Case Management: The Panacea Has Its Side Effects

Wayne D. Brazil

Berkeley Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Three fundamental tensions permeate the debate about civil case management. The first is the tension between the values of fairness and of efficiency. The proponents of case management are often accused of being more concerned about efficiency than fairness—of speeding up dispositions and reducing docket backlogs at the expense of thoroughness in the search for truth. The opponents of case management contend that judicial officers may be pressured to generate flattering statistics about productivity and ignore the subtle forms of misbehavior that can be exposed only by tenacious and complete discovery.
Proponents of case management naturally reject this view, along with the notion that fairness and efficiency are locked in a simple bipolar relationship. Instead, the case management people insist that one of the major sources of unfairness in our system is its inefficiency. They point out, for example, that parties who must wait five years for a jury trial (as they must in some urban court systems) can be discouraged even from trying to enforce their rights, and that backlogs of that duration can give defendants economic incentives not to make serious efforts to settle claims or to promptly acknowledge liabilities. Further, when parties are discouraged from trying to enforce their rights because doing so would take too long and cost too much, and when the system's slowness and ineptitude discourage defendants from acknowledging their obligations, the rule of law itself is jeopardized. The system's failure to provide meaningful law enforcement encourages people to break the law. It rewards the unprincipled at the expense of the law-abiding.

The second major tension at the center of this debate stems from strongly held views about the adversary system. Opponents of case management believe it will eviscerate our traditional form of dispute resolution and replace it with an essentially inquisitorial system: the primary responsibility will shift away from litigants and counsel and toward the judiciary and its minions, allowing the judiciary to extend and concentrate its power, at the same time that the system will become further bureaucratized and rigidified.

The third tension at the center of the case management debate is between the proponents of the two principal forms of organization of civil courts in the United States: the master calendar system, which is associated primarily with state courts, and the single assignment system, which is the dominant form in federal trial courts. In the sections that follow I will discuss the virtues and the problems associated with each of these systems, exploring the other two tensions identified above. En route, I will describe some of the principal tools American courts use for case management.

Before turning to these matters, however, it is important to point out why the movement toward case management
The problems that inspired it seem to be as old as litigation itself. They include the high cost of adjudication, the slow pace of dispute resolution, delays and docket backlogs, the convoluted and often clumsy procedures by which cases are moved toward trial, and the sense of powerlessness and frustration that clients, even sophisticated institutional clients, often feel when they are involved in the system. These problems are easy to describe, but they are not easy to ameliorate. They have shown a distressingly remarkable capacity to survive even the most determined and conscientious efforts at procedural reform. Deep concern about cost, delay, and convolution inspired the great reformers of the mid-nineteenth century who led the movement away from common-law pleading and toward the codes. The same concerns led to the reformulation of the federal equity rules in 1912. They also inspired the 30-year campaign that culminated in the merger of law and equity in the federal system and the adoption of a radically expanded system of pretrial discovery, both accomplished through the promulgation of the Federal Rules of Civil Procedure in 1938. Most recently, they inspired the substantial changes in Federal Rules 7, 11, 16 and 26, changes that simultaneously impose greater responsibility for management on federal judges and greater duties to demonstrate restraint, reasonableness, and a sense of proportionality on lawyers. Thus, case management is simply the most recent reform effort aimed at assaulting hoary problems that have eluded other kinds of procedural solutions. No one thinks the case management approach can completely solve these problems. The best it can do is reduce their sway.

We should bear in mind two points about these problems when we examine criticism of case management and evaluate options. One is that the magnitude and character of the needs that underlie the case management movement vary considerably from jurisdiction to jurisdiction in the United States. In some less densely populated regions, for example, litigants have ready access to early trial dates, which seem to be the best single source of discipline in our system. Where they are available, there is less room for other problems to grow. Moreover, lawyers who practice in rural areas or smaller towns are likely to know each other socially and to expect to see each other in subsequent lawsuits. These facts can temper adversarial excesses and create an environment that rewards civility and reasonableness. The combination of an early trial date and social pressure toward restraint can reduce the need for assertive management by the judiciary.

In large cities, however, there are fewer socio-professional restraints: lawyers are less likely to know each other, less likely to have confidence in each other, less likely to expect to need to get along with each other in subsequent cases. It is in this environment that the backlogs are most severe and the economic stakes in lawsuits tend to be greatest. Not surprisingly, it is in this environment where the discovery system is most abused and where the case development process is most unwieldy and expensive. The second point we must bear in mind when thinking about case management is that in the jurisdictions where it is needed, it is sorely needed. The problems it aims to solve are real, immediate, large, and have ominous implications. That means we must be prepared to take some risks and tolerate some imperfections when we fashion remedies. It is important to consider whether the benefits delivered by case management outweigh the potential threats or actual damage to other interests.

THE MASTER CALENDAR SYSTEM

Under the master calendar system, courts divide responsibility for various parts of the adjudicatory process: certain judges hear only pretrial or discovery matters, other judges rule on requests for equitable relief, others host settlement negotiations, and yet others preside at trials. Some courts also compel some of their judges to develop expertise in certain substantive areas of the law, e.g., family law or probate: they then handle cases primarily in their specialties.

The principal virtues of this kind of system are the efficiencies that come with highly developed expertise among the judges. When a judge or commissioner handles virtually nothing but discovery problems for a substantial period of time, that officer learns the relevant law inside and out. He or she also learns a great deal about how lawyers behave in that part of the litigation world and about the nature of the problems that arise in it. Such judges are adept at applying the law to particular disputes and may become important sources of ideas about how to improve the law in the areas they master. Many people also think that the master calendar system is the only system capable of mass-processing a large volume of litigation. The theory behind this thinking has two central elements: expertise makes for the most efficient resolution of discrete disputes, and judges whose responsibilities are confined to pieces of suits are less likely to get caught up in overseeing inconsequential, time-consuming matters.

The principal disadvantages of the master calendar system is that it gives the court no means to oversee each lawsuit as a whole. Because different judges are responsible for different parts of each suit, no one judicial officer is responsible for the entire development of each civil action. That makes it difficult for the court to set a tone
Do the benefits of case management outweigh its problems?

for the case, to monitor the progress of an action, to learn the personalities of counsel and litigants, to respond with management tools that fit the needs of given cases. No one judge is in a position to help counsel develop and execute a management plan; no one judge can help counsel adjust as original plans fail to fit evolving situations. There is no judicial officer to whom counsel can turn as a resource to help prevent problems from arising in the first place, and no one who knows the case well enough to provide expeditious solutions when the unanticipated occurs (e.g., no one is familiar enough with the case to be able to fairly resolve a dispute that arises during discovery simply by making a phone call).

Lawyers handling cases in a court organized under the master calendar system spend most of their time in wholly unsupervised activities, and most of what happens in each case remains invisible to the judges. That means that lawyers have considerable room to overprepare, underprepare, misfocus, meander, postpone, or overcharge. The magnitude of these problems varies with the integrity and competence of counsel and with the sophistication of clients. Some institutional clients, for example, can look out for themselves and can discipline their lawyers, but parties who have little or no experience with litigation and who do not understand its subtleties can be vulnerable. The court that uses the master calendar system is in a poor position to intercede on a client’s behalf.

Another management problem associated with the master calendar system is that each judge who is responsible for a discrete problem must nonetheless learn the case from scratch. It follows that unless there is considerable duplication of learning effort, the judges will know relatively little about the whole case environment in which they are acting. Each judge who has an impact on the case may have only the most superficial knowledge of it and of the principal actors in its drama, which, of course, increases the risk of error and of undetected problems. Moreover, lawyers may be more tempted to play fast and loose with the rules if they know the judges lack an overview of the case.

The magnitude of the kinds of problems associated with the master calendar system also can be a function of the size, complexity, or spleenfulness of particular suits. In smaller, less complex matters, where the lawyers are proceeding in basic good faith, there is no obvious need for judicial intervention. Simply providing a forum for resolving disputes and setting an early trial date may be all that is required to optimize delivery of service to clients. Similarly, in less complex matters, judges handling discrete parts of a suit will not have great difficulty mastering enough of the situation to render efficient and reliable decisions, nor will there be a great deal of room for undetected maneuvering or for shenanigans by counsel.

On the other hand, the master calendar system is less well-suited to handle matters that are more complex, or in which lawyers are not competent or are not proceeding in good faith. Some state courts have recently acknowledged this fact by creating special management tracks for complex cases and assigning each case on such a track to just one judge, who handles all pretrial aspects of it.

THE SINGLE ASSIGNMENT SYSTEM

Under the single assignment system, most of the shortcomings that can plague the master calendar system can be avoided. One judge is assigned responsibility for virtually all phases of an action as soon as the complaint is filed. Once assigned, the judge can (1) hold an early status conference to help counsel identify core issues and to develop a plan for acquiring necessary facts for assessing the strengths and weaknesses of positions and conducting meaningful settlement discussions; (2) help counsel conduct settlement negotiations or find another host for such negotiations; (3) explore with counsel the advisability of using some alternative mode of dispute resolution, such as mediation, a mini-trial, summary jury trial, or neutral expert, or an innovative procedural technique, such as joint fact finding or use of a special master to orchestrate a search for stipulations or to resolve privilege claims; (4) isolate key legal issues whose early resolution through summary judgment or bifurcated trial might terminate the dispute or establish the basis for serious settlement discussions. A judge in the single assignment system can also pace case development by fixing sound schedules and by resolving disputes quickly. A judge who has kept in contact with the suit as it has developed also is in a better position to know when a lawyer or party is misbehaving and when it would be appropriate and constructive to impose sanctions. Finally, the single assignment system lends itself better to grouping similar cases so that they can be litigated in one integrated procedure that permits pooling resources and information (e.g., in the asbestos and other mass tort cases).

A study published in 1978 by the National Center for State Courts offers some dramatic, if not definitive, evidence that the single assignment system is superior to the master calendar system as a tool for reducing delay. In Justice Delayed: The Pace of Litigation in Urban Trial Courts, Thomas Church and his co-authors compared mean disposition times for similar kinds of cases (torts) in two different groups of state courts. The first

(Please turn to page 49)

35
Special

(Continued from page 28)

judicial education. Rural Court Committee Chair Judge Cloyd Clark, Jr. reported:

The Rural Courts Conference went well. Geiger and Fahmstock are excellent facilitators and resource people. The selection of participants could not have been improved. Everyone worked. Everyone was excited about the prospect of being part of a group concerned about Rural Courts. Dean Kern and his staff gave great support. Kern’s enthusiasm about the challenge of providing top quality court services in small courts set a good tone for the conference. The facility worked well. It was not monastic but there wasn’t anything else to do but work on the problem at hand.

Because of the rapid improvements in computer technology, I have reactivated the Modern Technology in Courts Committee under the direction of Judge William Kelly.

After attending the ABA Section Officers Conference in Chicago in September I decided the conference needed a Conference Manual which addressed both the internal and external relationships, procedures, time lines, etc. necessary to keep this conference running. I hope to have the preliminary draft available for your Executive Board at the Midyear meeting in Baltimore. Suggestions from past chairmen and board members would be appreciated.

The Conference Plans and Development Committee was chaired and hosted by Vice-Chair Robert S. Carr in Charleston, S.C. Long-range goals, planning and budget were the topics of the day as well as strategy for strengthening membership and increasing our liaison within and outside the ABA. It was a most productive meeting and you will hear more about these discussions in future columns.

I started this column by posing the question, who are these special court judges? Let me tell you what I’ve observed after twelve years of associating with the members of this conference. They are Special Judges of Special Courts. If we look up “special” in the dictionary we find it means “of a distinct or particular kind or character; distinguished or different from what is ordinary or usual; extraordinary; exceptional; great; being such in an exceptional degree. . . .” Each of you will receive from the conference in proportion to what you are willing to give. Likewise each of us needs what is truly special about you.

I pose a challenge to each member of the conference for the next year: reach out and share the conference with one new member, and participate by serving on one committee, attend one meeting or conference and share your uniqueness with your fellow “special” judges.

Information regarding the National Conference of Special Court Judges can be obtained by writing: National Conference of Special Court Judges; American Bar Association; 750 North Lake Shore Drive; Chicago, IL 60611; Telephone (312) 988-5697.

Brazil

(Continued from page 35)

group consisted of 13 courts operated on the master calendar system; the second group consisted of 8 courts operated on the single assignment system. Church and his fellow researchers found that the mean disposition time in the courts operated on the single assignment system was 200 days faster than in the courts operated on the master calendar system. The same study found that dispositions per judgeship were appreciably higher in the single assignment courts than in their master calendar counterparts.

THE CHALLENGE TO THE PHILOSOPHY OF MANAGEMENT

Since there are so many management advantages in the single assignment system, why don’t all American courts use it? One answer is that it is perceived as being much more expensive than the master calendar alternative. Whether this is true depends in part on how much time the judges commit to each case assigned to them. If judges were to become heavily involved in developing and supervising execution of case preparation plans for every suit assigned to them the single assignment system would be quite costly (whether its net social cost would exceed that of the alternative system might remain an open question)—but deep judicial involvement in every matter is neither necessary nor desirable. The real question in this area is whether it is preferable to have a system that carries the capacity for this kind of involvement in selected matters.

To answer this latter question, one must squarely confront the negative implications of the kind of assertive and involved case management that the single assignment system permits. Early, deep involvement by a judge in the developmental stages of a lawsuit can threaten important values. If the judge who is so involved is the judge who will hear motions that might be dispositive (e.g., for summary judgment) or who will preside at trial, there is a risk that the decision maker will lose his or her impartiality, or at least the appearance of impartiality, by being exposed to information or arguments prematurely, or in a different light from that cast if the rules of evidence were being enforced. Of course there is a way to avoid this kind of problem: give responsibility for pretrial case management to a judicial officer (another judge, magistrate, or special master) who will not try the case or decide potentially dispositive motions. Some would reject this suggestion on grounds of efficiency, arguing that each case would have to be
learned by two judicial officers. Since only about 10 percent of all civil cases filed actually go to trial, however, this "inefficiency" might not amount to much. Moreover, the judge who presides at trial can learn the case through the detailed submissions counsel make in connection with a final pretrial conference.

Nor is it clear that managing a case's development and discovery is an efficient way for the judge who will preside at trial to learn what he or she needs to know about the action. Much of what occurs during the pretrial period turns out to be irrelevant or of marginal consequence, especially in large, complex cases, when discovery often involves a great deal of blind and fruitless groping: The amount of significant information that emerges from this process is very small. In smaller, less complex cases, the trial judge can master the relevant material relatively easily on the eve of the trial.

The idea of dividing judicial responsibility for the pretrial period and for trial might trigger fear that judges would become less "statistically accountable." One of the reasons for converting federal courts to the single assignment system was to improve administrators' ability to allocate workloads evenly among judges and to pressure judges to do their share by keeping track of the number of matters assigned them and the rate of their case terminations. One way to retain a significant level of accountability in a system of bifurcated judicial responsibility would be to assign individual cases to specified teams of two judges (or a judge and a magistrate) and to keep records for each such team.

Another possible ground for objecting to splitting the pretrial case management function from the trial function might be fear that the judicial officer who is involved only at the pretrial stage would have substantially less clout with counsel than would a judge who would preside at trial. While this might be true, it is not necessarily bad. As a matter of policy, it is not necessarily healthy for judges to have a great deal of informal influence over lawyers and litigants. The line between that kind of influence and coercion is a fine one.

This point raises a larger issue about the whole notion of case management. Does a judge who assertively manages the full pretrial development of a case acquire too much unrestrainable power? Some commentators fear that the managerial judge can make decisions during the pretrial period that effectively fix both the character and outcome of the case—and that many times such decisions are essentially immune from appellate review. Some argue, for example, that through rulings on what discovery can be had, a judge can exercise great power over the shape of a case and over litigants' rights—but because most such rulings are interlocutory, they escape meaningful scrutiny by appellate courts. Moreover, the cost of petitioning or appealing to an appellate court can deter parties from challenging all but the most clearly significant pretrial rulings—even though the aggregate effect of a series of nondispositive pretrial rulings might be devastating.

It is difficult to assess the seriousness of this problem. We have no data about how often judicial officers misuse or abuse (knowingly or otherwise) their power in the case management process. The paucity of reported problems of this kind suggests that instances of abuse are rare. In fact, lawyers and commentators more often complain about the judiciary's failure to play an active case management role.

Another challenge to the case management philosophy is based on the fear that the involvement of judges in planning and monitoring case development will threaten the creativity, industry, and morale of the litigation bar. Some writers fear that "outside management" will be heavy-handed and clumsy, forcing unnecessary confrontations, raising unnecessary issues, and pressuring litigants into unnecessary expense for the sake of thoroughness or keeping a predetermined pace. Some commentators have exacerbated such fears by comparing judicial management to political systems that feature rigid, centralized, exterior control. They contrast their version of case management with the individual freedom and creativity associated with laissez-faire economic systems and open democratic political organization.

To permit the debate about case management to be portrayed as a contest between the relative virtues of Social Darwinism and Eastern-bloc forms of socialism diserves the realities of the situation and introduces an emotionally laden and misleading element.

Case management need not involve usurpation of the lawyers' central role by judges. In fact, most judges are so busy and have so few resources relative to the demands on their time that they could not displace counsel even if they wanted to. Moreover, rational and responsible lawyering reduces even the most assertive managerial judge to a role that consists of occasionally lubricating the machine, suggesting fresh perspectives or new approaches, and providing a forum for discussing sensitive matters. When the lawyering is not rational and responsible, the purpose of case management is simply to help counsel bring their work closer to that ideal.

Good judicial case management begins by listening to the lawyers and their clients: it is situation specific, and responsive to the special needs of particular cases. Its goal is to help all participants in the process understand the dispute as clearly as possible, focus on what is central to it, develop expeditiously the information needed to resolve it, and either facilitate a negotiated disposition or deliver up the matter promptly and tidily to a trial court. Toward these ends, a good case manager encourages and capitalizes on the creativity and industry of counsel. The judge invites the lawyers to lead—and only moves beyond an essentially advisory role when the lawyers decline the invitation. Thus, there need be no tension between case management and litigators' morale. Only the lawyers whose interest is not in the "just, speedy, and inexpensive determination of every action" need be demoralized by confronting a managerial judge. By contrast, lawyers whose interests conform to the purpose of the adjudicatory system can look to the managerial judges as a valuable resource and ally—someone who will help with the case at hand.