal courts. Some of this software is purchased from outside vendors, including multinational firms such as Microsoft, and represent programs used generally by a variety of businesses other than courts to keep track of their workload. Other programs have been developed by the Administrative Office for the specific use of the Federal judiciary and have been constructed to meet the needs of those courts, with an eye towards specific judicial tasks. The following are examples of programs currently in use in the Federal courts of the United States.

CASE MANAGEMENT/ELECTRONIC CASE FILING (CM/ECF). The CM/ECF system provides the Federal courts with a variety of computerized tools for managing their cases.

Once logged onto the system, litigants and the judge may file case documents & pleadings,

motions, petitions, orders and opinions ß electronically over the Internet instead of in paper form.¹¹ Documents filed on this system are docketed immediately as they are filed, so that the court's records are always current. The system ensures that copies of the documents are distributed to all the affected parties ß this service is automatic and virtually instantaneous. Judges, court staff and the parties receive immediate notification of the filing of a document and can view the files twenty-four hours a day, seven days a week from virtually any computer or hand-held computer device (such as smart phone) that has a connection to the Internet. Judges may also file orders and opinions electronically, even when they are not in the courthouse. Except in cases in which the documents are sealed (for example, where trade secrets or national security are involved), the documents on the dockets are also accessible to the general public, allowing the public to monitor easily the progress of a case.¹² Multiple people can view the same case or document simultaneously.

CM/ECF greatly facilitates the handling of individual case files ß and with that enhanced handling comes better case management. Electronic files in the system are never removed from the filing system (and are easily archived), do not get misplaced and may be transferred with ease between divisional offices of the court, between trial courts and appellate courts, or between the clerk's office and chambers. The docket in such electronic

¹¹ The CM/ECF system uses standard computer hardware, an Internet connection and browser and requires filings to be in the Portable Document Format (PDF).

¹² The system that allows for public access to documents filed on CM/ECF is known as PACER, which stands for ðPublic Access to Court Electronic Records.ð PACER ðprovides public access to lists of cases, parties, participants (including judges, attorneys, and trustees), a chronology of case events, and a wide variety of other information.ð Eric Magnuson, Michael Gans, Jessica Stomski, ðCM/ECF on Appeal ß the Eighth Circuit Affirms,ð 8 No. 8 E-Filing Rep. 1 (2007). For more information on PACER see <http://www.pacer.psc.uscourts.gov/>.

cases may be accessed in most courtrooms, allowing judges, during the course of hearings and other proceedings, to view on computer screens particular documents in the record without having to bring voluminous paper files into the court. Judges may also download files from such systems onto their work computers, allowing them to read filings and draft orders and opinions on that computer while at home or traveling. These features allow judges to prepare rulings on motions from literally anywhere – even when thousands of kilometers away from the courthouse.

The records that are created electronically by this system are tracked in a variety of electronic reports. These reports are generated from information entered when filings occur and do not require anyone to enter further data into the court system. Using electronic docketing information automatically developed by the system, judges and administrators can track recent filings and the parties' compliance with deadlines, determine motions that are ripe for decision, and monitor the court's calendar. Other reports may be developed to allow judges to track cases before other judges or courts that involve the same or similar transactions and legal claims. The CM/ECF system also allows judges and court administrators to compile case and workload statistics directly from the docket, thereby greatly simplifying and enhancing the accuracy of monthly and annual reports. Data from the system may also be uploaded into other computer systems (such as the CEO program discussed below), allowing the information from the system to be used in a variety of other strategic case management tools.

Implementation of the CM/ECF system began in 2001. Today, virtually every court in the Federal judiciary – bankruptcy courts, district courts and courts of appeal – uses this system.

To provide a sense of the volume of these filings в in July of 2009, the CM/ECF system for U.S. District Courts handled 1,316,828 filings, while the system for the U.S. Bankruptcy Courts handled 4,690,976 filings. Overall, as of August 2009, there are more than 34 million cases on the CM/ECF system and more than 400,000 attorneys and others have filed documents on the system. As a result of collaboration between the courts and the Administrative Office, new features are constantly being added to the CM/ECF system.

CHAMBERS ELECTRONIC ORGANIZER (CEO). Chambers Electronic Organizer is a relatively new program that allows judges and court employees to access current scheduling information. This system, which was developed by courts in the southern United States with high volumes of filings, allows judges and court employees to access scheduling information that is generated from CM/ECF entries or calendar entries made directly by judges and court employees. CEO allows multiple employees to access the calendar simultaneously - a single calendar entry made under this program is reflected immediately on the docket and simultaneously communicated to all the affected parties within the court - judges, their staff, the clerk's office, employees reserving the court facilities and security personnel. Likewise, a calendar change made in CEO is immediately communicated to these same parties. The information on the system may be accessed by judges and other court personnel on smart phones, such as Blackberries.

One of the powerful features of CEO allows the court to accumulate a variety of electronic records and associate them with the calendar entry. The court can quickly move from the calendar entry to the full electronic docket of the case contained on CM/ECF or to an abbreviated version of that docket that contains only the court documents needed for a given hearing. But, CEO allows the judge and his staff to do much more. The court, for example, can create an electronic directory that is associated with a hearing date and load into that directory electronic copies of critical documents filed by the parties; relevant statutes, cases or other precedents; research memoranda prepared by the judge's staff; and drafts of orders or opinions to be issued. All the materials related to a single calendar entry thus can be kept in a single file, accessible by the judge and his staff, greatly facilitating preparation for that hearing. CEO also offers features that allow the court to quickly generate orders - it can be configured, for example, so that simple standardized orders are automatically generated by the system ready for filing.

CEO assists courts in managing their dockets by making it easier to monitor particular cases, prepare for hearings and render decisions. CEO is currently being used by approximately half of the Federal district courts. A related calendar program is the Chambers Automation Program (CHAPS) which is being used by bankruptcy courts to manage their dockets.¹³

OTHER DATABASE PROGRAMS. Individual judges use a variety of relational database programs for internal tracking purposes. These programs are called 'relational' databases because they allow a user to access and group data from multiple locations through a single program. Once the data is captured in this fashion it may be displayed in a variety of reports that are easily indexed and the same data, for example, may be displayed using an alphabetical listing of the case names or by the year a given case was filed. Some of these programs are purchased from private vendors (for example, Microsoft Access),¹⁴ while others are free and open-sourced (for example, MySQL).¹⁵ These programs allow individual judges to develop reports that track very particular information regarding cases, including details regarding how the case is being handled by the judge's staff. In many chambers, the reports generated from these databases are reviewed periodically as part of docket reviews to determine the next steps that should be taken in a given case.

¹³ Further information on CM/ECF, CEO and CHAPS may be found in the Annual Report of the Director, Administrative Office of the United States Courts (2008), an electronic version of which is available at <http://www.uscourts.gov/library/annualreports/2008/22.cfm>.

¹⁴ See Wikipedia: Microsoft Access, http://en.wikipedia.org/wiki/Microsoft_access (as viewed on September 11, 2009).

¹⁵ See Wikipedia: MySQL <http://en.wikipedia.org/wiki/MySQL> (as viewed on September 11, 2009).

Many of these programs were used by judges to track the progress of their cases prior to the availability of CM/ECF and CEO. These programs have been maintained by some judges who prefer a system in which they control all of the data which is entered and the parameters of the reports that are generated. Nevertheless, as both CM/ECF and CEO are further developed, the need for such internal tracking databases will be lessened. B indeed, it is anticipated that an entirely new version of CM/ECF, which will be available in several years, will render obsolete not only these personal databases, but also the CEO and CHAPS calendar program.

III. SOME CONCLUDING THOUGHTS

The programs discussed above are not designed to compel judges to approach case management in any particular fashion. B indeed, such a requirement would run counter to the independent streak of the Federal judiciary. Rather, these programs are designed merely to be tools. B to empower the judge and chambers staff to approach the management of cases in whatever way the judge deems appropriate, to provide the information needed to ensure the just, speedy, and inexpensive determination of every action and proceeding,⁴ as required by the Federal rules. The increased use of these programs is the direct result of the value that they provide. B the ability to track the progress of individual cases, to tailor narrowly procedures to advance litigation, and to compile a variety of reports that assist in global management and in maintaining the integrity of the judicial system.

Was developing these programs an easy task? No. Mistakes were made. Indeed, the CM/ECF system was originally designed primarily by court administrative staff for themselves and did not initially offer judges and their chamber staff many of the basic options needed to perform case management. It required significant additional interaction

between judges and the computer personnel to produce modifications to the program, so that it now meets many case management needs. And, indeed, there continues to be tension between developing programs that provide some level of national uniformity and yet still respond to local demands.

Are these programs, even after nearly a decade of refinement, nearing perfection?

Absolutely not. Indeed, they are constantly being refined to correct newly-discovered problems and to improve the features and utilities available. Beyond that, as mentioned, the Administrative Office of U.S. Courts is now in the process of developing an entirely new successor system for CM/ECF that will include many of the features now found on CEO, including substantially improved calendar and reporting functions. The goal is to have a single program that performs all of the database tasks required by the Federal judicial system. That said, at least two important lessons have been learned: First, that court electronic systems must be designed with significant input from the judges B the programs must be sensitive to how the data actually will be employed by judges and court staff in dealing with real cases. Second, that in this area, as in many, the words of the French writer, Voltaire, ring true B Athe perfect is the enemy of the good.@ This is to say that in some instances, it is more important to have a database program be more quickly available that meets many of the court's needs, rather than to delay implementation of a computer system (perhaps for years) until it is perfected. A program that takes too long to be 'perfected' often becomes obsolete before it is released.

So why do so many Federal judges in the United States use these programs? It is because, even with a few flaws, the information that these programs provide and the functions they permit are invaluable and far superior to that which was previously available. And, even if some judges feel otherwise, they are forced to deal with attorneys before their courts who

have come to expect the advantages and economies offered by these computer systems.¹⁶ The demands of these practitioners undoubtedly have prompted further improvements in the systems. In the end, for judges, court staff and counsel alike, the use of these systems is prompted by synergy and self-interest: each group receives its own benefit from the system while providing electronic information that benefits the others. The ultimate beneficiary of these efforts, of course, is the public at large, which benefits from a better managed court system.

¹⁶ As noted by one legal commentator: “The paperless office is now here. The vast majority of the . . . attorneys and staff who have already [filed documents on] CM/ECF have found [it] to be a significant improvement to their law practices and would not go back to the old paper system if given an opportunity to do so.” Cass C. Butler, “Ten Reasons You May Just Like CM/ECF,” 17-JUL Utah B.J. 17, 19 (2004).

SPEAKER BIOGRAPHY - JAMES C. MOORE, ESQ.



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James C. Moore has been a trial lawyer for more than 40 years. For many years, Mr. Moore's practice has been focused on business and construction disputes. In his early career, Mr. Moore served as a prosecutor and defense counsel in criminal proceedings.

Mr. Moore is the senior lawyer in his law firm, Harter Secrest & Emery LLP. He has appeared in federal and state courts throughout New York State as well as in Pennsylvania, Virginia, Florida and Washington, D.C. and before numerous state and federal agencies.

Mr. Moore was the president of the New York State Bar Association (1998-1999), the largest state bar association in the United States. He is an elected member of the American Law Institute (which analyzes and recommends reform of the law) and is a Fellow of the American College of Trial Lawyers. Mr. Moore is also a Director of the Union Internationale des Avocats.

Mr. Moore often serves as an arbitrator and mediator in commercial disputes. He has also been an appointed judge in cases involving the judiciary.

Mr. Moore served as an officer in the U.S. Army in Vietnam. He is a graduate of Cornell University (B.S. 1961) and the Cornell Law School (L.L.B. 1964).

PAPER –

CASE MANAGEMENT IN U.S. COURTS FROM A PRACTITIONER’S PERSPECTIVE

JAMES C. MOORE, ESQ.

COURTS OR ARBITRATION IN U.S.

- A. All cases involving crimes are conducted in courts.
- B. The majority of commercial, contract, property and injury cases are conducted in courts; many courts have specialized jurisdiction:
 - + Bankruptcy
 - + Claims against the government
 - + Claims involving the military
 - + Trademark, patent
- C. Arbitration frequently used in:
 - + Construction
 - + Labor and employment

OVERVIEW OF STRUCTURE OF JUDICIAL SYSTEMS WITHIN U.S. AS IT RELATES TO CASE MANAGEMENT

D. Principles Governing U.S. Criminal Proceedings

- * U.S. and state constitutions guarantee all parties:
 - + A "speedy and public" trial.
 - + Trial by an impartial jury of peers.
 - + Presumption of innocence.
 - + Defendant not required to testify.
 - + Access to competent counsel at state's expense when defendant cannot afford counsel.
 - + Guilt must be established beyond reasonable doubt.
 - + Defendant is entitled to confront all witnesses.
- * Standards are closely monitored in criminal proceedings
 - + Especially true when defendant is incarcerated.

E. Principles Governing U.S. Civil Proceedings:

- * No constitutional guarantee of swift trial but individual courts establish time standards.
- * Trial by jury is assured in most cases.
- * No guarantee of counsel.
- * Each party pays its own counsel.
- * Claiming party must establish its claim by a preponderance of evidence.

RESPONSIBILITIES OF JUDGES AND ATTORNEYS IN CONNECTION WITH CASE MANAGEMENT

F. Role of Judges in Criminal and Civil Proceedings.

- * Manage pre-trial proceedings:
 - + Establish schedule for pre-trial hearings, discovery and trial.
 - + Determine if case should be dismissed.
 - + Judges employ magistrate judges or law clerks to assist in managing pre-trial proceedings.
- * Manage all aspects of the trial:
 - + Rule on applications by counsel.
 - + Apply rules of evidence.
 - + Instruct jury.
- * Judges do not investigate case or participate in questioning witnesses.
- * Judge is responsible for assuring that case proceeds with reasonable speed.
- * Judicial Accountability
 - + Judges must meet case management standards established by state's highest court and comply with codes of judicial conduct, and in extreme cases may be removed.
 - + A judge who fails to meet standards may be required to appear before a court devoted exclusively to complaints against judges.

G. Role of Attorneys

- * Prepare case for trial and conduct trial
 - + Analyze the crime or claim and determine how to proceed.
 - + No *ex parte* communications with court.
 - + Conduct trial by:

- Acting as a vigorous advocate for the client.
 - Presenting exhibits, question witnesses.
 - Addressing and explaining case to jury.
 - Presenting legal arguments to the judge.
- * Advise the client about:
- + Risks of trial.
 - + Consequences of conviction.
 - + Value of claim.
 - + Whether to appeal.
- * Attorney Accountability
- + Authority to monitor and sanction attorney conduct resides with the state.
 - + Depending upon the state, attorney conduct is monitored by:
 - The state's highest or intermediate court.
 - The state bar association.
- * Attorney Accountability - An attorney's failure to comply with case management standards may result in:
- + Private or public censure.
 - + Suspension or removal of law license.
 - + Civil damages.

PRINCIPLES OF CASE MANAGEMENT

H. Principles of Case Management for the Attorney

- * Early analysis of legal issues; determination of strength/weakness of client's case.
- * Early appraisal of costs of handling the case; appraisal of the attorney's ability to handle the case.
- * Respect for time limitations is of utmost importance.
- * Role of client in case management.
- * Knowledge of adverse party's case is essential; adequate time must be preserved to allow the complete gathering of evidence.
- * Because judges are assigned randomly, knowledge of the judge's abilities is essential:
 - + Ability to analyze legal issues.
 - + Respect for counsel.
 - + Timeliness in rendering decisions.
 - + Ability to manage a complicated trial.
 - + Ability to render unpopular decisions.
 - + Use of technology
 - + Judge's personal rules
 - + Personal considerations regarding the judge.
- * Technological devices available to assist in case management.

I. Principles of Case Management from the Judge's Perspective

- * Employing scheduling conferences/orders.

- * Establishing a realistic time frame for case preparation and trial is important and should be established at an early moment with the participation of counsel.
- * Requiring the parties to meet the schedule is important but flexibility is appropriate.
- * Timely decisions on requests by counsel are essential.
- * The preferred approach is to have one judge manage all aspects of a case; this assumes that the judge is diligent in performing his or her responsibilities.
- * The use of court appointed experts is not common (exception: child custody).
- * During the trial, respect for the role of the attorney as an advocate is important but also, assuring order in the proceedings is essential.
- * Limiting repetitious or unnecessary proceedings by the attorneys may be required.
- * Increasingly, judges are assigned to single subject courts:
 - + Domestic issues.
 - + Drug.
 - + Housing.
 - + DWI.
 - + Criminal.
 - + Sex Offenders.
 - + Commercial.
- * Employing ADR
 - + When?
 - + Cost.
 - + Court ordered or voluntary?
 - + Required or voluntary?
 - + With Whom?

ROLE OF MEDIATION AND ARBITRATION IN CIVIL DISPUTES

- * Decline in number of claim filings and trials.

UAE Ministry of Justice - Case Management Forum

Dubai, UAE

3 October 2009

Page 31

- * Factors causing this phenomenon.
- * Rise of mediation.
- * Advantages/disadvantages of mediation from a case management perspective.

SPEAKER BIOGRAPHY – JUDGE FRANÇOIS PAYCHÈRE



FRANÇOIS PAYCHÈRE

Born 1958; Law, Philosophy of Law and Political Sciences studies (Universities of Geneva, Saint-Gall and Paris; Institute of Political Sciences, Paris); Doctor of Laws (Paris, 1990), Barrister (Geneva, 1992); Visiting Research Fellow (University of Kent at Canterbury, 1989-1990), Assistant Rapporteur at the Swiss Federal Supreme Court (1992-1995), Deputy State Attorney (Geneva, 1995-1996), Judge at the Geneva Administrative Supreme Court (1996-2008), Deputy Chairperson and Chairperson (2001-2008) of the Geneva Administrative Supreme Court, Member of the High Council of Justice (2001-2007), Judge at the Geneva Civil and Criminal Supreme Court (2008-...), Chairperson of the Working Group on quality of justice (CEPEJ-GT-QUAL, Council of Europe, 2008-...).

PAPER –

CASE MANAGEMENT:

IS THERE A WAY TO ENSURE A FAIR TRIAL WITHIN REASONABLE TIME?

FRANÇOIS PAYCHÈRE

INTRODUCTORY REMARKS

There is nothing like “the one” unique good solution for case management. Everyone dealing with the variety of institutional history, legal provisions, economical situations and actual state of development within Europe knows that local circumstances have to be taken in account.

There is therefore necessity for considering on one hand the requirements of the European Convention on Human Rights as well as the case-law and on the other hand what is at stake in a particular situation before promoting a solution for case management. Both aspects of the question give the skeleton of my report: let us start with the European Human Rights Convention (EHRC; the Convention)¹⁷ and the case-law of law of the European Court of Human Rights (the Court) based in Strasbourg¹⁸ (part 2) before exemplifying the requirements of the Convention and the case-law through a local system of case

¹⁷

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT'005&CM'1&DF'11/09/2009&CL'ENG>

¹⁸ http://www.echr.coe.int/echr/Homepage_EN

UAE Ministry of Justice - Case Management Forum

Dubai, UAE

3 October 2009

Page 34

management (parts 3 and 4) meeting hopefully the requirements of the Convention and the aspirations of the citizens.

TIME REQUIREMENTS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

THE EUROPEAN HUMAN RIGHTS CONVENTION

The EHRC entered in force in 1953. It has been ratified by forty-seven States as of 11 September 2009¹⁹ and is the most effective treaty within the Council of Europe. For our discussion, Article 6 § 1 EHRC is relevant ; it gives a definition of what a fair trial should be in terms of procedure and contains a real **right to a fair trial**, enforceable for every person living under the jurisdiction of one of the 47 Members-States :

“1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing **within a reasonable time** by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

¹⁹ <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT'005&CM'8&DF'11/09/2009&CL'ENG>

The idea of a fair trial within a reasonable time reappears in the Article 14 of the International Covenant on Civil and Political Rights of 16 December 1966²⁰ :

"1. All persons shall be equal before the courts and tribunals [...]

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality : [...]

(c) **To be tried without undue delay."**

The right to have one's case heard within a reasonable time is therefore now embodied in international law as well as in national law²¹. Within Europe, at least it should encompass the same rights for every citizen and the same duties for every State. However, States could derogate from their obligations in time of war or other major public emergency²².

²⁰ <http://www2.ohchr.org/english/law/ccpr.htm>

²¹ E.g. Art. 29 Federal Constitution of the Swiss Confederation of 18 April 1999 :

General procedural guarantees

¹ Everyone has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.

(<http://www.admin.ch/ch/e/rs/101/index.html>)

²² Article 15 EHRC :

¹In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

THE CASE-LAW OF THE EUROPEAN COURT

As far as the length of proceedings is concerned²³, the case-law of the Court is well established for almost forty years²⁴ and settled on three main criteria:

THE COMPLEXITY OF THE CASE

This criterion involves legal factors as well as factual elements.

THE APPLICANT'S CONDUCT

Under certain circumstances, these criteria can involve a report of non-violation, while at the same time there the procedure is excessively lengthy. Nevertheless applicants are only held to be responsible for delays when they have manifestly shown bad faith.

THE CONDUCT OF THE COMPETENT AUTHORITIES

Generally speaking, the Court does not take in consideration States claiming that courts are facing an exceptional backlog of cases. It is of duty for contracting States to organize themselves in order to cope with the requirements of Article 6 § 1 ECHR. Member states are free to choose themselves the adequate measures to adjust their own judicial systems. However, if they fail to do so, then they have to accept liability.

²³ For a more in-depth study : FRANÇOISE CLAVEZ, *Length of court proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights*, CEPEJ Studies No. 3, 2007 ; http://www.coe.int/t/dghl/cooperation/cepej/series/default_EN.asp?

²⁴ <http://cmiskp.echr.coe.int/tkp197/view.asp?item'2&portal'hbkm&action'html&highlight'Neumeister&sessionid'29673348&skin'hudoc-fr> : § 16-21.

OTHER CRITERIA

Under certain circumstances, the Court considers what is at stake for the litigants: employment disputes, child custody, parental authority are examples of cases where the national court concerned must show particular diligence.

SEARCH FOR AN REASONABLE TIMEFRAME

If a case lasts less than two years for each procedural phase²⁵, it is generally speaking considered as meeting the requirements of Article 6 § 1 EHRC. When this period of time lasts more than two years, the Court seems ready to rule in favour of the defendant if the applicant's behaviour is to be blamed.

A temporary backlog of court business does not entail a Contracting State's international liability if the State takes appropriate remedial action with the requisite promptness. In such circumstances, it is legitimate as a temporary expedient to decide on a particular order in which cases will be dealt with, based on their urgency and importance. The urgency of a case, however, increases with time; consequently, if the critical situation persists, such expedients are shown to be insufficient and the State must take other, more effective action to comply with the requirements of Article 6 § 1 EHRC. The fact that such backlog situations have become commonplace does not, in the Court's view, justify excessive length of proceedings.

In a very interesting case, the Court considered the difficulties encountered by the Spanish government to restore democracy but ruled that the effective measures taken in a particular court were not sufficient for meeting the criteria of Article 6 § 1 EHRC and that the

²⁵ First instance judgement, appeal and eventually proceedings before a Supreme Court.

defendant could not argue with general difficulties – even real – for not handling properly with backlog²⁶; in this case the Court criticized the internal organisation of the Spanish court, a reasoning which leads us to the second part of our paper:

"41. In the instant case, the two periods of delay noted by the Court ... are very substantial, and the courts concerned did not point to any special feature of the case which could have explained such dilatoriness (...).

The increase in the Barcelona courts' workload was foreseeable, not only because of the measures taken following the adoption of the 1978 Constitution to facilitate access to the courts but also because of a trend, long since observed, towards a high level of migration to Catalonia in general and Barcelona in particular.

Lastly, the Ombudsman and the Barcelona Bar Council had already reported the seriousness of the problem (...).

This state of affairs continued for several years, thus becoming organisationally in-built. The measures taken in 1981 and 1982 in respect of the courts of first instance (...) and in 1983 and 1985 in respect of the Court of Appeal (...) proved, even at the time, insufficient and belated. They slightly reduced the length of the proceedings in the Court of Appeal but (...) had no effect on the specific situation in the Barcelona Court of First Instance no. 9.

26 Unión alimentaria Sanders S.A. v. Spain, 07 July 1989
(<http://cmiskp.echr.coe.int/tkp197/view.asp?item'1&portal'hbkm&action'html&highlight'Union%20%7C%20Alimentaria%20%7C%20Spain&sessionid'29738978&skin'hudoc-fr>)

42. In the light of all the circumstances of the case, the Court considers the length of the impugned proceedings excessive. The undeniable difficulties encountered in Spain could not deprive the applicant company of its right to have its case heard within a "reasonable time".

The length of judicial proceedings is still a major concern in all Member States. The intervention of the Court itself is not a sufficient remedy as not every European citizen – even deprived from his rights – is ready to enter a lawsuit against a member State and as every mislead trial within a member State could end up with a new case for the Court and increase the backlog of the European Court for Human Rights.

A EUROPEAN RESPONSE TOWARDS A FAIR TRIAL WITHIN REASONABLE TIME

The European Commission for the Efficiency of Justice (CEPEJ) was established on 18 September 2002 with Resolution Res (2002)1227 of the Committee of Ministers of the Council of Europe. Its creation demonstrates the will of the Council of Europe to promote the Rule of Law and Fundamental Rights in Europe, based on the European Convention on Human Rights.

EUROPEAN DIVERSITY AND A NEED FOR COMMON APPROACH

Europe is not a national State and will never be. Its forty-seven members States do not belong to the same judicial tradition. They do not reach the same level of economic development for the moment being. It is therefore useless to think about "a" model of

27

[https://wcd.coe.int/ViewDoc.jsp?Ref'Res\(2002\)12&Sector'secCM&Language'lanEnglish&Ver'original&BackColorInternet'9999CC&BackColorIntranet'FFBB55&BackColorLogged'FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref'Res(2002)12&Sector'secCM&Language'lanEnglish&Ver'original&BackColorInternet'9999CC&BackColorIntranet'FFBB55&BackColorLogged'FFAC75)

UAE Ministry of Justice - Case Management Forum

Dubai, UAE

3 October 2009

Page 40

judicial organization, which would suit with the need of these forty-seven members. For the past recent years, the CEPEJ works with concepts like best “practices” which represent not the “unique” solution to a given problem, but simply a possible one which meets the requirements of the case-law of the Court and are in line with the opinions of experts.

A “DAY BY DAY” ANSWER

As far as case management and court management are concerned, the CEPEJ already published two sets of guidelines, one devoted to the “Time management” made of a list of indicators for the analysis of lengths of proceedings in the justice system²⁸ and another one devoted to the question of quality²⁹. The “Time management checklist”, adopted by the CEPEJ in December 2005, is a tool for internal analysis of the timeframe of proceedings before a particular court. By asking the right questions, the checklist should help the stakeholders to take the right decisions for a better use of time in the court they administrate.

A DAILY APPLICATION WITHIN A COURT OR HOW TO DEAL WITH CASE MANAGEMENT IN ORDER TO COPE WITH THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The practical experience of a better case management described here is based on experiences made at the Geneva Administrative Supreme Court, a small specialized court with five full-time judges, a scientific and an administrative staff, ruling one thousand cases

²⁸

[https://wcd.coe.int/ViewDoc.jsp?Ref'CEPEJ\(2005\)12&Language'lanEnglish&Ver'rev&Site'COE&BackColorInternet'eff2fa&BackColorIntranet'eff2fa&BackColorLogged'c1cbe6](https://wcd.coe.int/ViewDoc.jsp?Ref'CEPEJ(2005)12&Language'lanEnglish&Ver'rev&Site'COE&BackColorInternet'eff2fa&BackColorIntranet'eff2fa&BackColorLogged'c1cbe6)

²⁹ [https://wcd.coe.int/ViewDoc.jsp?Ref'CEPEJ\(2008\)2&Language'lanEnglish&Ver'original&Site'DGHL-CEPEJ&BackColorInternet'eff2fa&BackColorIntranet'eff2fa&BackColorLogged'c1cbe6](https://wcd.coe.int/ViewDoc.jsp?Ref'CEPEJ(2008)2&Language'lanEnglish&Ver'original&Site'DGHL-CEPEJ&BackColorInternet'eff2fa&BackColorIntranet'eff2fa&BackColorLogged'c1cbe6)

a year on the field of public law. The Court is a last instance court at a state level, which means that an appeal at the national Supreme Court is still possible.

A CITIZEN VIEW

All Geneva courts ran for almost fourteen years public surveys on a regular basis³⁰. Even if the administrative Court did quite well, it was commonly notice that the access to the case-law was insufficient and the length of proceedings criticized.

HOW TO REACT?

The lack of knowledge of the case-law can be seen as a cause for more ill conceived judicial actions, which are part of the workload of the judges. Even under the viewpoint of a speedy justice, a free access to the case-law can be seen as an overall measure for a better case management as possible applicants had better know if they are in position to win the case.

A free access to the case-law of the Geneva Administrative Court³¹ has been set up in February 2005, but the content of the data bank goes back to 1971.

At the same time, it has also been decided to give a better hint of the length of proceedings by publishing on the website of the court some figures³²:

30 <http://www.ge.ch/tribunaux/pouvoir-judiciaire/vie-judiciaire/enquetes/welcome.html>

31 <http://justice.geneve.ch/jurisprudence/TA/>

32 Zofia Swinarski Huber, PhD, MBA, in charge of Management Accounting, gave many help by drawing slides and I thank her for helping.

Length of procedures in 2008

Annual statistics published yearly on the Judiciary Power web site

Types of procedures	10% percentage of cases decided in a period of ...	25%	50%	75%	90%
<i>Road regulations</i>	17	32	59	126	291
<i>Building and planning regulations</i>	47	104	193	340	516
<i>Fiscal/taxes</i>	48	89	174	313	402
<i>Deprivation of personal freedom for administrative reasons</i>	5	7	8	8	11
<i>Public tenders</i>	34	44	65	131	315
<i>Civil service</i>	49	74	127	358	416

...days after the case has been registered.

http://www.geneve.ch/tribunaux/renseignements-pratiques/Duree_procedure_TA.html

The same kind of information is also available under a written form, yearly published and distributed to the members of Parliament, the press and other stakeholders:

Indicators 2008

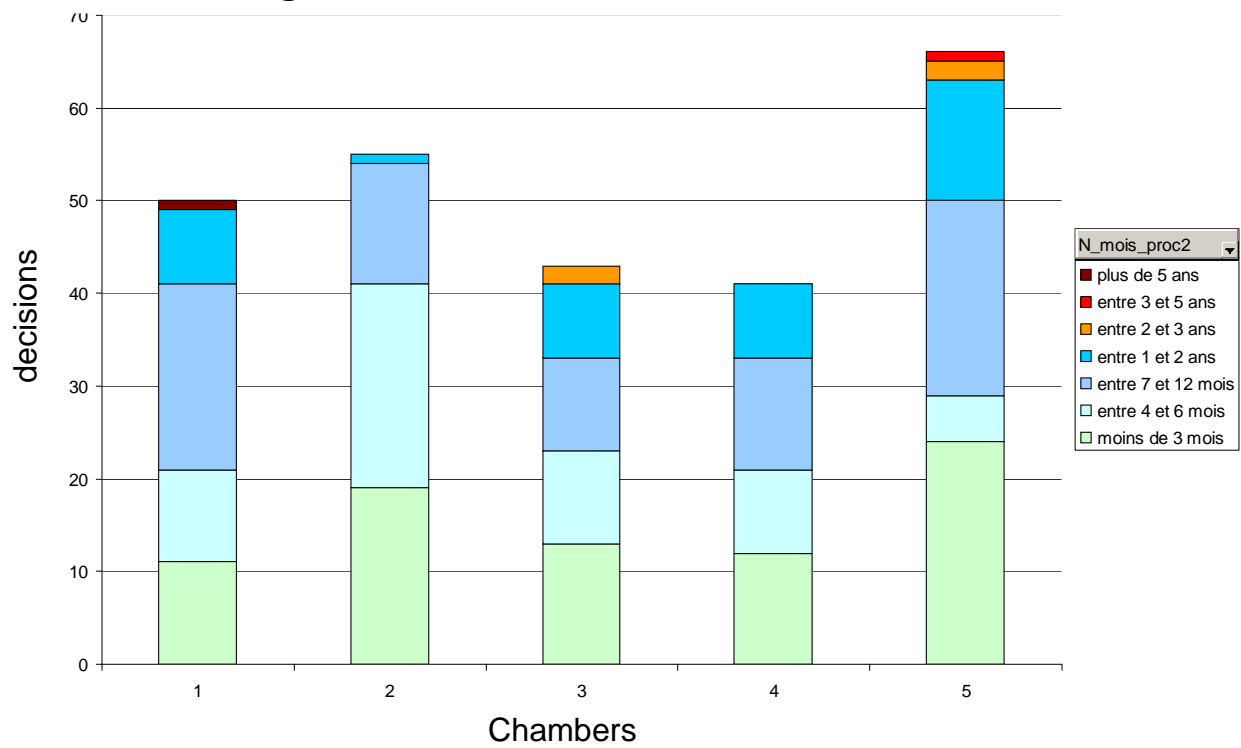
(Annual report)

Procedures	Indicators	2007 (number of days)	2008 (number of days)
Overall figures	Reduced average length of proceedings - decisions (days)	118	122
	Reduced average length of proceedings - pending cases (days)	142	139
	Time needed for the cases in stock (days)	127	160
Road regulations	Reduced average length of proceedings - decisions (days)	72	82
	Reduced average length of proceedings - pending cases (days)	128	113
	Time needed for the cases in stock (days)	76	70
All other administrative cases	Reduced average length of proceedings - decisions (days)	152	150
	Reduced average length of proceedings - pending cases (days)	148	144
	Time needed for the cases in stock (days)	163	219

<http://www.geneve.ch/tribunaux/pouvoir-judiciaire/vie-judiciaire/comptereendu/>

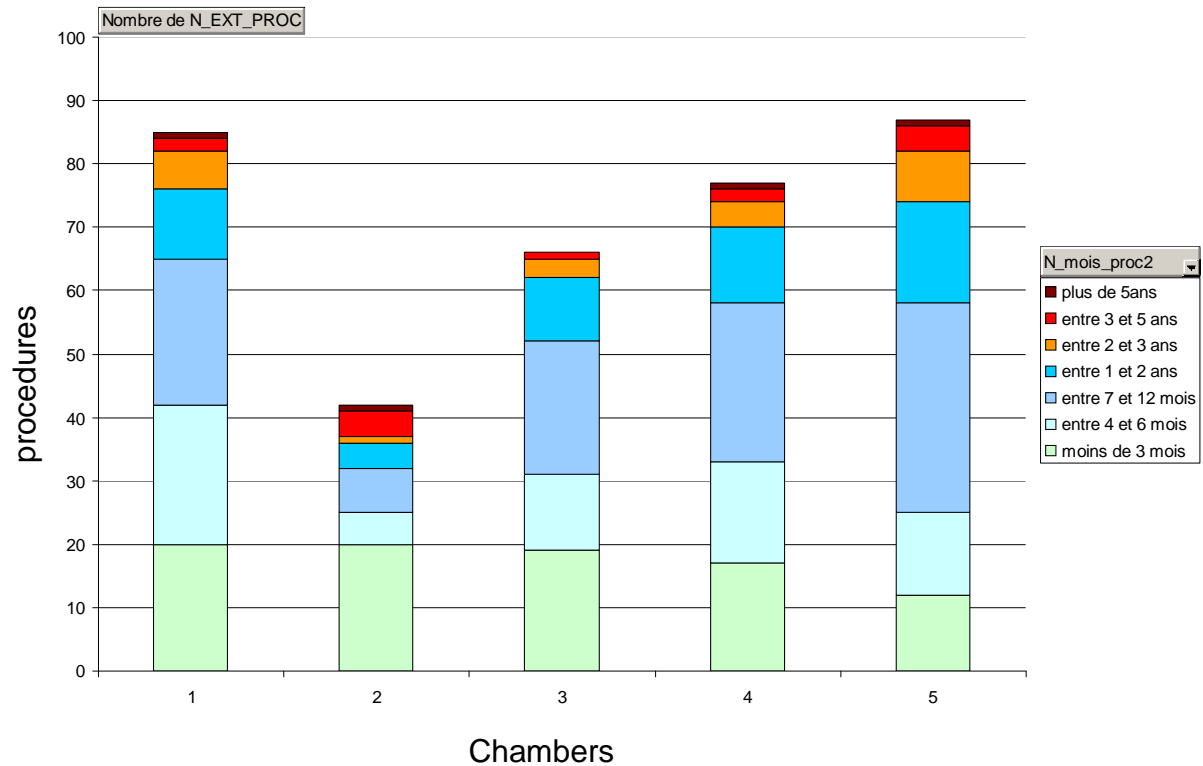
The information given to the High Council for the Judiciary has been improved to give a better view of the workload of the Court. Twice a year, the High Council gets the following information under this form and it of course entitled to get it under a more detailed form:

Distribution of decisions considering their length in months as of 31.05.2009



It is also necessary to consider the existing workload twice a year and to know how old the pending cases are:

Distribution of pending stock considering the length of proceedings in months as of 31.05.2009



A DAILY PROCESS FOR A BETTER MANAGEMENT

To address the question of the length of proceedings, a set of measures have been taken. First, the internal data bank gives an access to all the decisions made, such as time limits, the letters sent or received to the judge in charge of the case, the court clerks working on and the President of the Court as well as all other judges.

Every judge is able to follow daily what is going on in the files he is in charge of; the information is shared within the Court or the section:

Files as of 13.09.2009:

N° proc	Motifs	Et.	Natu r.	D. Inscr	D. Jur	D. Attr.	Attri b	Appl.	Def.	N_m onth s proc	N_m onth s_ jur	N_m onth sma g
PS./2009	OPTAX	EC	CHOI	1.06.2009	1.06.2009	30.06.09	A	X	Y	3	3	3
P./2008	192LST	EC	CHOI	7.08.2008	9.05.2009	30.06.09	C	X	Y	13	4	3
P./2008	144CP	EC	CHOI	3.06.2008	5.05.2009	30.06.09	A	X	Y	15	4	3
P./2009	90LCR	EC	CHOI	2.01.2009	4.05.2009	30.06.09	B	X	Y	8	4	3
P./2008	160CP	EC	CHOI	4.04.2008	8.04.2009	30.06.09	C	X	Y	17	5	3
P./2006	123CP	EC	CHOI	2.04.2006	9.04.2009	30.06.09	B	X	Y	41	5	3

P./2008	123CP	EC	CHOI	2.10.2008	7.04.2009	30.06.09	A	X	Y	11	5	3
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It is very important to realize that the person in charge of the case and also the President as well as all other colleagues in the same Court or the same section share the same information.

This choice has been made for improving a collaborative approach of the workload. The idea is to answer the following question:

- What has to be done for the Court as an entity?

And not

- What do I have to do to go back home earlier this evening?

Once the President of a Court is able of monitoring all the files pending in his Court, he has to a duty to look after the cases, which seem to be problematic. His first duty is to look for similar cases to build up "series"; it is always a risk to have more than one judge working on the same legal problem, as each particular judge may not have an overview of what is going on in the other chambers. Therefore, a President has to be active on this field in order to avoid the building up of a backlog caused by an unproductive duplication of work. He has also a duty to search for old cases and to understand why they last. Eventually he is also to define a policy for easy and numerous cases in order to save time for more demanding ones.

CONCLUDING REMARKS

UAE Ministry of Justice - Case Management Forum

Dubai, UAE

3 October 2009

Page 48

As already stated there is nothing like the one solution. A better court management is a collective work within a court. You cannot expect from court assistants and court clerks to work harder if there is nothing like a common goal. You can neither reduce the work done for the judicial power as any kind of other job nor reasoning as if the litigants were "customers". What is at stake is the conviction of the users that judges as well as scientific and administrative staff are doing their best for the society. As judges, we have to be prepared to share the necessary information with all citizens to show how we work – even on a non-competitive market – and to run our courts in a collective way to be efficient.

SPEAKER BIOGRAPHY – PROF. DR. TANIA SOURDIN



Tania Sourdin is a Professor of Conflict Resolution at The University of Queensland, based in Melbourne and Sydney, Australia. Professor Sourdin has extensive experience in conflict resolution, negotiation, alternative dispute resolution, commercial litigation, trade practices and consumer issues and is an active adjudicator and mediator. She is a member of National Alternative Dispute Resolution Advisory Council (for three terms) which advises the Australian Commonwealth Attorney-General on ADR, case management and other court related processes.

Professor Sourdin has led national research projects and produced important recommendations for reform in eight courts and four independent conflict resolution schemes. She also has extensive experience in training and educating mediators, investigators, conciliators, tribunal members, judges, architects, lawyers and others in relation to court related processes, communication, mediation, negotiation and alternative dispute resolution. As well, Professor Sourdin is the author of books, articles, papers and has published and presented widely on a range of topics including case management, court

UAE Ministry of Justice - Case Management Forum

Dubai, UAE

3 October 2009

Page 50

reform, judicial education and appraisal, mediation, conflict resolution, artificial intelligence, technology and organisational change.

PAPER –

COURT BASED CASE MANAGEMENT – TIMING, DIRECTIONS AND COST EFFICIENCY

PROFESSOR TANIA SOURDIN

TERMINOLOGY

The focus of case management is that the court, rather than the parties or their lawyers, either through administrators or judges or both, drives the litigation forward to a conclusion.

Case management is a term used to describe both the processes that control the movement of cases through a court (caseflow management) and the control of the total workload of a court (caseload management).

Where judges are involved in case management, the term 'judicial case management' is often used. Case management is used to describe trial and pre-trial techniques used by judges, registrars and others to control the activity and progression of individual cases.

While the progress of cases before Australian courts has always been 'managed', it was traditionally the case that courts left the pace and control of litigation largely in the hands of practitioners and litigants. The court was responsive to the actions of practitioners. In more

UAE Ministry of Justice - Case Management Forum

Dubai, UAE

3 October 2009

Page 51

recent years, courts and tribunals within Australia have adopted a variety of processes to manage cases and there has been a rapid evolution of case management techniques. It has been said that case management:

..involves a deliberate transfer of some of the initiative in case preparation from the parties to the court, with the aim of controlling costs and ensuring the timely resolution of cases, without compromising the quality and fairness of the process.³³

One of the main principles is the acceptance by the judiciary of individual and collective responsibility for court control and the active management of the flow of all cases from commencement to disposition. The institution of consultation by a court on case management with all relevant interested parties, is another important principle. Other measures necessary for a successful caseflow management system include: the establishment by judges of appropriate standards and procedures to govern caseflow; a restrictive policy on adjournments; a centralisation of judicial policy on adjournments; the development of time standards and criteria for system performance; the development of criteria for monitoring and measuring case management performance; the development of a capacity to make periodic modifications in response to changing conditions; the monitoring

³³ Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report 89 (Canberra: ALRC, 2000), para 6.3 referring to *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 [71 ALJR 294; 141 ALR 353] (HC), Dawson, Gaudron and McHugh JJ at 154.

of cases from commencement to disposition; steps to minimise conflict in lawyer schedules; and the coordination of the process by an appropriate court administrator.³⁴

Case management processes are directed at achieving the early resolution of disputes and encouraging early case preparation. The main aims of case management processes have been described as:

- (1) achieving an early settlement of a case or issues in a case where this is practical;
- (2) the diversion of cases to alternative methods for resolution;
- (3) encouraging a spirit of cooperation between parties;
- (4) the identification and reduction of issues as a basis for case preparation; and
- (5) where settlement cannot be achieved, progressing cases to trial as speedily and at the least possible cost.³⁵

Within Australia these objectives are pursued by rules requiring parties to a dispute to adhere to timetables, file the necessary documentation for their case, and attend before a court to indicate that compliance with the relevant requirements has taken place and that the issues are as specified in the relevant documents.

³⁴ See Solomon M, *Caseflow Management in the Trial Court*, American Bar Association Commission on Contemporary and Future Issues in the Field of Court Management, 1972 cited in Sallmann P, 'Judicial participation in caseflow management' (1989) 8 CJQ 129 at 135.

³⁵ Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice system in England and Wales* (London: HMSO, 1995), 30.

Case management has been instrumental in bringing about substantial cultural, procedural and operational changes to the civil court system within Australia. All Australian courts and many tribunals have now instituted some system of case management. There are variations in the forms of case management implemented. In part, these variations are due to the differences in the workload of particular courts and the human and other resources available to deal with any backlog. Legislatures around Australia have been unequivocal that the Courts should identify on the real issues in legal proceedings as quickly as possible, and ensure the parties are able to minimise costs. Court rules often refer to an 'overarching objective' and there are specific rules that set out timeframes and requirements.

For example, in Victoria, the *Supreme Court (General Civil Procedure) Rules* 2005 provide that in exercising any power under the Rules, the Court:

"shall endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined..." 36

Case management processes and systems are directed at the early and efficient resolution of disputes. Case management system objectives include:

- early resolution of disputes
- reduction of time
- more effective use of resources
- the establishment of standards

36 Rule 1.14 (Exercise of Power) of the Supreme Court (General Civil Procedure) Rules 2005.

- monitoring of case loads
- development of information technology support
- increasing accessibility
- facilitating planning for the future
- enhanced accountability
- the reduction of criticism of the system by reason of perceived inefficiency.³⁷

There have been many reports relating to the effective use of case management in the litigation system. For example, Lord Woolf in his interim report to the Lord Chancellor on the civil justice system in England and Wales focussed on the role of case management in encouraging settlement of disputes at the earliest possible stage. According to Lord Woolf the specific objectives of case management are:

- achieving an early settlement of the case or issues in the case where this is practical
- the diversion of cases to alternative methods for resolution
- encouraging a spirit of cooperation between the parties
- the identification and reduction of issues as a basis for case preparation
- when settlement cannot be achieved progressing cases to trial as speedily and at as little cost as is appropriate.³⁸

³⁷ See for example, J Wood 'The changing face of case management: The New South Wales experience' *Paper*, August 1994, 3.

The fundamental elements of a successful caseload management system have been said to include:

- commitment and leadership
- consultation with stakeholders
- supervision of case progress
- the use of standards and goals
- a monitoring information system
- listing for credible dates
- strict control over all time lines – including final dates.³⁹

CASE MANAGEMENT TIME LINES

The degree of 'delay' in case processing is one useful indicator of the effectiveness of case management processes. This is because one of the main objectives of case management is to reduce delay in court proceedings. 'Delay' is usually measured by the time that has elapsed between the commencement and conclusion of proceedings in a court or tribunal. It is not clear what constitutes reasonable delay, however courts now aim to dispose of most

38. Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* 1995, 30.

39. M Solomon & D Somerlot *Caseload management in the trial court: Now and for the future* American Bar Association 1987. 'In the judicial administration literature on caseload management ... these 'fundamental elements'', or versions of them are stated over and over again. They have become the 'conventional wisdom' — I Scott 'Caseload management in the trial court' in R Cranston & A Zuckerman (eds) *Reform of civil procedure: Essays on access to justice* Clarendon Press Oxford 1995 1, 7.

matters within a 12 to 18 month period. Often a specific target is set – for example that 90 percent of matters will be finalised with 12 months of filing.

Case management impacts upon delay by introducing time standards requiring cases to move more quickly through the court system and by introducing dispute resolution processes that resolve cases at an earlier time thereby reducing the average delay.

Case management processes depend upon having strict time frames. This means that if a court requires parties to file certain documents, attend certain court or other process events and attend a fixed hearing date, then the court must be able to keep its side of the bargain. That is, the court must have adequate resources to hear and deal with matters under a case management regime. Legal practitioner compliance together with the availability of hearing dates are essential in ensuring that delay is reduced.

Case management processes vary widely and are often related to the nature and number of disputes within particular courts and tribunals. Within each court or tribunal there may be different case management processes operating within different parts of the court. A different process and series of case events may apply to commercial and business list cases compared to the regime that applies to personal injury cases. In some courts referral to Alternative Dispute Resolution and court conferences, as part of a case management process may be the usual practice, while in others, case management may involve in-court directions hearings with less emphasis upon conferences or referral to dispute resolution processes other than a judicial hearing.

The types of processes adopted as part of a case management system depend to a large extent, upon the individual preferences of judges and practitioners within a particular court or tribunal. One focus of most case management processes is a clear emphasis upon time

UAE Ministry of Justice - Case Management Forum

Dubai, UAE

3 October 2009

Page 57

lines to manage cases. Parties who commence a matter in a Court that uses case management are expected to respond and inquire within set frames that are provided to parties early in the case management process. In this respect there are fixed milestones where documentation is required.

Each case is then assigned to either a specific judicial case manager or specialist court staff who then contact parties and act as the main point of contact for the parties to the dispute.

In some court systems complex cases (or sometimes all cases) are referred to a judge who manages the case management regime with the assistance of administrative staff. For example, it has been noted in respect of the Court system in the UK:

I do not see the active management of litigation as being outside a judge's function. It is an essential means of furthering what must be the objective of any procedural system, which is to deal with cases justly. Case management includes identifying the issues in the case; summarily disposing of some issues and deciding in which order other issues are to be resolved; fixing timetables for the parties to take particular steps in the case; and limiting disclosure and expert evidence. These are all judicial functions.⁴⁰

There are two basic models of case management used within Australia: the differential case management system and the individual case management system. In the first system, control is exercised by requiring the parties to report to the court (often to a registrar) at specific intervals. (This system is often referred to as a master docket system.) In contrast,

40. Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* 1996, 14.

in the individual case management system, one judge manages a defined group of cases from commencement to conclusion.

Differential case management provides for the court-wide management of cases on the basis of individual case characteristics. Such programs may involve the creation of defined pathways with strict time regimes. The use of designated 'tracks' for different kinds of cases is an example of a differential case management system that operates in many courts. A track is a defined pathway with set time intervals that prescribe events such as case management conferences and directions hearings. Tracks can also allow for a combined individual case management and differential case management system to operate in that some tracks may provide for complex cases to be managed by trial judges while other cases may be managed by registrars and others within a court system.

The sanctions and incentives vary widely in case management processes, from offering earlier hearing dates for those who comply with case management directions to striking out proceedings and imposing costs orders upon those who do not. Sanctions may also involve practitioners being required to explain to a court, verbally or in affidavits, about a failure to comply with a case management requirement. As most case management systems are designed to impose time restraints on parties to litigation, sanctions are usually directed at ensuring compliance with time limits.

CASELOAD

Case management is intended to maximise the timely disposition of cases. However the success of caseflow management is also dependent on the overall caseload of a Court. The

overall caseload will be affected, not only by how quickly existing cases are disposed of but also by the number of new cases that are commenced.

Many of the factors that influence caseload may not be within the direct control of the Court. These include changes in law or commerce altering the frequency within which disputes occur. Disputes about complex financial transactions for example may mean that demands upon some Courts are likely to increase.

Caseload can also be influenced by the sharing of jurisdiction with other Courts. The choice of jurisdiction is sometimes limited by legislation and other factors although there may be some members who can choose which Court they may litigate in. This choice can be influenced by the perceived quality of the outcomes in different Courts and by factors such as the advantages and disadvantages of different courts' practices and procedures, differences in the way judges and those who may make determinations or recommendations deal with matters, fees and other cost issues.

COST EFFICIENCY

There are tensions in most case management systems relating to costs. On the one hand preparing cases early ensures that public costs and judicial time can be saved. On the other hand, early case preparation can 'frontload costs.'

While case management may be instrumental in reducing delay and backlog, it may increase litigation costs. Costs can increase as a result of the burdens that are placed upon lawyers due to additional documentation and procedural requirements. Case management may also require that senior lawyers attend court events rather than delegating attendances to more junior lawyers. There are also concerns that case management increases costs in

UAE Ministry of Justice - Case Management Forum

Dubai, UAE

3 October 2009

Page 60

the early stages of a case and that these costs would not usually be incurred as cases are often resolved after the early stages of litigation have passed.⁴¹

This tension is difficult to reconcile unless Judges continuously consider the impact of case management on parties. One eminent jurist in Australia has noted that, for the future:

*Another skill required of case managers will be the capacity to ensure that case management processes do not become the cause of cost and delay which they are designed to reduce. There is a line to be drawn between appropriate levels of judicial supervision, ensuring that the cases move forward in an appropriate way and at an appropriate rate, and hounding the parties into frequent appearances before the court, which are expensive and can be a distraction from case preparation.*⁴²

Case management processes are generally directed at ensuring time certainty. These processes vary from court to court, but a common feature appears to be an attempt to provide the legal profession with greater certainty as to trial dates.

For example, in the High Court of New Zealand, rules provide that a Case Management Conference must be held 75 days after filing and that the trial date must be fixed at such

⁴¹ See Matruglio T and Baker J, *An Implementation Evaluation of Differential Case Management: A Report on the DCM Program in the Common Law Division of the Supreme Court of New South Wales* (Sydney: Civil Justice Research Centre, 1995), 71.

⁴² Chief Justice Wayne Martin (Western Australia);_"Courts in 2020: Should they do things differently?" Paper delivered at National Judicial College of Australia Conference, October 2008 Sydney.

time. Discussion also takes place at that time about timing of a Judicial Settlement Conference.

The Supreme Court of the Australian Capital Territory has recently changed its rules in its criminal jurisdiction to require the Director of Public Prosecutions to file an indictment within 21 days from a fixed date upon which the accused first appears before the court and to provide a case statement. The changes are designed to direct greater prosecution attention to the case at an earlier stage with a view to reducing a high number of adjournments.

In terms of cost savings and case management, many Courts listing practices reveals that some courts choose to deliberately over-list and others do not. The rationale for over-listing is to ensure that there is always a back up case to fill the court's time, if a case settles. The problem with over-listing is that it can create uncertainty for lawyers, parties and witnesses as to when their case will actually proceed and create difficulties in ensuring they maintain a state of readiness in case it does. Individual case management systems tend to have fewer issues with overlisting.

EVALUATING CASE MANAGEMENT PROCESSES

Courts with case management systems regularly report upon caseload and case management processes. Annual reports, statistical information and summaries provide information that is relevant for Judges, Court administrators, litigants and government. Most judges receive information about the norms within a court (that is overall statistics) as well as individualized statistics so that they have information about their individual performance.

UAE Ministry of Justice - Case Management Forum

Dubai, UAE

3 October 2009

Page 62

However at times there are issues about how comparable the data is and how work on performance data can improve data collection and the quality and comparability of indicators.

Clearly factors such as administrative and technological support, leadership, the level of confidence, communication, and caseload will influence efficiency. However more developed case management systems will evaluate timeliness (efficiency) as well as user costs, user satisfaction and other indicators.

Most early case management systems tended to evaluate their case management processes by focussing on the effect on delay. Computerised case management systems are also intended to ensure that judges and court staff have up to date and relevant information to assist them in managing cases. Many courts need to modify and fine tune systems to make sure that they are producing the data that is required in the form in which it can be most use. Some courts still report difficulties associated with having to grapple with inadequate computer systems in order to produce meaningful statistics.

Evaluations of the cost benefits or disadvantages of case management are somewhat divided as to its beneficial or detrimental effects. In Australia, there was some evaluation completed in respect of the introduction of the differential case management program in the Common Law Division of the Supreme Court of New South Wales.⁴³

⁴³ Matruglio T and Baker J, *An Implementation Evaluation of Differential Case Management: A Report on the DCM Program in the Common Law Division of the Supreme Court of New South Wales* (Sydney: Civil Justice Research Centre, 1995), 71; see also Guest C and Murphy T, *An Economic Evaluation of Differential Case Management* (Sydney: Civil Justice Research Centre, 1995).

That study concluded that case management produced cost benefits however; such benefits were related to the timing of settlement. In the United States, a comprehensive study of many thousands of files that were the subject of a range of case management processes and systems concluded that case management sometimes increased litigation costs, although overall case management processes had little impact upon cost, delay or factors such as litigant or attorney satisfaction.⁴⁴ The study suggested that early judicial case management and setting an early trial date, as well as having litigants available at settlement conferences, could reduce the time taken to reach settlement. However, the study also showed that early case management was associated with increased litigation costs in respect of lawyer work hours.

Case management processes are usually evaluated by reference to their capacity to reduce delay and backlog in courts and tribunals. The development of case management processes has been largely driven by the acceptance of the aphorism 'justice delayed is justice denied'. Their success has been evaluated according to the reduction in court backlogs or waiting time that has occurred. Courts measure and report upon backlog and delay, but evaluation using more sensitive indicia such as user satisfaction or cost is generally far more difficult. It has been suggested that focussing upon delay rather than other problems has produced case management processes that are aimed at reducing delay rather than the other stated objectives of case management processes

PERFORMANCE STANDARDS

⁴⁴ RAND Institute for Civil Justice, *Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act* (Santa Monica: RAND Institute, 1996).

The basic principles of caseflow management, which include the use of standards and goals and associated information systems, help facilitate performance monitoring and may make Courts more accountable for the exercise of their powers and the expenditure of their budgets.

Common indicators for performance in dispute systems are:

- client satisfaction
- affordability
- timeliness (case completion times)
- accessibility
- proportion of decisions 'successfully' enforced
- unit costs.⁴⁵

Within the United States, standards have been grouped under five main performance areas:

- (1) access to justice;
- (2) expedition and timeliness;
- (3) equality, fairness and integrity;
- (4) independence and accountability; and
- (5) public trust and confidence.⁴⁶

45. Steering Committee for the Review of Commonwealth/State Service Provision *Report on Government Service Provision* Commonwealth of Australia 1995, 463.

There can be competing tensions in case management use. However, Australian Courts have made it clear that court administration means that the conduct of litigation is a matter for the court and that the court should have regard to the claims of other litigants (who may need to use a court's limited resources) when making orders.⁴⁷

Arguments against case management often relate to the concern that the disposition of cases will become the overriding focus of the judiciary rather than the quality of justice. The High Court of Australia has considered these concerns in *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 [71 ALJR 294; 141 ALR 353]. In that matter Dawson, Gaudron and McHugh JJ considered the principles of case management and noted that:

*Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.*⁴⁸

CASE MANAGEMENT AND ALTERNATIVE DISPUTE RESOLUTION (ADR)

46 National Center for State Courts, *Trial Court Performance Standards* (Washington DC: United States Department of Justice, 1990), 5.

47 *Sali v SPC Ltd* (1993) 67 ALJR 841 [116 ALR 625] (HC), Brennan, Deane and McHugh JJ at 843-844. See also *Jackamarra v Karkouer* (1998) 195 CLR 516.

48 *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 [71 ALJR 294; 141 ALR 353] (HC), Dawson, Gaudron and McHugh JJ at 154. See also *Jackamarra v Krakouer* (1998) 195 CLR 516, Kirby J at 541-2.

Case management schemes may foster the streaming of cases into mediation, conciliation, evaluation or arbitration, or may involve specific conference techniques that are also aimed at resolving issues and settling cases.

Case management conferences can be directed at early disclosure of information, making directions and also settlement of disputes. Justice Davies has noted:

*Parties, and especially their legal advisers, are often reluctant to settle early if there is some realistic possibility that relevant information in the possession of other parties may materially affect the outcome of the case. So early mutual disclosure of relevant information is likely not only to make early settlement fairer but also to increase the rate of early settlement.*⁴⁹

It is common now in many Australian jurisdictions to have case management conferences (directed at case management and resolution) and referral out to internal or external ADR processes (or both).

In other jurisdictions, ADR processes are also used to support case management initiatives and many jurisdictions have integrated case management and conferencing processes.

These processes can also be directed at cultural change. In November 2006, the Civil Justice Reform Working Group in Canada released a report titled *Effective and Affordable Civil Justice* ("the Canadian report") which set out a model for a Case Planning Conference ("CPC").

⁴⁹ See Davies G, "Civil justice reform: Some common problems, some possible solutions", (2006) 16 *Journal of Judicial Administration* 5. Davies G, "A Blueprint for reform: Some proposals of the Litigation Reform Commission and their rationale", (1996) 5 *Journal of Judicial Administration* 201.

The Canadian report says that:

"The litigation process must be streamlined through:

- *early identification of issues and interests;*
- *ensuring that the amount of process is proportional to the value, complexity and importance of the case; and*
- *increasing judicial intervention to establish and enforce timelines for completing major litigation events."*⁵⁰

One of the challenges highlighted by the Canadian report was shifting the "ingrained cultural beliefs and practices" of the legal profession which "will require early and active judicial involvement in cases".⁵¹ It notes that the proposed CPC recognised there are many paths to resolution of a dispute, with a traditional trial at the end of a discovery process being just one option. The CPC – which will be an extensive conference attended by the parties in person and their legal representatives *before* they actively engage with the system – sees a judge work with the parties to develop a plan which identifies, very early in the process, the other options that might result in a faster and cheaper resolution of the dispute.

The Canadian report suggests the judge presiding over the CPC should have extensive powers, including the ability to limit discovery, order summaries of the facts and issues,

⁵⁰ "Effective and Affordable Civil Justice", a report by the Civil Justice Reform Working Group, Canada, November 2006
at page 11.

⁵¹ Ibid.

limit the time expended at various steps of the process, making directions with respect to the use of experts (including whether a joint expert should be used on a certain issue) and limiting the length of any trial. Indeed, the report says that the judge should have power to make "any other orders to produce an efficient and proportional resolution of the case".⁵²

The Canadian report says that:

- (a) *"Earlier understanding of the case and consideration of planning options will assist in achieving better resolutions for the parties";*⁵³
- (b) *while the process may result in "some front-end loading of time and cost, we believe that these costs will be outweighed by the benefits of an early and meaningful conference";*⁵⁴ and
- (c) *the initiative should be considered a success if:*
 - *fewer parties refrain from commencing actions or abandon actions because of cost, complexity and delay;*
 - *more actions are resolved early and to the satisfaction of the litigants;*
 - *the overall process costs to litigants are reduced to a level proportional to*
 - *the value, complexity and importance of their dispute;*

⁵² Ibid at page 14.

⁵³ Ibid at page 15.

⁵⁴ Ibid at page 17.

- *the number and length of contested chamber applications is reduced;*

....the process is sufficiently affordable in that there are an increased number of

- *trials for those matters that need an adjudication, and*
- *trials are scheduled earlier, take less time and are more focused.”⁵⁵*

⁵⁵ Ibid.



UAE Ministry of Justice - Case Management Forum

Dubai, UAE

3 October 2009

Page 71