

# RECONCEPTUALIZING MANAGERIAL JUDGES

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*What is the ideal role for a judge in today's litigation environment? Should it be passive—waiting in her chambers for the lawyers to bring motions raising issues and disputes during the pretrial process, then presiding over trial? Or should it be proactive—initiating conferences periodically during the pretrial process to steer the case and prevent disputes, then presiding over trial?*

*While “presiding over trial” is repeated in both options, trial has become almost a curiosity in federal civil litigation, with about one percent of cases going to trial. In today’s litigation climate, the debate over judges’ posture is a debate over pretrial behavior; litigation is pretrial practice in a world where nearly every case settles.*

*Survey data suggest an uncommon agreement between plaintiffs and defendants that more judicial involvement leads to quicker, less expensive, and more satisfying results. Yet, scholars criticize active judicial case management as contributing to the demise of the trial and undermining the integrity of the judicial system. They paint pictures of judges strong-arming parties to settle, allowing their personal biases to intrude into the proceedings, and exacerbating costs and delays. This Article departs from that widely held view.*

*Although the Federal Rules of Civil Procedure allow active case management, they require almost none. The Advisory Committee, which drafted the extensive and controversial 2015 amendments, has consistently opted to encourage, rather than require, judges to become more involved in the pretrial process.*

*This Article reconceptualizes managerial judges after the death of the trial and recommends that the Rules require judges to actively manage their cases. More fundamentally, there needs to be a paradigm shift in the normative*

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*expectations for judges. Today's judges need to be case managers, selected for their temperament and skills as managers, trained to manage cases, and then trusted to manage their cases at the pretrial stage fairly, transparently, and appropriately—just as they are trusted at the trial stage.*

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#### INTRODUCTION

Federal litigation operates today in a changed environment. In particular, the disappearance of the trial from federal court is well documented.<sup>1</sup> In 1938, when courts first began operating under the Federal Rules of Civil Procedure, about eighteen percent of cases went to trial.<sup>2</sup> The percentage fluctuated thereafter, but trended downward over the years, falling to the eleven to twelve percent range

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1. See, e.g., Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 12 (2006) (noting that, while media fixates on stories of excessive trial and litigation, in reality there has been a decline in trials); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 464 (2004) (describing the decreasing percentage of cases that ended in trial).

2. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 633 n.3.

during the late 1960s and '70s.<sup>3</sup> By 1984, it had decreased to about six percent.<sup>4</sup> Today, just over one percent of cases go to trial.<sup>5</sup>

This precipitous decline in trials has been the focus of numerous articles.<sup>6</sup> Coercion by judges to settle cases on their dockets and the cost of litigation in general, or discovery in particular, are potential culprits behind this trend.<sup>7</sup> Regardless of the cause of the decline in trials, however, the consequence is the same: if judges are to have a meaningful role in advancing the "just, speedy, and inexpensive" determination of matters before them, they cannot primarily play their part in a black robe ruling on evidentiary objections at trial. Rather, the role of judges must adapt to the new litigation climate and must focus on the pretrial process.

The Federal Rules of Civil Procedure ("Rules") were conceived as one unified set of rules flexible enough to govern cases of all sizes and variations in complexity.<sup>8</sup> Discovery illustrates this point nicely. Discovery is scalable—capable of being expanded for large complex cases and shrunk for small, simple ones.<sup>9</sup> Because discovery must be

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3. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 558 tbl.1 (1986).

4. *Id.*

5. Judicial Business, Administrative Office of the U.S. Courts, U.S. District Courts-Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2013, tbl.C-4 (Sept. 30, 2013), <http://www.uscourts.gov/statistics/table/c-4/judicial-business/2013/09/30>.

6. See generally, e.g., John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012); Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, A.B.A. SEC. LITIG. Winter 2004, at 1; Xavier Rodriguez, *The Decline of Civil Jury Trials: A Positive Development, Myth, or the End of Justice as We Now Know It?*, 45 ST. MARY'S LAW J. 333 (2014).

7. See, e.g., Mark W. Bennett et al., *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005) (attributing the decline of civil jury trials to, among others, the increasing use of alternative dispute resolution and summary judgment, rising litigation costs and stakes at issue, and a lack of trial experience among judges and judicial resources); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 80–81 (2006) (explaining the federal courts' shift from trials to a "settlement culture").

8. See Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 698 (2010) (noting that "the same set of Civil Rules applies to all civil cases in federal court, regardless of the size, complexity, or subject matter of the case, or the dollar amount in controversy"); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 386 (2010) (explaining that the Advisory Committee created the Federal Rules of Civil Procedure with a strong insistence on simplicity and flexibility).

9. See Subrin, *supra* note 8, at 392 (indicating that on one hand, many civil suits do not involve much discovery, but on the other hand, there is widespread agreement that a substantial number of cases involve an overwhelming amount of discovery).

tailored to fit the particulars of each case, it is one phase of litigation where the debate about active judges crystallizes: do the parties make the alterations themselves, or does the judge fashion the process?<sup>10</sup> This Article will use discovery to explore the issues surrounding the evolving role of judges throughout the pretrial proceedings.

Although the Rules authorize the judge to “right-size” discovery in the initial case management order, much of the scaling is typically delegated to the parties in the first instance, with the judge engaging only upon request.<sup>11</sup> In our adversarial system, however, cooperation among the parties on how to configure discovery, without the ongoing monitoring and assistance of the judge, is simply not realistic in many cases. As a starting point, the parties typically have diametrically opposite and mutually exclusive objectives in the litigation. Furthermore, the asymmetries between the parties often make it difficult to find common ground on even procedural issues; one party will often have more electronically stored information than the other, will have more resources to devote to discovery, or will experience disproportionately greater advantage or disadvantage from delay.<sup>12</sup> Indeed, discovery has been compared to nuclear war.<sup>13</sup> It should not be

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10. There is certainly room for active, managerial judging for other phases of civil litigation. Judges can take an active or passive role in settlement, for example, and much of the perceived risk of active judging arises in the settlement context. Likewise, judges can be more proactive regarding issues like joinder of third parties, amendments, and motion practice. Because judges can have the biggest impact on the cost and pace of litigation in the context of discovery, though, this Article will primarily focus on the discovery aspects of active judges.

11. See Subrin, *supra* note 8, at 392 (“In other words, the lawyers under this characterization are effectively sorting cases on a case-size basis, despite the transsubstantive, equity-like nature of the Rules.”).

12. *Id.* at 388 (“When a procedure that permits the joinder of so many claims, issues, and parties coalesces with this lawyer training and canon of ethics, and one also adds to the mix the widest array of discovery possibilities . . . , the temptation to expand the litigation in terms of time, expense, and nuggets of information can prove irresistible.”). Other strategic reasons, such as wearing out the other side mentally and economically, may also encourage parties to drag out the litigation process and expand discovery beyond what is necessary. *Id.*

13. John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 569 (1989); see also Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 635 (1989) (“That discovery is war comes as no surprise. That discovery is nuclear war, as John Setear suggests, is. Discovery more often calls to mind the trench warfare of World War I, the war of attrition. During World War I cooperative patterns evolved, as soldiers called time-out and even sang holiday carols to the other side. The cooperation broke down as fresh troops, or worse, new officers, arrived on the scene and disregarded the established patterns.” (footnotes omitted)).

surprising then that these asymmetries in resources and strategy lead adversaries to seek tactical advantages in the pretrial process rather than setting those interests aside to work cooperatively with their opponents.<sup>14</sup>

Under the current rules, the only mandated interaction with the judge before or during the discovery process occurs in connection with the parties' Rule 26(f) proposed discovery plan.<sup>15</sup> In the majority of cases, the judge charts the course of the discovery process based only on that document, without even speaking with the parties.<sup>16</sup> In other cases, the judge speaks with the parties at an initial Rule 16 conference prior to issuing the case management order.<sup>17</sup> Many of these judges then disengage after the first conference, leaving the parties to manage themselves unless a dispute arises.<sup>18</sup>

Neither of these approaches is a recipe for effective and efficient pretrial proceedings. A judge who does not even meet with the parties before setting the discovery parameters is hardly in a position to assess all of the complexities that should factor into decisions about how the case should proceed. Nor is one "drive by" conference with the judge at the beginning of a case sufficient to overcome the impediments to cooperation and proportionality. Based on the information available at the initial status conference, the judge is rarely able to accurately calibrate proportionality, nor is she likely to be able to ensure cooperation throughout the pretrial process.<sup>19</sup> The most logical way to achieve "cooperation and proportionality" is for the judge to engage with the parties on a regular basis throughout the litigation.<sup>20</sup>

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14. See Setear, *supra* note 13, at 583–85 (explaining that game theory suggests that the parties are not individually incentivized to cooperate in the discovery process, even though both might be better off if they did).

15. See FED. R. CIV. P. 26(f)(2) (requiring submission of a discovery plan).

16. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 11–12 (2009) [hereinafter FJC REPORT], [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

17. *Id.* at 13.

18. *Id.*

19. See Easterbrook, *supra* note 13, at 638 ("Judges can do little about positional discovery when parties control the legal claims to be presented and conduct the discovery themselves.").

20. See JUD. CONF. ADVISORY COMM. ON CIV. RULES & COMM. ON RULES OF PRAC. & PROC., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 4 (2010) [hereinafter CIVIL LITIGATION REPORT], <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil> (observing that if the Rules are to be changed, "sustained, active, hands-on judicial case management" and "cooperation and proportionality" are necessary to make those changes effective).

In 2010, over two hundred judges, practitioners, and professors attended a conference at Duke University School of Law to discuss improvements to the pretrial process.<sup>21</sup> They converged on three deficits in our civil litigation system, summarizing them as follows: “What is needed can be described in two words—cooperation and proportionality—and one phrase—*sustained, active, hands-on judicial case management.*”<sup>22</sup> The report from the conference described these three deficits as gaining “nearly unanimous agreement” by plaintiffs and defendants, liberals and conservatives.<sup>23</sup>

One would expect, then, that the 2015 amendments to the Federal Rules of Civil Procedure, flowing directly from the Duke Conference, would be replete with new provisions to advance “sustained, active, hands-on judicial case management.”<sup>24</sup> One would, however, be mistaken. The extensive set of amendments does not contain a single revision mandating active case management. Instead, the Committee opted to “encourage” more active case management<sup>25</sup> by giving judges the express option (which they already had implicitly) of ordering the parties to participate in a conference before filing discovery motions.<sup>26</sup>

The Committee has been encouraging active case management since at least 1983,<sup>27</sup> but the data suggest that judges have resisted changing their traditional roles. The present litigation climate makes the need for managerial judges more compelling, and amending the Rules to mandate a more active role for judges may be the only way to change most judges’ behavior. Not only is there a rare consensus among parties

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21. *Id.* at 1.

22. *Id.* at 4 (emphasis added).

23. ADVISORY COMM. ON RULES OF CIV. PROC., REPORT OF THE DUKE CONFERENCE SUBCOMMITTEE 79 (APR. 10–11, 2014), <http://www.uscourts.gov/file/15486/download>. Not everyone agreed with the report, of course. See, e.g., Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1086 (2012) (contending that the data do not support the common perception that federal court litigation is too costly and slow—what the author terms the “cost-and-delay narrative”).

24. CIVIL LITIGATION REPORT, *supra* note 20, at 4.

25. ADVISORY COMM. ON RULES OF CIV. PROC., REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 8 (MAY 8, 2013), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf>.

26. See FED. R. CIV. P. 16(b)(3)(B)(v) (stating that “[t]he scheduling order may . . . set dates for pretrial conferences and for trial”).

27. See Richard L. Marcus, *Slouching Towards Discretion*, 78 NOTRE DAME L. REV. 1561, 1588 (2003) (“Beginning in 1983, Rule 16 was amended to require case management activity by all judges in most cases, and to encourage more managerial activity than was required.” (footnote omitted)). See generally David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1984–87 (1989) (describing the history of Rule 16 and the purposes of the 1983 amendment).

on “both sides of the v” that the process benefits from such active judges, the current litigation reality has diminished the historic role of judges.<sup>28</sup>

Seventy percent of the cost in complex federal litigation is incurred in discovery,<sup>29</sup> and 100% of the costs are incurred in the pretrial process in the vast majority of cases.<sup>30</sup> Judges are relegated to bystanders if they do not participate actively in the pretrial process. Recognizing this reality changes the normative view of judges. Rather than selecting judges primarily for their abilities to preside over trial—skills they will exercise in only 1.2% of the matters on their dockets—the criteria for selecting judges must include skills to enable them to excel in handling the other 98.8% of cases that resolve before trial. Judges could then be trained to become effective and transparent case managers, and their performance as case managers could be monitored and evaluated in the pretrial phase of litigation.<sup>31</sup>

Inherent in this paradigm shift is trusting judges to manage their cases fairly and transparently.<sup>32</sup> Much of the criticism of active, managerial judges is rooted in a mistrust of judges—concerns that they will abuse or misuse their discretionary powers. If our judges cannot be trusted, however, the solution is to pick more trustworthy judges, not to accept untrustworthy judges and diminish their authority. Judges are trusted to preside over trials fairly and can also be trusted to do the same in the pretrial process—with appropriate safeguards comparable to those that protect against judicial abuse at trial.<sup>33</sup>

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28. See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 34–36 (2003) (explaining that the historic role of judges was to rely on parties to frame the disputes, and on law to resolve those disputes); Victor Eugene Flango, *Judicial Roles for Modern Courts*, NAT'L CTR. FOR ST. CTS. (Nov. 2013), <http://www.ncsc.org/sitecore/content/microsites/future-trends-2013/home/> Monthly-Trends-Articles/Judicial-Roles-for-Modern-Courts.aspx (“Yet we all have a conception of what a judge should be—a distinguished person presiding over a trial.”).

29. AM. BAR ASS’N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 2 (2009) [hereinafter ABA SURVEY].

30. By definition, all costs and fees are incurred in the pretrial process in the 98.8% of the cases that resolve before trial.

31. Although the details of who would monitor the judges’ performance as case managers and the criteria they would use is beyond the scope of this Article, appellate courts could evaluate the trial judges’ performance for appealed matters, and the Administrative Office of the U.S. Courts could also monitor the judges’ performance through the metrics it compiles. Additionally, any interested groups or academics could monitor the judges as well.

32. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 600 (1993) (Rehnquist, J., dissenting) (“I defer to no one in my confidence in federal judges . . . ”).

33. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 427–28 (1982) (referring to certain safeguards, such as statutory disqualification rules, to ensure judges’ impartiality).

This Article will start with an overview of the historical debate regarding managerial judges, sparked by Judith Resnik's landmark article. It will then advance arguments in favor of, and address the criticisms of, active judicial management. Finally, this Article will recommend that the Advisory Committee move beyond its attempts to encourage ongoing, hands-on case management and adopt amendments requiring greater judicial involvement in the pretrial process.

### I. THE HISTORICAL DEBATE

The concept of the active judge is, of course, not new, nor has it been free from controversy. Professor Resnik started the dialog regarding proactive judges in an iconic article she wrote in 1982 in anticipation of the expansion of judges' authority in the 1983 amendments to Rule 16.<sup>34</sup> In her article, she coined the term "managerial judges" and roundly criticized the concept.<sup>35</sup> Resnik identified a number of risks inherent in active judicial management.<sup>36</sup> First, she noted the lack of transparency when judges manage cases in chambers, off the record.<sup>37</sup> Second, she observed that the statistical metrics by which we evaluate judges might lead them to exercise their

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34. *See generally id.* at 376–80 (setting forth that judicial roles have shifted from a sense of "disengagement" to being more active and managerial and asserting that the 1983 amendments would solidify this shift).

35. *Id.* at 378. Resnik criticized both active judicial management of the litigation process and active judicial management of the remedy, such as actively supervising "the implementation of a wide range of remedies designed to desegregate schools and to reform prisons and other institutions." *Id.* at 377 (footnote omitted). This Article addresses only active judicial management of the litigation process.

36. Resnik illustrates her objections to managerial judges through two hypothetical scenarios. In these scenarios, she portrays managerial judges as engaging in abusive practices that even advocates of active judges would condemn. For example, when called on to rule on a discovery motion, the fictional judge in one of the cases instead held *ex parte* meetings with each party to coerce settlement. *Id.* at 390. While that judge's behavior was improper, one could easily construct a hypothetical case in which active judicial management was of tremendous benefit to the lawyers, the parties, the court, and justice. The fact that one can conceive of situations in which a judge might abusively—or beneficially—use the powers bestowed on her to manage cases does little to illuminate whether, in balance, the judicial system benefits from those powers—virtually any power can be abused. *See* Steven Flanders, *Blind Umpires—A Response To Professor Resnik*, 35 HASTINGS L.J. 505, 508 (1984) (criticizing Resnik for failing to provide evidence, other than her own hypotheticals, either of judges abusing their case management powers or of the negative effects of judicial case management).

37. *See* Resnik, *supra* note 33, at 378 ("Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.").

managerial function in a way that preferentially rewards the number and rapidity of case resolution over the quality of that resolution.<sup>38</sup> She viewed endowing judges with new case management powers as sailing into uncharted waters, with potential for abuse<sup>39</sup>: exposing the judge to the facts and the parties' arguments during the pretrial phase of the lawsuit would lift the metaphorical blindfold from Lady Justice<sup>40</sup> and could lead to a lack of impartiality.<sup>41</sup> This concern is heightened, she reasoned, if the judge is exposed during the pretrial process to evidence that would be inadmissible at trial.<sup>42</sup>

Two years later, Professor Steven Flanders wrote a rejoinder to Resnik's article, sharply disagreeing with her.<sup>43</sup> Resnik had illustrated her concerns with two hypothetical scenarios in which active judicial management resulted in inappropriate judicial conduct, such as coercive settlement tactics.<sup>44</sup> Flanders criticized these hypotheticals as not representing real world behavior.<sup>45</sup> He summarized the results

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38. *See id.* at 380 ("Moreover, judicial management may be teaching judges to value their statistics, such as the number of case dispositions, more than they value the quality of their dispositions.").

39. *See id.* at 425 ("Transforming the judge from adjudicator to manager substantially expands the opportunities for judges to use—or abuse—their power.").

40. *See id.* at 431 ("Although the sword remains in place, the blindfold and scales have all but disappeared."). Professor Resnik traces the historical evolution of the iconography of justice, observing that the blindfold was originally a derisive symbol, suggesting ignorance and lack of insight. *Id.* at 447. By the end of the sixteenth century, however, the blindfold had become a "symbol of impartiality." *Id.* at 448.

41. *See id.* at 427 ("The extensive information that judges receive during pretrial conferences has not been filtered by the rules of evidence."). The combination of ex parte discussions and close contact that the judge has with attorneys during the course of management could lead to personal bias. *See id.*

42. *Id.* at 413. Of course, judges are exposed to inadmissible evidence in almost every case. Prior to trial, parties file motions in limine, the very purpose of which is to ask the judge to consider certain evidence and rule it inadmissible. At trial, parties routinely seek to introduce evidence that the court ultimately deems inadmissible, after considering the evidence. There is no research or compelling argument suggesting that a judge will be more prejudiced or influenced by exposure to such inadmissible evidence at earlier stages of the pretrial process.

43. *See* Flanders, *supra* note 36, at 508 (arguing that Resnik's approach and her use of two hypothetical models were "disingenuous" and did not demonstrate anything of value).

44. *See* Resnik, *supra* note 33, at 376–77, 386, 387. For example, in one of Resnik's hypotheticals, the judge exerts an extreme degree of pressure on the parties to settle their case, suggesting a settlement figure, telling the parties that the court "looked with disfavor upon uncompromising litigants," and then postponing ruling on pending motions until the parties had more time to consider settlement. *Id.* at 390.

45. *See* Flanders, *supra* note 36, at 508 ("Professor Resnik's central error is that she builds her argument on a foundation of two hypothetical 'models.' These models are the basis of her 'description' of what she understands to be 'managerial'

of a study he conducted that compared the number of days it took passive and active judges to complete cases.<sup>46</sup> For cases settling, he measured an average duration of 366 days for cases before active judges and 682 days for cases before passive judges.<sup>47</sup> For cases going to trial, he calculated an average of 472 days for cases before active judges and 945 days for cases before passive judges.<sup>48</sup> In other words, according to Flanders' study, cases before active judges resolve approximately twice as fast as those before passive judges, whether by settlement or by trial. Flanders also took issue with Resnik's ideal of blind justice. He argued that many of the rulings judges make are better shaped by context, such as relevance rulings.<sup>49</sup>

Stoked with ample fuel, the fires of this debate have continued to smolder for the last thirty-plus years. Judges soon threw their own logs onto the embers. Judge Robert Peckham wrote an article in 1985 defending the value of active judicial management.<sup>50</sup> He argued that the risk of judicial bias and exposure to inadmissible evidence is not unique to the pretrial process—judges must set aside biases at trial and put inadmissible evidence out of their minds when making rulings.<sup>51</sup> He advocated that all pretrial conferences be conducted on the record, with all parties present, to alleviate concerns about lack of transparency or accountability.<sup>52</sup> He did not defend the coercive settlement tactics that the fictitious judge employed in Resnik's hypothetical case; rather, he condemned the tactics, but not the managerial approach to judging

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judging.'"). Flanders considered Resnik's approach to be "disingenuous at best" because she did not demonstrate how her hypothetical facts would conform to the real world. *Id.*

46. Flanders described active judges as using case management tools including "1) mechanisms to screen cases early for jurisdictional or recusal problems; 2) tailor-made schedules that will bring each case to the earliest possible resolution; 3) close supervision of discovery; and 4) the well-known components of rule 16 of the Federal Rules of Civil Procedure . . . that bear on the scope and conduct of the trial." *Id.* at 514–15 (footnotes omitted).

47. *Id.* at 519.

48. *Id.*

49. *Id.* at 520.

50. Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985) [hereinafter Peckham, *A Judicial Response*]; see also Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981).

51. See Peckham, *A Judicial Response*, *supra* note 50, at 262 (emphasizing that issues of impermissible evidence arise regularly when judges are faced with evidentiary objections, but "[i]mpartiality is a capacity of mind" and judges are trusted to know how to proceed without impartiality or bias).

52. *Id.* at 263.

that enabled them,<sup>53</sup> ultimately advocating for more expanded active judicial management.<sup>54</sup>

Another prominent voice in this debate was Judge Frank Easterbrook, who wrote on the subject in 1989.<sup>55</sup> Easterbrook landed on Resnik's side of the debate, but for different reasons. To manage discovery, Easterbrook observed, a judge must be able to distinguish between "normal" or appropriate discovery and "impositional" discovery (discovery imposed so that the cost of responding will influence the opponent's settlement posture).<sup>56</sup> Easterbrook reasoned that judges are not in a position to distinguish between normal and impositional discovery at the outset of the case because they do not know enough about the facts and issues to make this assessment.<sup>57</sup> At the same time, he believed, the parties are incentivized to distort, or at least exaggerate, the information they present to the judge, hoping to influence the judge's evaluation of normal and impositional discovery.<sup>58</sup> Accordingly, Easterbrook argued, judges cannot make informed judgments about the scope and course of discovery at the outset of the case.<sup>59</sup>

In 2006 and 2007, interest in the judiciary's role flared again. In his 2006 article, Professor Jay Tidmarsh observed that the goal of litigation should be resolution of cases on the merits.<sup>60</sup> Whenever a judge must exercise discretion, there is the potential for the issue to become a contested matter, diverting the case away from the merits.<sup>61</sup>

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53. *Id.* at 264. Peckham describes the primary purpose of status conferences as "to plan and structure the pretrial and trial stages of litigation," which could promote settlements in an indirect way if properly conducted. *Id.* at 267.

54. Specifically, Peckham advocated a two-tiered discovery system with interwoven alternative dispute resolution procedures. Parties would conduct initial discovery on issues key to settlement prospects, then participate in an alternative dispute resolution process, and then conduct additional discovery as needed if the case did not settle. *Id.* at 267–68.

55. See generally Easterbrook, *supra* note 13.

56. *Id.* at 637–38. Discovery is only "normal" (meaning appropriate) if the cost to the party propounding the discovery (ignoring the responding party) is less than the anticipated effect on the ultimate judgment (not on settlement). *Id.* at 637. Discovery that is not normal is "impositional"—excessive, or abusive. *Id.*

57. *Id.* at 638–39 (reasoning that the Rules encourage parties to file "sketchy" complaints and develop the facts during discovery, such that, at the outset of a case, the court will not have a clear sense of the facts or the issues).

58. *Id.* at 638.

59. *Id.* at 638–39.

60. Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 515 (2006).

61. *Id.* at 558.

Vesting judges with discretion, therefore, only leads to “expense, delay, unpredictability, and abuse of power.”<sup>62</sup>

In 2007, Professor Robert Bone evaluated procedural discretion not on the basis of expediency, but rather by questioning whether judges are properly trained or skilled in case management. “The pervasive assumption that expert trial judges can do a good job of tailoring procedures to individual cases is empirically unsupported and at best highly questionable. In fact, judges face serious problems fashioning case-specific procedures to work well in the highly strategic environment of litigation . . . .”<sup>63</sup>

The 2010 Duke Conference further fanned interest in the issue. Professor Elizabeth Thornburg wrote an article echoing Professor Tidmarsh’s concern about judicial discretion.<sup>64</sup> In her article, she observed that concerns about a judge’s influence of discretion or bias should not be confined to the pretrial phase of litigation.<sup>65</sup> She noted that the rules pertaining to trials cede almost unfettered discretion to the trial judge.<sup>66</sup> Judges make numerous rulings during trial, both substantive and procedural, which are discretionary and very difficult to overturn on appeal.<sup>67</sup> Thornburg concluded that excessive management at any stage—pretrial or trial—is problematic, particularly when management entails a “myopic focus on speed.”<sup>68</sup>

Professor Steven Gensler wrote an article characterizing judicial activism as one piece of a many-piece puzzle affecting the

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62. *Id.*

63. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDozo L. REV. 1961, 1963 (2007).

64. Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICHMOND L. REV. 1261 (2010).

65. *Id.* at 1265. Professor Thornburg was not disagreeing with Resnik’s fundamental premise that managerial judging was undesirable. *Id.* at 1271–72. To the contrary, she agrees heartily with Resnik and only argues that the same concerns apply at the trial stage if a judge is managerial rather than passive. *Id.* at 1291.

66. *Id.* at 1262 (“The procedural rules that govern the actual trial do almost nothing to guide or constrain judicial discretion. There are rules about juries, evidence, and jury instructions, but in substance and application most are almost wholly discretionary.”).

67. *See id.* (mentioning the very basic limits imposed by the rules at trial, which result in a wide latitude of judicial discretion). Thornburg states that “[i]f there is a jury, the judge will give it some kind of charge, requesting some kind of verdict. The parties must be treated in a way that is not facially unequal. But that is about it.” *Id.* (footnotes omitted).

68. *Id.* at 1266–67 (“The business of managerial judging is accomplished not by applying the law, but by using the judge’s own beliefs about the techniques best suited to lead a case to a quick and efficient end.”).

performance of the federal courts,<sup>69</sup> noting that the current transsubstantive system relies heavily on judicial discretion. He argued that we either need to overhaul the system to reduce the need for judicial discretion—such as by adding tracks or some other differentiated provisions to accommodate the needs of different sized cases—or we need to optimize the system for the exercise of judicial discretion.<sup>70</sup> Gensler argued that discretionary case management represents a policy choice regarding not only how we want judges spending their time, but also that it more broadly implicates how we want cases resolved.<sup>71</sup>

Rule 1 instructs that cases be resolved justly, speedily, and inexpensively.<sup>72</sup> The debate about managerial judges begs the question: does active judicial case management promote that end?

## II. THE ARGUMENT FOR ACTIVE JUDICIAL CASE MANAGEMENT

This Article posits that, unless we are going to scrap our current federal civil litigation structure, the arguments for active and ongoing judicial case management during the pretrial process are more compelling than those against managerial judges. It acknowledges the validity of concerns raised by opponents of active case management, but explains that those concerns can be mitigated. The next subsection advances the case for active judicial case management and the subsequent subsection addresses the concerns.

### A. *The Case for Active Judges*

The evidence and arguments supporting active judging are convincing. Perhaps most compelling are the survey data.<sup>73</sup> Various legal organizations conducted a number of surveys in the period leading up to the Duke Conference, finding that both plaintiffs and defendants responded in favor of active judging—and these two groups do not agree on much.<sup>74</sup>

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69. See Gensler, *supra* note 8, at 672–73.

70. *Id.* at 719, 723–36.

71. *Id.* at 744.

72. FED. R. CIV. P. 1.

73. See, e.g., AM. C. OF TRIAL LAW. & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT (2009) [hereinafter AMERICAN COLLEGE OF TRIAL LAWYERS SURVEY], <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053> (reflecting views within the American College of Trial Lawyers about the role of discovery in the civil justice system); ABA SURVEY, *supra* note 29 (reflecting members' views of pre-trial practice in federal court); FJC REPORT, *supra* note 16 (reflecting attorneys' experiences in pre-trial practice in federal civil cases).

74. These surveys tended to ask for non-quantitative, "Likert-type scale"

### 1. *The survey data*

In 2009, the American Bar Association (ABA) published its survey results in a detailed report.<sup>75</sup> The respondents<sup>76</sup> were asked a series of questions about the cost of litigation in federal court. The report revealed a broad consensus that the cost of litigating in federal court is excessive, with more than eighty percent of the responding lawyers—who represent plaintiffs, defendants, or both—agreeing that litigation in federal court is too expensive.<sup>77</sup> The respondents blamed discovery for much of the excessive costs, with the median response estimating that discovery made up seventy percent of the fees incurred in a typical matter.<sup>78</sup> The respondents singled out electronic discovery as a particular cost driver, although they also recognized its effectiveness at generating responsive information.<sup>79</sup>

The survey also asked about the effects of these excessive litigation costs. The respondents reported that: (1) they turn away smaller cases because they cannot be handled cost-effectively;<sup>80</sup> (2) the cost of litigation forces cases to settle that should not be settled based on the merits;<sup>81</sup> and (3) the cost of litigation is disproportionate to the value of smaller cases.<sup>82</sup>

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responses with a series of statements about the litigation process. *See ABA SURVEY, supra* note 29, at 32 (asking whether members “strongly agree, agree, disagree, strongly disagree, or express no opinion”). It does not appear that the respondents were asked to review records or conduct analysis to respond, but instead simply provided their opinions. For example, when asked whether they agree or disagree with the statement that “[d]iscovery is too expensive” in a typical case in federal court, respondents likely responded based on their general sense of the process. *See id.* at 151. It is unlikely that respondents reviewed their bills or otherwise conducted any quantitative analysis of how much time or legal fees they spent on discovery compared to the overall legal fees and time spent unrelated to discovery in the litigation. Thus, the responses appear to be quite subjective. Nonetheless, they are informative.

75. *Id.*

76. It is interesting to note that the two largest categories of cases that responding plaintiffs and defendants handle are complex commercial disputes and contracts. *Id.* at 21–22. This suggests that the survey results in general, and the responses regarding active judicial case management in particular, are more relevant to larger, more complex cases than to simple cases like prisoner’s civil rights cases or social security appeals.

77. *Id.* at 150.

78. *Id.* at 2.

79. *Id.* at 101, 103.

80. *Id.* at 9 (suggesting that access to the courts is effectively denied for smaller cases).

81. *Id.* at 159. More than ninety percent of respondents representing defendants or both plaintiffs and defendants said the cost of litigation caused them to settle cases that should not have based on the merits. *Id.* at 157. Over ninety percent of respondents in every category agreed that the cost of discovery often drove settlement. *Id.* at 159.

82. *Id.* at 153.

When asked about the role of active judicial management, seventy-eight percent of respondents believed that early intervention by judges helps to narrow the issues, and seventy-two percent agreed that early intervention helps to limit discovery.<sup>83</sup> Significantly, seventy-three percent of all respondents believed that when a judicial officer gets involved early and stays involved, the results are more satisfactory to their clients.<sup>84</sup> The report identifies this as “[o]ne area of substantial agreement.”<sup>85</sup>

The American College of Trial Lawyers and the Institute for the Advancement of the American Legal System also jointly conducted a survey in 2009, which this Article will refer to as the American College of Trial Lawyers Survey.<sup>86</sup> The respondents to this survey also strongly favored active judicial management. “Seventy-four percent of the [respondents] said that early intervention by judges helped to narrow the issues and [sixty-six] percent said that it helped to limit discovery.”<sup>87</sup> Seventy-one percent of respondents reported that their clients were more satisfied with the results<sup>88</sup>—which, after all, is more important than the satisfaction of the lawyers—if a judicial officer was involved in the matter early and frequently.

The authors of the American College of Trial Lawyers Survey recommended that judges “have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial.”<sup>89</sup> The authors also noted that “[a]ccording to one Fellow, ‘Judges need to actively manage each case from the outset to contain costs; nothing else will work.’”<sup>90</sup>

The American College of Trial Lawyers Survey recommends that this increased judicial involvement occur early and often: “[e]arly judicial involvement is important because not all cases are the same and because different types of cases require different case management.”<sup>91</sup> The survey also stresses the necessity of initial pretrial conferences to discuss discovery at an early stage.<sup>92</sup> Further,

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83. *Id.* at 124–25.

84. *Id.* at 126.

85. *Id.* at 11. Interestingly, the report suggests that this is an area of satisfaction with the court system. The actual reported data do not provide any indication of whether respondents believe that most judges are already actively managing their cases.

86. See generally AMERICAN COLLEGE OF TRIAL LAWYERS SURVEY, *supra* note 73, at 1.

87. *Id.* at 19.

88. *Id.*

89. *Id.* at 2.

90. *Id.*

91. *Id.* at 19.

92. *Id.*

the survey emphasizes the importance of frequent status conferences and the need for the parties to make periodic reports of these conferences to the court.<sup>93</sup>

These surveys suggest that the primary consumers of judicial services—practicing trial lawyers and clients—believe that the system works better with active judges.<sup>94</sup> Surely their opinions carry significant weight in evaluating the proper role of judges.

## 2. *How judges spend their time*

If judges in today's litigation environment so infrequently oversee trials, are they substituting time spent managing the pretrial process? It turns out that not only are trials on the decline; judges' hours in the courtroom conducting proceedings of any nature are also waning. Data from the Administrative Office of the U.S. Courts show that the federal judges' total hours on the bench in open court have declined ten percent since 2008.<sup>95</sup>

This section will examine two sources of data regarding how judges spend their time: data from the Western District of Pennsylvania on motions that the parties file, and data gathered by the Federal Judicial Center ("FJC") relating to how often judges interact with the parties during the discovery process.

The Western District of Pennsylvania gathers data on the types of motions filed each year. The chart below presents the data for certain common motions from 2003 through 2013.<sup>96</sup> The first column lists the total number of motions filed. The second column lists the number of those motions that were summary judgment

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93. *Id.* at 21.

94. Not all the data are consistent with the ABA Survey and American College of Trial Lawyers Survey described above. The Federal Judicial Center ("FJC") issued the *Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* ("FJC Report") in October 2009. FJC REPORT, *supra* note 16, at 1. The FJC Report found no agreement by plaintiff or defense lawyers as to whether the Federal Rules of Civil Procedure should be revised to encourage more judicial management. *Id.* at 67. The FJC Report also contains other data inconsistent with the ABA and American College of Trial Lawyers surveys. For example, the FJC Report found much lower overall median costs of litigation—\$20,000 for defendants and \$15,000 for plaintiffs—and a much lower percentage of those costs devoted to discovery—in the twenty to twenty-seven percent range. *Id.* at 2; see also Reda, *supra* note 23, at 1088 (discussing the median costs of litigation reported by the FJC Report in relation to the Duke Civil Litigation Conference's concern with electronic discovery).

95. Jordan M. Singer & William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565, 566 (2014).

96. The author thanks the Clerk's Office of the Western District of Pennsylvania for providing these data.

motions, followed in parentheses by the percentage of the total motions that were summary judgment motions. The third column lists the same figures for motions to dismiss. These two dispositive motions are presented because they are the most time-consuming to adjudicate. The last five columns relate to discovery: total discovery motions, motions to compel, motions for a protective order, motions for sanctions, and motions to extend the time for discovery.

*Table 1: Motions Data from the District Court for the Western District of Pennsylvania, 2003–13*

| Year | Total Motions | Summary Judgment | Dismiss   | Discovery   |        |            |           |        |
|------|---------------|------------------|-----------|-------------|--------|------------|-----------|--------|
|      |               |                  |           | Total       | Compel | Prot. Ord. | Sanctions | Extend |
| 2003 | 9,433         | 607 (6%)         | 821 (9%)  | 808 (9%)    | 473    | 173        | 93        | N/A    |
| 2004 | 9,439         | 586 (6%)         | 892 (10%) | 862 (9%)    | 482    | 165        | 150       | N/A    |
| 2005 | 11,045        | 572 (5%)         | 849 (8%)  | 1,207 (11%) | 505    | 196        | 121       | 272    |
| 2006 | 11,691        | 571 (5%)         | 850 (7%)  | 1,389 (12%) | 451    | 189        | 104       | 483    |
| 2007 | 11,237        | 497 (4%)         | 686 (6%)  | 1,385 (12%) | 432    | 177        | 70        | 524    |
| 2008 | 11,755        | 418 (4%)         | 757 (6%)  | 1,277 (11%) | 365    | 165        | 88        | 497    |
| 2009 | 11,446        | 337 (3%)         | 821 (7%)  | 1,238 (11%) | 368    | 158        | 77        | 478    |
| 2010 | 11,112        | 378 (3%)         | 765 (7%)  | 1,166 (10%) | 356    | 170        | 87        | 420    |
| 2011 | 11,465        | 277 (2%)         | 616 (5%)  | 1,050 (9%)  | 327    | 167        | 71        | 348    |
| 2012 | 11,650        | 273 (2%)         | 454 (4%)  | 1,057 (9%)  | 299    | 219        | 63        | 333    |
| 2013 | 11,264        | 285 (3%)         | 426 (4%)  | 968 (9%)    | 293    | 149        | 61        | 379    |

The data suggest that—at least in this court—while the total number of motions has remained fairly constant or increased over the past eleven years, the number of motions for summary judgment

and motions to dismiss have dropped by approximately half.<sup>97</sup> Likewise, the number of contested discovery motions seems to be trending down. Thus, the decrease in trials has not led to a corresponding increase in dispositive motions or contested discovery motions. Are judges already substituting case management for presiding at trials and adjudicating dispositive motions? While some may be, data gathered by the FJC suggest that the majority of judges are not.

In October 2009, the FJC reported results of a survey it conducted in the Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (“FJC Report”).<sup>98</sup> The data showed that the courts conduct an initial conference to plan discovery and set time limits for discovery in only about forty-five percent of cases.<sup>99</sup> After the initial planning conference, the courts bring the parties in to monitor discovery in only about thirteen percent of cases.<sup>100</sup> The courts adjudicate motions to compel or for protective orders in five to ten percent of the cases and impose sanctions in less than five percent.<sup>101</sup>

Thus, the only regular involvement of judges that survey respondents reported was in an initial discovery planning conference and the ensuing case management order, and even those activities were reported in less than fifty percent of the cases.<sup>102</sup> Thereafter, in the vast majority of cases, the court had little contact with the parties during the discovery process, whether initiated by the parties or the court.

In sum, these data suggest that judges have not substituted active case management for their diminished hours presiding in open court. Given that plaintiff lawyers, defense lawyers, and clients all report that active judicial involvement in a case lowers the cost,

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97. These data come from a small sample and have not been subjected to any formal statistical analysis. Furthermore, while the data contain the number of motions filed, it does not reflect the number of hours that the judges (or their law clerks) spent on these motions. Obviously, a motion for summary judgment requires far more time to adjudicate than a motion to extend the time for discovery. Likewise, the categorization of the motions is determined by the filing party’s selection from the court’s electronic filing webpage—so some may be improperly categorized. Furthermore, it does not take into account court initiated actions, such as orders compelling attendance at a status conference. Recognizing these limitations, the data nonetheless are interesting.

98. See generally FJC REPORT, *supra* note 16.

99. *Id.* at 13.

100. *Id.*

101. *Id.*

102. It is interesting to note that the respondents to this survey seemed more satisfied with the judges’ level of involvement. The FJC Report states that the “[r]espondents seemed relatively satisfied with current levels of judicial case management in the federal courts.” *Id.* at 3.

increases the pace, and increases satisfaction with the outcome, the data strongly support the need for a systemic change in judges' participation in the pretrial litigation process.

### 3. Three exemplars

In her landmark article, *Managerial Judges*, Professor Resnik describes two hypothetical cases in which occurred some of the harms leading her to oppose managerial judges.<sup>103</sup> Those hypotheticals have been criticized as unrealistic.<sup>104</sup> To provide some examples firmly grounded in reality, this section will describe three actual cases that represent different size litigation proceedings<sup>105</sup>: a contract claim with about \$2 million at issue; an environmental claim with about \$8 million at issue; and a tort claim seeking substantial but unquantified damages that resembled "bet-the-company"<sup>106</sup> litigation. They were selected to represent typical current complex federal litigation. In addition, one of the cases presents the fees and time from the plaintiff's perspective (although not on a contingency fee basis), and the other two from the defense perspective, providing some balance.

These three cases, of course, provide no statistically analyzed data. At the same time, these anecdotal accounts provide a strong real-world sense of how attorneys spend their time and expend their clients' resources. Furthermore, these case studies detail the points at which the respective judges became involved, helping to demonstrate where revisions to the process are most likely to have significant impacts.

#### *Case 1*

Case 1 was a contract claim of slightly over \$2 million brought by the buyer of a business for post-closing payments. This account reflects the role of the buyer/plaintiff. The litigation lasted about

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103. Resnik, *supra* note 33, at 386–87.

104. Flanders, *supra* note 36, at 508.

105. The three exemplar cases described in this section are actual cases and the information in the discussion derives from two sources: (1) the pleadings, motions, briefs, and court rulings that were filed in the cases; and (2) the invoices for legal services for the featured party (which the author reviewed and coded to develop the totals spent on the various categories of activity). All of the documents in the court's docket are in the public record, but the billing information is not public. Under these circumstances, citations to the record information would be inappropriate, as such citations would link the billing information in this Article to the specific party involved in the case, effectively disclosing the party's confidential information. Accordingly, while the descriptions of the exemplar cases are factual descriptions of actual events and the associated costs, they are not accompanied by citations to record information.

106. In the legal world, any litigation that potentially jeopardizes a company is often referred to as "bet-the-company" litigation or high-stakes business litigation.

two and a half years, and the plaintiff's legal fees totaled \$383,596 plus expenses of \$43,161 (not including expert fees).

For the plaintiff, the first task was drafting the complaint. Contemporaneous with filing the complaint, the parties exchanged a round of settlement proposals, essentially concluding a settlement dialogue that started before the plaintiff drafted the complaint. The defendants answered the complaint without filing any Rule 12 motions. Their answer included a counterclaim for some of the purchase price that had been escrowed, which the plaintiff had claimed after the dispute arose. After the pleadings closed, the court entered a Case Management Order ("CMO") establishing deadlines through the summary judgment stage.

The parties then commenced discovery, starting with interrogatories and document requests among the parties and subpoenas to nonparties. This process generated a substantial volume of paper documents and electronically stored information ("ESI"), which required review and privilege analysis, production of privilege logs, and review of the documents and ESI that the defendants produced.

Approximately five months after the plaintiff filed the complaint, the court held its first status conference. At about the same time, the parties complied with the court's mandatory alternative dispute resolution program by selecting mediation. They drafted mediation statements and attended the mediation, which was unsuccessful. Discovery continued, with further document exchanges and depositions. Each side took seven or eight depositions. Many of the witnesses were located in distant states, requiring travel.

Approximately ten months into the case, the defendants moved to amend their counterclaim to assert additional causes of action. The plaintiff opposed the motion, arguing that the motion was untimely and that the amendment would be futile because the additional causes of action failed to state a claim under Rule 12(b)(6).<sup>107</sup> The parties briefed the motion and the court wrote an opinion granting leave to amend.

The plaintiff then filed a motion to dismiss the new claims in the amended counterclaim, asserting the same defense that had been the basis for the futility argument, which the court had not reached on the merits. At about the same time, the parties jointly proposed an amendment to the schedule set forth in the CMO. The court held a telephonic status conference and agreed to amend the schedule. Following briefing, the court granted the motion to dismiss. The court then conducted another status conference to address scheduling.

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107. FED. R. CIV. P. 12(b)(6).

Throughout this time, discovery was ongoing. An issue arose regarding one deposition, and the plaintiff moved for a protective order contending that the deposition did not relate to an issue presently in the case. Following letter briefs, the court granted the motion.

About sixteen months into the case, the parties shifted the discovery focus to expert issues. The parties also engaged in another effort to settle the case—this time informally exchanging telephone calls and settlement proposals without any involvement by the judge or a neutral. This effort again was unsuccessful. Accordingly, the parties proceeded to file cross-motions for summary judgment.

About a month later, a number of disputes arose. The defendants contended that the plaintiff had not produced certain documents. The parties resolved this dispute informally when the plaintiff identified the specific responsive documents it had already produced and represented that no other known documents existed. In addition, the plaintiff contended that one of the defendants' experts offered opinions that were either rendered moot by the court's dismissal of one of the defendants' counterclaims or purported to interpret the contract language—a legal issue for the court. Additionally, the defendants again sought to amend their answer and counterclaim, which the court again denied. The defendants also filed motions to amend and supplement their motion for summary judgment. Additionally, the defendants sought to strike certain exhibits from the plaintiff's motion for summary judgment. Expert discovery continued throughout this time.

Finally, almost two years after the plaintiff filed the complaint, the court granted the plaintiff's motion for summary judgment and denied the defendants' motion. The defendants filed various motions seeking some relief from the ruling, all of which were unsuccessful. Because the contract provided for recovery of attorney's fees, the plaintiff prepared a fee petition supported by an expert affidavit, and the court awarded the fees set forth in the petition.

The defendants filed a notice of appeal. The parties then entered into a settlement, which was for approximately seventy-five percent of the total judgment, to avoid the cost and delay of appeal and the challenges of collection from the individual defendants.

Of the \$384,000 in legal fees that the plaintiff incurred in this case, approximately \$204,000 (fifty-three percent) went towards fact discovery and \$25,000 (seven percent) towards expert discovery. This resulted in a grand total of \$229,000 (sixty percent) in discovery fees. Of the total discovery fees, \$51,000 (thirteen percent) was incurred in the summary judgment process and \$39,000 (ten percent) in the

combined motion to amend and motion to dismiss. The plaintiff also spent \$32,000 (eight percent) in fees during the settlement processes. The plaintiff incurred only \$9000 (two percent) in fees for the pleadings and \$7000 (just under two percent) for its attorney's fees petition.

The court's primary involvement was to rule on three motions: a motion to amend the defendants' counterclaim; a motion to dismiss portions of the counterclaim; and the parties' cross motions for summary judgment. The court also held a small number of status conferences to address the schedule. Aside from a couple of discovery motions, the court had virtually no involvement in the discovery process (where sixty percent of the fees occurred).

Although the lawyers cooperated relatively professionally in Case 1, the process would still have been improved with active judicial management. A routine case with no unusual circumstances interfering with progress (interlocutory appeals, bankruptcy stays, etc.) should not take two and a half years to get to summary judgment. Periodic status conferences checking on progress and clearing roadblocks would surely have helped. Likewise, the discovery disputes might have been resolved more quickly and less expensively through a discussion with the judge rather than formal motion practice. Thus, while the parties did not need a heavy-handed managerial approach, the case would have undoubtedly proceeded more smoothly and quickly before a judge who monitored the matter's progress through periodic status conferences.

#### *Case 2*

Case 2 was an environmental case in which the buyer of a plant was faced with a cleanup estimated to cost approximately \$8 million. The buyer sued the seller seeking an injunction requiring the seller to perform the cleanup and alternatively seeking contribution towards the cleanup costs. Each party was a large corporation with sufficient resources and comparable amounts of documents and ESI. This description presents the activities and costs from the defendant's perspective and in more summary fashion than provided for Case 1.

The case proceeded for four years. After the plaintiff filed the complaint, the defendant filed a motion to dismiss certain counts, and in the alternative to stay the case pending the resolution of related bankruptcy proceedings.

The court denied the motion to stay, and the parties engaged in discovery. The parties prepared their Rule 26(f) report and met with the judge for an initial Rule 16 conference. In this timeframe, the plaintiff made a settlement demand, based upon which the parties agreed to try to

mediate the dispute. They selected a mediator, prepared mediation statements, and participated in an unsuccessful mediation.

The parties then engaged in considerable discovery. Both parties had substantial paper documents and ESI. The parties cooperated on the protocols for exchanging ESI. Each party sent a team of lawyers to the other party's document repositories to inspect paper documents. The defendant also sought considerable documents pursuant to the Freedom of Information Act.<sup>108</sup> Each party took eight to ten depositions, with one primary expert on each side.

After the completion of fact and expert discovery, the defendant moved for summary judgment. The summary judgment process included challenges to the evidence that each party submitted in support of its position. While the motion was pending, the court scheduled the final pretrial conference, and the parties prepared pretrial statements. The judge then granted summary judgment as to the federal statutory claims and declined to rule on the motion as it pertained to the state law claims (or to continue to exercise supplemental jurisdiction over those claims). One of the federal statutory claims provided for recovery of attorney's fees for the prevailing party, so the defendant hired an expert on fees and submitted a fee petition, which the court denied. The defendant then filed a cost application, and the clerk's office awarded costs.

The plaintiff refiled the state law claims in state court. The defendant filed a motion to dismiss those claims, making the same arguments it had advanced in its motion for summary judgment. The state court granted the defendant's motion, ending the proceedings.

In the federal court litigation, the judge conducted an initial Rule 16 conference before entering the first CMO and a final pretrial conference in the lead-up to trial. In between, the judge was passive, ruling only on issues that the parties presented.

To defend the federal court litigation, the defendant incurred \$1,075,658 in fees and \$88,284 in costs (not counting expert fees or local counsel fees). Of those fees, more than half a million dollars (\$547,000 or fifty-one percent) were incurred in discovery, almost twenty percent of which was related to the experts. Much of the fees were incurred in connection with e-discovery, including over \$16,000 for technical, non-legal personnel to manipulate the electronic data. The defendant spent \$133,000 (twelve percent) on the motion for summary judgment and related proceedings and \$61,000 (six percent) on the motion to dismiss. The fee and cost petitions

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108. 5 U.S.C. § 552 (2012).

resulted in \$100,000 (nine percent) in fees. The defendant incurred \$51,000 (five percent) in the various settlement efforts.

As with Case 1, the relationship between the lawyers in Case 2 was professional and cooperative. Similarly, Case 2 should not have taken four years to get to summary judgment. Because the judge was entirely passive, however, the case floundered at times. For example, although the parties cooperated to frame a mutually acceptable common search for ESI, the back-and-forth process took an inordinate amount of time. That issue could likely have been ironed out in a conference call with the court. The two Rule 16 conferences that the court held with the parties over the four-year litigation period were plainly insufficient to achieve the “speedy” determination of this action. Furthermore, as time generally correlates with cost,<sup>109</sup> these cases were undoubtedly more costly than was necessary.

### *Case 3*

Case 3 was a toxic tort case with two fatalities. Although the complaint did not specify a damages amount, the prospects of a large jury award, potential claims by other copycat plaintiffs, and the risks of a harmful finding about the company’s core product made this “bet-the-company” litigation for the defendant, whose perspective is presented in this description.

This case proceeded for eleven years, although it was stayed for over a year during an interlocutory appeal of a venue issue. The complaint was quite lengthy—more than thirty counts—and the defendant filed a motion to dismiss many, but not all, of the counts. The defendant then proposed a “Lone Pine” CMO, where the parties would test the validity of the plaintiffs’ scientific causation evidence at the outset before full-blown fact discovery. The plaintiffs vehemently opposed this procedure, and the judge entered a traditional scheduling order.

In contrast to Cases 1 and 2, there was a considerable disparity between the parties in the amount of discoverable information each possessed. This disparity seemed to lead the plaintiffs to resist efforts to narrow the scope of discovery. Accordingly, the defendant produced 600 boxes of paper documents as well as many gigabytes of ESI. The defendant offered to allow the plaintiffs immediate access to the 600 boxes of documents if the plaintiffs would agree to a “claw back” provision for any privileged documents, but the plaintiffs declined. It took the defendant’s lawyers months to conduct the

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109. ABA SURVEY, *supra* note 29, at 148 (indicating the belief of both plaintiff and defense lawyers that delays directly correlate to higher cost).

privilege review and additional time to prepare the ninety-page privilege log. It then took the plaintiffs' firm—a small office with two partners and a small, varying number of associates and contract lawyers—more than a year to go through the documents. The defendant rented storage space for the entire time of both reviews to house the documents, which had previously been stored in space that was unsuitable for legal review. The parties also took numerous fact and expert depositions.

The lawyers did not, in general, cooperate during this contentious litigation. Numerous discovery disputes arose during the case. The plaintiffs challenged many of the defendant's privilege assertions, which entailed a meet-and-confer session of several days to go through the lengthy privilege log before formal motion practice. An employee of the defendant sent fifty-five boxes of documents of old financial records to the shredder during the lengthy hiatus in the case, believing them not relevant to the litigation. Because no record existed of the precise nature of each document, the plaintiffs filed a spoliation sanctions motion. In conjunction with that motion, the plaintiffs filed a motion to take the deposition of one of the lawyers representing the defendant who had investigated the circumstances of the document destruction. The defendant filed a motion contending that the plaintiffs' attorney was improperly coaching witnesses during depositions and instructing them not to answer questions. The defendant also filed a motion to exclude from discovery documents relating to a second plant it operated eleven miles outside the town where the plaintiffs had lived.

After discovery concluded—eight years into the litigation—the defendant moved to exclude the plaintiffs' experts under the *Daubert* standard<sup>110</sup> and for summary judgment based on a variety of grounds, including lack of requisite expert testimony should the court grant the *Daubert* motion. After a two-day hearing, the court excluded the plaintiffs' specific causation expert and granted the defendant's summary judgment motion. That ruling was upheld on appeal.

Throughout the entire eleven-year litigation, the judge was the model passive judge. He conducted an initial status conference and thereafter only met with the parties to adjudicate motions that the parties filed.

In defending this litigation, the defendant incurred \$3,909,144 in fees and \$477,845 in costs (not counting expert fees or local counsel

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110. See *Daubert v. Merrell Dow Pharmas., Inc.*, 509 U.S. 579, 592, 597 (1993) (establishing that trial judges must determine whether the expert witness will testify to "(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue," and that admissible scientific evidence must be relevant and based on "scientifically valid principles").

fees). Of those fees, \$2,288,000 (fifty-nine percent) were incurred in discovery, as compared to only \$244,000 (six percent) on the motions to exclude the experts and for summary judgment. The spoliation motion alone resulted in \$145,000 in fees.

The three cases described above are consistent with the survey results indicating that the majority of litigation costs are incurred in the discovery process, particularly in complex and high-stakes litigation.<sup>111</sup> The case descriptions also suggest that, at least in these three exemplars, the judges did not manage the discovery process at all. While speed is not the only, or even most important, measure of justice, it is certainly relevant.<sup>112</sup> All three cases would likely have proceeded more quickly and less expensively, with no less due process or justice, with a managerial judge.<sup>113</sup>

Case 3 in particular demonstrates that disparities in the parties' situations in high-stakes litigations without active and ongoing judicial management can lead to a messy discovery process. For example, consider the plaintiffs' refusal to enter into a claw back agreement for the 600 boxes of documents. That caused months of delay while the defendant conducted a privilege review, as well as significant legal fees. At the same time, filing a formal motion on the issue would have resulted in commensurate delay, fees in briefing the motion, and an uncertain outcome, not to mention the judge's displeasure at receiving another discovery motion. If the judge had been meeting with the parties regularly, it seems likely that he could have brokered a compromise of the issue or a more streamlined process.

#### *4. Can the system rely on cooperation between adversaries?*

As Case 3 illustrates, it may be unrealistic to expect parties in high-stakes litigation to cooperate fully and voluntarily, particularly in the discovery process. Our system is adversarial, with each lawyer obligated to zealously represent her client.<sup>114</sup> In Case 3, there were tremendous disparities between the parties. The plaintiffs had almost

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111. See *supra* notes 73–95 and accompanying text (providing an in-depth discussion of the survey data).

112. See ABA SURVEY, *supra* note 29, at 148 (indicating that delays directly correlate to additional cost).

113. See Peckham, *supra* note 50, at 257–58 (explaining the positive impacts of active judicial management, which include increased monitoring and expediting of cases). In contrast, Peckham notes that prior to the 1983 amendment of the Federal Rules of Civil Procedure, “cases were allowed to drift, and settlement often occurred because one party could no longer tolerate the uncertainty and delay.” *Id.* at 257.

114. See, e.g., MODEL RULES OF PROF’L CONDUCT 1 (AM. BAR ASS’N 2015) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

no paper documents and very modest ESI from the plaintiffs' personal email accounts, while the defendant had substantial paper and electronic records. The plaintiffs were represented on a contingency fee basis, while the defendant was represented on an hourly basis. Under these circumstances, it is hardly surprising that the parties had widely disparate views about how discovery should proceed—the plaintiffs wanted unrestricted extensive discovery, and the defendant viewed discovery as costly and only likely to increase its litigation risks.

In every case pending in federal court, discovery must be scaled on both a macro and micro level.<sup>115</sup> On the macro scale, issues like the length of the discovery period, any alterations to the default limits on the number of discovery requests, and the manner in which electronic discovery is handled must be set at the outset, then adjusted as needed as the case progresses.<sup>116</sup> The parties typically address these issues in the Rule 26(f) report to the judge, either reporting agreement on a joint proposal or their individual positions.<sup>117</sup> The judge then sets these parameters in the initial CMO.<sup>118</sup>

On the micro scale, the rules place the initial burden on the parties to ensure that each discovery request is proportional: the propounding party has a duty to serve discovery that meets this balancing test, and the responding party may object to discovery if it perceives as out of balance.<sup>119</sup> Although the rules permit judges to impose proportionality limits *sua sponte*, in practice, judges only get involved if the parties file a motion to compel or for a protective order.<sup>120</sup>

Under the current rules, in a case on a passive judge's docket like those in the exemplar cases, the parties perform this macro and micro scaling, with the judge's involvement being only to break impasses that the parties present. Professor John Setear wrote an

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115. See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 769 n.16 (2010) (acknowledging criticisms of the micro- and macro-level costs of discovery and litigation).

116. See *id.* at 766–67 (explaining that, because the existing discovery rules do not identify contested issues early on, discovery is expansive and, therefore, costly, and stating that e-discovery “needs a serious overhaul” (quoting AMERICAN COLLEGE OF TRIAL LAWYERS SURVEY, *supra* note 73, at 2)).

117. See FED. R. Civ. P. 26(f) (providing the procedures for party conferences and planning discovery).

118. See FED. R. Civ. P. 16(b)(3) (noting the application of case management orders to discovery parameters, in terms of the required and permitted contents of the orders).

119. See FED. R. Civ. P. 26(b)(1), (b)(2)(C)(iii) (specifying both the scope and limits of discovery and the role of the court—on its own or by motion—to limit the extent of discovery in certain circumstances).

120. See FED. R. Civ. P. 26(b)(2)(C)(iii) (providing that, “on motion or on its own, the court must limit the frequency or extent of discovery if” certain scenarios occur).

article applying game theory to the positions that parties must take in this discovery process.<sup>121</sup> He likened discovery to a “prisoners’ dilemma” problem. In the classic prisoners’ dilemma scenario, each prisoner is incentivized individually to make the decision that seems to minimize his jail time.<sup>122</sup> This individual incentive perspective leads each prisoner to make a decision with an outcome that is less favorable than the outcome he might achieve if both prisoners cooperated. Setear argues that the federal rules and litigation structure incentivize parties to maximize their own individual advantage by propounding disproportionate, “impositional” discovery, at the expense of the overall process.<sup>123</sup>

Litigators are highly motivated to win cases. Winning is good for an attorney’s retention of existing clients, attraction of new clients, and reputation in the legal community. Attorneys who are even marginally competent will realize that there are tactical advantages to certain outcomes in the discovery process.<sup>124</sup>

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121. See generally Setear, *supra* note 13.

122. In the classic prisoners’ dilemma, two defendants are separated. *Id.* at 576. Each is told that if he “squeals” while his co-defendant does not, he will go free, and the co-defendant will receive a sentence of eight years. *Id.* If both squeal, both will receive sentences of five years. *Id.* If neither squeals, they will each receive sentences of two years. *Id.* So each prisoner considering his own interest will conclude that he is better off squealing; if the co-defendant squeals, then by squealing himself the prisoner reduces his sentence from eight years to five years. *Id.* at 577. And if the co-defendant does not squeal, then the prisoner goes free by squealing. *Id.* This leads them both to squeal and serve five-year sentences, when they could have served two-year sentences if they both refrained from squealing. *Id.* at 578.

123. Discovery requests are sometimes divided into “normal” discovery—which we can think of as discovery where the objective is gaining information that will help the propounding party win the case—and “impositional” discovery—which we can think of as discovery designed to impose a burden on the opposing party, seeking to cause the opposing party to change its settlement position. *See, e.g.*, Easterbrook, *supra* note 13, at 637–38 (stating that an “impositional request” is justified by additional costs to one’s opponent, instead of the gains obtained from requested information); Setear, *supra* note 13, at 581–82 (describing the “impositional benefits” one may derive from imposing costs on the responding party). Discovery sometimes has elements of both normal and impositional objectives. The information sought might be helpful in establishing or defending the claims at issue, but the propounding party might also recognize that there is some benefit in imposing an additional burden on the opposing party.

124. *See* Peckham, *supra* note 50, at 256 (“Attorneys, trained in the traditional adversarial system, continued to believe that serving their clients effectively required them, in many instances, to attempt to manipulate the discovery rules to frustrate and subvert the opposing party.”); *see also* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308 (1986) (“Our current system of civil litigation creates perverse incentives for lawyers, and then relies on judges to

As seen in Case 3, a lawyer representing an individual suing a corporation will realize that electronic discovery is typically more likely to uncover relevant evidence from the corporate party than discovery of paper documents.<sup>125</sup> Electronic discovery is also likely to be far more burdensome to the corporation than to the individual.<sup>126</sup> Thus, the attorney representing the individual will be more likely to push for extensive electronic discovery, motivated by the evidentiary, “normal” aspect of the discovery, but cognizant of the “impositional” aspect as well. Asking that lawyer to ignore the tactical impositional advantages of more extensive electronic discovery is simply not realistic and might even be a violation of an attorney’s ethical obligation to be zealous in some circumstances.<sup>127</sup>

If we consider other high-stakes contested processes, it is rare that we would ask the participants to regulate or referee themselves. In a pickup basketball game on the playground, for example, the players might self-regulate, calling their own fouls and other violations. In professional league finals, however, we would not dream of asking the players to officiate themselves—the NBA and WNBA use the most skilled and experienced referees to adjudicate their highest stakes contests. These leagues use referees not because they have concluded that the players are cheaters or uncooperative, but rather because it is simply irrational to expect them police themselves when the passions and stakes are so high.

It is similarly irrational to expect attorneys to referee themselves in high-stakes federal court litigation. Again, this conclusion does not depend on whether the attorneys are operating in good faith within

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police litigant behavior through techniques like managerial judging. If we are not satisfied with the results, we should redesign the system to provide direct incentives for appropriate behavior.”); Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—and the Extent of Convergence with Civil-Law Judging*, 36 Sw. U. L. Rev. 191, 213 (2007) (noting that litigators occasionally require judicial “adult supervision” to foster pretrial cooperation).

125. See ABA SURVEY, *supra* note 29, at 101 (reporting that about eighty-nine percent of plaintiffs’ attorneys believe that electronic discovery enhances their ability to discover all relevant information).

126. *Id.* at 108 (reporting that around eighty-five percent of defense attorneys consider electronic discovery disproportionately burdensome).

127. See Thornburg, *supra* note 64, at 1269 (concluding that many lawyers are not effective case managers because of their self-interest (hourly billing), risk-averse nature (worried that they might miss key evidence if they do not turn over every discovery stone), and strategic actions (creating settlement leverage through impositional discovery)). Consequently, Thornburg notes that judges are better suited to make decisions that serve the collective interests of the clients, taxpayers, and other users of the court system. *Id.*

the rules or whether they are good, ethical people. The Rules of Civil Procedure, and perhaps the Model Rules of Professional Conduct,<sup>128</sup> prohibit purely impositional discovery and endorse purely normal discovery, but there is a wide swath of gray area between those two ends of the spectrum. It is in this gray area that the adversarial nature of litigation trumps complete cooperation.

No one disagrees that the judge serves the role of referee in civil litigation—those opposing managerial judges do not contend that the judge should not resolve disputes that the parties present. The question is whether the judge should make rulings only when the parties formally present their disagreements or should monitor the proceedings and intervene whenever the judge thinks it appropriate. In other words, in Case 3, should the judge have actively monitored the discovery process and taken additional measures to make the process more efficient and less combative once he recognized that the parties were not cooperating well and did not trust each other?

Professor Bone analogized managing litigation to managing a workplace.<sup>129</sup> Imagine a manager trying to supervise “a workplace where the employees are committed to achieving diametrically opposite results, encouraged to pursue their own self-interest and not the interest of the firm . . . and allowed to use a wide range of strategic tools to achieve their ends.”<sup>130</sup> Under such conditions, Bone observed, “Even the best manager is likely to have great difficulty managing such a fractious workplace environment.”<sup>131</sup>

Suppose you are in charge of hiring the manager in Bone’s analogy. One candidate announces that he has a laissez-faire approach to managing, and intends to stay in his office and only evaluate whether the employees are working towards the overall good of the company if they come to him with problems. The other candidate states that she takes a proactive approach to managing and communicates regularly with the employees to make sure everything is running smoothly to advance the company’s welfare. Most people would hire the proactive manager under the working conditions in Bone’s workplace.

Managing adversarial lawyers is a lot like managing Bone’s employees; however, under the current rules and judges’ current practices, most judges are like the passive, laissez-faire manager. Rule

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128. See MODEL RULES OF PROF’L CONDUCT r. 3.4(d) (AM’ BAR Ass’n 2015) (prohibiting unnecessary discovery requests and the failure to make a reasonable effort to respond to proper requests).

129. Bone, *supra* note 63, at 1963.

130. *Id.*

131. *Id.*

16 of the Federal Rules of Civil Procedure authorizes, but does not require, judges to conduct a pretrial conference prior to issuing the initial CMO.<sup>132</sup> The FJC Report suggests that judges only hold such pretrial conferences about forty-five percent of the time.<sup>133</sup> Thus, in more than half of the cases, the judge sets all of the parameters for the discovery process without meeting with or speaking to the parties, and likely with very little knowledge about the nature of the case and the issues likely to arise.<sup>134</sup>

Europe has a litigation system where the judges and the lawyers jointly participate in a search for the truth.<sup>135</sup> They have very little discovery, and it is conducted incrementally and with the active participation of the judge.<sup>136</sup> In the United States, in contrast, discovery is a set of tools used by each party to develop its own case and to contest the opponent's case—an integral part of winning or losing.<sup>137</sup> Without abandoning the fundamentally adversarial role of the litigators in our system, it is naïve to think that lawyers will wear blinders during the pretrial process, blocking out the tactical opportunities available during discovery and the financial and other

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132. FED. R. CIV. P. 16(a). The only change to these provisions in the 2015 amendments was to shorten the time for the judge to issue the scheduling order and to provide that, if the judge conducts a pretrial conference for the purpose of framing the scheduling order, the judge should do so in a manner that allows for "direct simultaneous communication" between the parties, rather than by email or other non-concurrent means. FED. R. CIV. P. 16(b)(1)(B), (b)(2) (amendments effective Dec. 1, 2015); COMM. ON RULES OF PRAC. & PROC., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE app. B-12 (2014), <http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014> (explaining that the provision in Rule 16(b)(1)(B) that pretrial conferences can be held through mail or telephone was deleted to promote real-time communication).

133. FJC REPORT, *supra* note 16, at 13.

134. In contrast, Rule 26(f) requires the parties to meet and confer to prepare the discovery report that judges typically use as the starting point for their scheduling orders. FED. R. CIV. P. 26(f). Where the drafters of the federal rules hesitate to tell judges what they must do, they show no such reticence when it comes to telling the parties what they must do.

135. Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1019–20 (1998).

136. Steven Baicker-McKee, *Discovery: Legal Aspects*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 516, 521 (James D. Wright ed., Elsevier, 2d ed. 2015).

137. *See id.* at 517 (implying that broad, extensive discovery is necessary due to the notice and pleading standard in U.S. federal courts); *see also* James F. Herbison, *Corporate Reps in Deps: To Exclude or Not to Exclude*, 78 WASH. U. L.Q. 1521, 1524 (2000) (intimating that discovery is the process that bridges the pleading stage and the summary judgment or trial stage of litigation).

rewards attendant to winning their cases. Returning to Professor Setear's game theory analysis, we either need to change the rules of the game to incentivize the participants to use discovery to advance overall effectiveness and efficiency, or we need the judge to manage the process actively to advance those goals.<sup>138</sup>

### *B. Responding to the Criticisms*

The concerns about active judges are certainly legitimate, but can be addressed. This section will address the most common of those concerns.

#### *1. Transparency*

One of Professor Resnik's primary concerns was that a judge's activities during the pretrial process might occur off the record, less subject to public scrutiny or appellate review.<sup>139</sup> While off-the-record conferences and actions are undeniably less transparent and reviewable, there is a simple solution to this concern: require most or all conferences to be on the record.<sup>140</sup> Many judges already conduct most of their status conferences on the record, and there is no reason the Rules could not require conferences to be on the record, perhaps with exceptions for settlement conferences with the parties' consent.

Of course, it will still be extremely difficult to persuade an appellate court to overturn a trial judge's managerial actions, even if captured word-for-word on the record.<sup>141</sup> It is important to recognize, though, that pretrial rulings on contested motions by passive judges are also difficult to appeal; they are subject to the same abuse of discretion standard.<sup>142</sup> Similarly, outcomes that result from the parties' agreements or default conditions that result from the parties' inability to compromise are not subject to appeal at all.

For example, consider the issue of the number of depositions, set by default at ten per side.<sup>143</sup> In a case before a passive, non-managerial judge, if the plaintiff wants more than ten depositions from the defendant who does not consent, the plaintiff must either

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138. See Setear, *supra* note 13, at 616–17, 631–32.

139. Resnik, *supra* note 33, at 378.

140. Peckham, *supra* note 50, at 263.

141. See *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (stating that reviewing courts examine discretionary decisions of the trial court only for abuse of discretion).

142. See, e.g., *Gov't of Ghana v. ProEnergy Servs., LLC*, 677 F.3d 340, 344 (8th Cir. 2012) (noting that appellate courts review discovery rulings in a "narrow and deferential" way, and the appellate court will not reverse such rulings "absent a gross abuse of discretion resulting in fundamental unfairness").

143. FED. R. CIV. P. 30(a)(2)(A)(i).

file a motion with the court or decide that the issue is “not worth the candle” and live with the ten depositions. The judge’s ruling on the motion to enlarge the number of depositions is technically subject to appeal, but is virtually impossible to overturn.<sup>144</sup> If the plaintiff decides to live with the default limit, there is no ruling to appeal.

If the same case were proceeding before an active, managerial judge, the judge would engage in some dialog with the parties regarding the number of depositions appropriate for the case at an initial scheduling conference. The plaintiff would advocate for a higher limit, and the judge would either agree or disagree, setting the limit in the initial CMO. The judge’s managerial ruling would be on the record and technically subject to appeal, but would be virtually impossible to overturn just like the ruling on the discovery motion before the passive judge.<sup>145</sup>

In short, the vast majority of the pretrial process entails intensely discretionary decisions that are virtually immune from appeal, whether decided by an active judge, a passive judge, or the parties. Appealability, therefore, is not a compelling reason to condemn active judges so long as all proceedings are on the record.

The above scenario does illustrate, however, how much more sensible the process is when the judge schedules an initial conference and takes an active role in managing the case. If the parties come to the conference with an agreement on the appropriate number of depositions, the judge is quite likely to use that number in the CMO. If the parties cannot agree, then an exchange at the conference is much more efficient and less costly than formal motion practice, and there is no reason to conclude that a formally briefed motion would produce a different, much less better, result. Assuming the conference is on the record, the judge’s decision is transparent and subject to appellate review comparable to that for an order issued following a formal motion.

An additional measure to address this concern—albeit one this Article does not advocate—is to require judges to articulate explicitly the basis for their rulings.<sup>146</sup> With such a requirement, judges’ case

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144. See, e.g., O’Leary v. Accretive Health, Inc., 657 F.3d 625, 636 (7th Cir. 2011) (applying the “abuse of discretion” standard of review to rulings that adjust the deposition limits).

145. See *supra* notes 141–42 and accompanying text (observing the standard of review is the same in either situation).

146. See *Thornburg*, *supra* note 64, at 1322 (examining the potentially clarifying effect that detailed, reasoned, and published managerial orders and decisions might have on the appeal process). However, any possible benefit might be undermined because the decisions: (1) might be too factually-specific to represent helpful

management rulings would more easily be subject to scrutiny by the parties, the public, and appellate courts.

## 2. *Improper settlement pressure*

Another concern is that managerial judges will try to coerce parties into settling cases.<sup>147</sup> It is not clear how frequently such coercion occurs, but survey data suggest that it does not occur in the majority of cases and that defendants report experiencing such coercion more frequently than plaintiffs.<sup>148</sup>

Few would defend the judge's coercive tactics described in Professor Resnik's hypothetical—postponing ruling on a substantive ruling while at the same time advising the parties that the court would be unhappy if the case did not settle, and then requiring the parties to attend multiple settlement conferences.<sup>149</sup> At the same time, it is a mistake to equate active case management with settlement strong-arm tactics. Judges have many powers that are subject to beneficial use, but also subject to abuse. The preferable approach is to discourage and police the abuse, not divest judges of discretionary powers.

A starting point is to change the metrics we use to evaluate judges—the current metrics arguably incentivize the coercive behavior that Resnik describes. The metrics that the Administrative Office of the U.S. Courts uses to evaluate judges primarily measure speed and volume of case resolution—how many cases a judge resolves in each period and how long cases have been on the judge's docket.<sup>150</sup> Of course, the speed at which a judge adjudicates cases is important, but it is only one small measure of a judge's overall effectiveness—it does not take into account accuracy and cost-effectiveness of resolution, satisfaction of the lawyers or parties, or

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patterns without developing extensive case law; (2) would not communicate how effective the trial plan actually was; and (3) would not afford any opportunity to evaluate the effectiveness of the trial plan. *Id.*

147. See Resnik, *supra* note 33, at 390 (suggesting that active, directorial judges might maneuver for a particular outcome by discussing with litigants the high costs, risks, and length of trials, as well as sharing personal opinions about potential outcomes).

148. ABA SURVEY, *supra* note 29, at 130 (reporting that twenty-three percent of plaintiffs' lawyers and forty percent of defendants' lawyers agree or strongly agree with the statement that "[j]udges inappropriately pressure parties to settle cases").

149. Resnik, *supra* note 33, at 390.

150. William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PA. ST. L. REV. 55, 57 (2013) (explaining that "court 'productivity' studies focus nearly exclusively on timeliness measures, such as the time from case filing to disposition or the number of motions that are not resolved within six months").

any broad measure of justice.<sup>151</sup> More importantly for this purpose, the pressures from this speed-oriented metric may cause some judges to coerce cases to settle in an effort to improve their statistics.<sup>152</sup>

Part of the solution, again, is not to abandon the notion of active judges, but rather to use better metrics for evaluating judges, or at least to place less emphasis on speed and volume when evaluating effectiveness. Judge William Young and Professor Jordan Singer have proposed a metric they term “bench presence,” which measures the time a judge sits on the record with the parties.<sup>153</sup> They include arguments and conferences on the record as well as trials in their evaluation, reasoning that bench presence is a good proxy for fairness because it promotes four values: “(1) opportunities for participation and voice; (2) the neutrality of the forum; (3) the trustworthiness of legal authorities; and (4) the degree to which people are treated with dignity and respect.”<sup>154</sup> They favor time when the judge is sitting in the courtroom, but also include proceedings in chambers, so long as they are on the record.<sup>155</sup>

While bench presence may not be the perfect or only metric for evaluating judges,<sup>156</sup> the point is that our current metric of volume and speed of adjudication measures only one aspect of a judge’s effectiveness, and may prompt some judges to coerce parties to settle. The solution is to change the metric, not to prohibit judges from managing cases on their dockets.

The other part of the solution is to take measures that discourage judges from exerting excessive settlement pressure. Conducting all proceedings on the record should largely curb improper settlement pressure, but the

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151. See *id.* (denouncing measurement of productivity that only considers the speed at which a district court can dispose of cases); Steven S. Gensler & Lee H. Rosenthal, *Measuring the Quality of Judging: It All Adds Up to One*, 48 NEW ENG. L. REV. 475, 475 (2014) (arguing that measuring productivity of district courts in terms of a judge’s speed does not account for the quality of a judge’s work).

152. See Resnik, *supra* note 33, at 390 (entertaining a hypothetical situation typifying ways in which a judge might pressure litigants to settle their claims).

153. Young & Singer, *supra* note 150, at 58 (proffering “bench presence” as a better measurement of judicial productivity because it takes into account procedural fairness, reorients the focus back on a judge’s main function of managing trials and hearings, and can be measured directly and easily).

154. *Id.* at 80.

155. *Id.* at 89 (calling proceedings in chambers the “weak form” of bench presence).

156. For example, bench presence might have the unintended effect of incentivizing judges to schedule unnecessary proceedings or to prolong necessary proceedings in order to enhance their bench presence measures.

rules of procedure or judicial conduct could certainly be amended to address, or potentially eliminate, the judges' role in settlement.<sup>157</sup>

A potential corollary to the concern that managerial judges will exert excessive settlement pressure is that more cases would settle as a result, exacerbating the decreasing trend in the number of cases that go to trial.<sup>158</sup> This argument confuses pretrial *management* with pretrial *resolution*. Case management is not inconsistent with the notion of jury trials and should not be anathema to those who bemoan the decrease in jury trials. Judge Young, a strong proponent of jury trials, wrote that requiring one to choose between jury trials and active judicial management is a false choice: "Case management is not an end in itself but a means to other ends, and one of those ends is trial."<sup>159</sup>

One of the potential causes of the decline in trials is the cost of litigation (and in particular the discovery process);<sup>160</sup> so, by making the litigation process more efficient and cost effective, judicial management might actually *increase* the number of trials. If parties know that the judge will actively manage their case to eliminate unnecessary cost and delay, they might be more willing to slog through the pretrial process and proceed to trial.

### 3. *Lack of partiality*

Exposing a judge to the parties and their arguments during the pretrial process, critics of managerial judging argue, would remove

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157. For example, the Federal Rules of Civil Procedure could prohibit the judge who is handling a case from conducting any settlement discussions—a magistrate judge or a different Article III judge could handle them. Similarly, the Code of Conduct for United States Judges could be amended to more explicitly spell out what is and is not appropriate in a settlement conference.

158. See, e.g., Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1935 (1997) (suggesting that the decrease in number of cases that go to trial is due, in part, to a defective civil jury trial system); see also Stanley Marcus, Judge, U.S. Court of Appeals for the Eleventh Circuit, "Wither the Jury Trial," Speech Before the National Conference of Law Reviews (Mar. 13, 2008), in 21 ST. THOMAS L. REV. 27, 28, 30 (2008) (positing that jury trials are the bedrock of the rule of law because they allow the public to both observe and participate in the judicial process).

159. Gensler & Rosenthal, *supra* note 151, at 484; see William G. Young, *An Open Letter to U.S. District Judges*, FED. LAW., July 2003, at 32–33 (clarifying that his argument does not go to either extreme of maligning the jury trial process or denigrating the judicial role).

160. See, e.g., Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (concluding that "cost-conscious defendants" will be forced by the cost of discovery to "settle even anemic cases" before reaching summary judgment proceedings); ABA SURVEY, *supra* note 29, at 2 (finding that eighty-one percent of respondents felt litigation is too expensive, while eighty-two percent felt discovery in particular is too expensive).

the blindfold from Lady Justice and improperly influence the judge's rulings.<sup>161</sup> This may be the weakest criticism of managerial judges.

Good, impartial judges should be "blind" (or impartial) toward the specific parties in the case, not ignorant of the facts or the parties' arguments. In other words, we do not want judges making particular rulings because they know one party or have personal biases about the parties, but we do want judges making rulings informed by the facts and the parties' arguments.<sup>162</sup> Judges are often exposed to inadmissible evidence at trial, just as they might be in the pretrial process.<sup>163</sup> They must set aside their biases at all stages of the process—at trial as well as in the pretrial processes.<sup>164</sup> Judges are exposed to the parties' arguments, to contested evidence, and to other facts and allegations about the case in motions to dismiss, jurisdictional challenges, disputed discovery motions, motions in limine, and motions for summary judgment. There is no principled difference in the effect on a judge's neutrality or "blindness" between these events—that even the most passive judge must adjudicate—and a Rule 16 conference conducted on the record by an active judge. In other words, there is nothing inherent in the process of actively managing a lawsuit that renders the judge incapable of remaining fair or impartial.

#### *4. Judicial training*

Critics of judicial management have further observed that judges are not chosen or trained to be managers.<sup>165</sup> This is another important point, but one that does not militate restricting judges to presiding over trials. Quite the opposite, it militates changing the criteria by which we select judges and the way we train them.

As outlined above, unless we fundamentally restructure our civil litigation system, only a tiny portion of the cases that are filed go to trial. Should we select judges based on their skill at evidentiary objections and send them to judge's school to learn the finer points of conducting a trial so they can preside over the one percent of cases that make it that far in the process? Or should we broaden our

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161. See Resnik, *supra* note 33, at 383 (explaining that Lady Justice's blindfold represents the idea that justice is fair and impartial, and cannot be influenced or corrupted the way ordinary people can).

162. See Flanders, *supra* note 36, at 520 (arguing that many of the rulings judges make are better shaped by context, such as relevance rulings).

163. *Id.*

164. Peckham, *supra* note 50, at 262–63.

165. Bone, *supra* note 63, at 1963 (observing that scholars have historically overlooked the fact that there is no empirical support for the proposition that trial judges can effectively modify and adopt trial procedures on a case-by-case basis).

criteria to emphasize selecting judges who have the background and temperaments to manage cases well and then train them in case management? Unless and until the realities of trial frequency in the federal court system change significantly, case management should be the primary component of the selection and training of judges, although, of course, not to the exclusion of trial skills.

##### *5. Judges lack the necessary information*

A concern related to judicial training is whether judges have the information necessary to make appropriate decisions regarding issues like proportionality.<sup>166</sup> When the parties come before the court for the initial scheduling conference, the judge knows very little about the case.<sup>167</sup> Meanwhile, the parties are incentivized to distort or exaggerate the circumstances to support their preferences.<sup>168</sup> This is another important concern, but it weighs not in favor of less active management, but in favor of more *ongoing* active management.

The hypothetical above where the plaintiff sought to expand the number of depositions allowed by the Rules illustrates this point nicely.<sup>169</sup> The active judge scheduled a Rule 16 conference prior to issuing a CMO. At the conference, the plaintiff advocated for a higher limit, and the defendant advocated against increasing it. If the judge concluded that she did not have enough information about the dispute and the sources of evidence to make an informed balancing of the benefits and burdens of the additional depositions—a proportionality ruling—she could set an initial limit in the CMO while reserving the option to adjust the limit after assessing the effectiveness of the initial depositions. The judge could return to the topic at conferences conducted as discovery progressed, asking the parties to explain what depositions had already occurred and what their positions were at that time regarding the need for additional depositions. The parties might be in a position at that point to agree

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166. See Easterbrook, *supra* note 13, at 638–39 (stating that judges’ ability to detect and discourage impositional discovery requests is limited because the judge knows less than the parties, and the parties themselves often do not know details about their cases until after discovery); see also Elliott, *supra* note 124, at 331 (noting that potential benefits of managerial judging hinge on the extent and accuracy of a judge’s understanding of a particular case); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 793 (1993) (acknowledging that judges may not have sufficient understanding of a case to exercise full and complete control over a case).

167. Easterbrook, *supra* note 13, at 638.

168. *Id.*

169. See *supra* notes 143–45 and accompanying text (elaborating on the hypothetical).

on the need for additional depositions or they might still need the judge to make a ruling. If so, the judge's ultimate ruling would be based on this new and better information.

Keep in mind that not only is the judge lacking in information critical to making nuanced proportionality assessments at the outset of the case, but the parties typically lack that information as well. Each party must speculate about what information the other has, and may press for discovery that is not cost effective for either party simply because of the vague possibility that the discovery might turn up important evidence. An ongoing fluid process, captained by an active judge, allows all of the stakeholders to adjust as additional information becomes available.

In other words, no one—neither the judge nor the parties—is in a position to make fully informed decisions about proportionality and the various other pretrial issues that arise at the outset of a case when nothing more than the contents of the pleadings is known. A pretrial process that facilitates adjustment over the course of the litigation—active ongoing judicial case management—is inherently more likely to get things right than a pretrial process that makes static decisions at fixed junctures—passive judicial adjudication.

#### *6. Judicial discretion is bad*

Perhaps the most troubling concern about active judicial case management is the notion that giving judges discretion is a bad thing. Professor Tidmarsh expressly opined that vesting judges with discretion leads to “expense, delay, unpredictability, and abuse of power.”<sup>170</sup> Each instance where a judge may exercise discretion, in Tidmarsh’s view, has the potential to interfere with the resolution of the case on the merits,<sup>171</sup> and, therefore, should be avoided because of inevitable expense and delay.<sup>172</sup>

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170. Tidmarsh, *supra* note 60, at 558.

171. *Id.* Part of the problem may be the attitude that resolution of a case on the merits is the only successful outcome of the litigation process. Certainly, a trial on the merits is an essential component of the litigation process, and any procedure or process that forces parties to settle or abandon their claims is problematic. But settlement is the right outcome for many disputes, and any set of rules or principles that discourages settlement or views it as a uniformly bad outcome is misguided. We do not want parties to settle cases because the judge has coerced them or because the litigation process is so burdensome or expensive that they abandon their claims or defenses, but we do want them to settle when an appropriate compromise is available. See Jean Xiao, *Heuristics, Biases, and Consumer Litigation Funding at the Bargaining Table*, 68 VAND. L. REV. 261, 263, 287 (2015) (intimating that litigants may reject reasonable settlement offers when they have an inaccurate understanding of

Although not stated as overtly by other scholars, the notion that judicial discretion is at odds with justice is an undercurrent in much of the opposition to active judges. Professor Resnik's concern that judges will coerce settlements is, at its heart, a concern that if we give judges the discretion to manage cases, they will abuse that discretion by strong-arming parties into settlements that they would otherwise not accept.<sup>173</sup>

This lack of trust in judges to exercise discretion justly and appropriately implicates issues much more profound than how active or managerial our judges are—it signals a lack of faith in the entire judicial system. Judges, whether active or passive, must exercise discretion throughout the litigation process. Virtually every discovery issue, for example, is discretionary. Whether a discovery issue comes before a passive judge on a contested motion or arises in a discovery dialog initiated by an active judge, its resolution will require discretion. Likewise, many trial rulings are discretionary.<sup>174</sup> To take discretion out of judges' job descriptions would require an entirely new judicial employee handbook.

Right now, judges have almost unfettered liberty to manage the cases on their dockets.<sup>175</sup> Our current rules do not require active case management, but they certainly allow it; a judge may hold as many or as few conferences as she pleases and may raise almost any issue at those conferences.<sup>176</sup> An active judge with the predilections that cause the concerns discussed in this Article has ample opportunities to act on those predilections. Conversely, a passive judge may sit quietly on the sidelines while a case flounders wastefully and ineffectively. It is easy to imagine scenarios where active judges cause harm, but it is equally easy to imagine scenarios where a judge's laissez-faire approach causes it.

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the costs and benefits of settling and going to trial).

172. Tidmarsh, *supra* note 60, at 558.

173. See Resnik, *supra* note 33, at 425 (discussing a hypothetical case in which the presiding judge attempted to induce the parties to settle by holding separate meetings, challenging the parties' arguments, and proposing specific settlement figures).

174. Balancing the probative value of evidence against the prejudicial value under Rule 403 of the Federal Rules of Evidence is one example. See FED. R. EVID. 403.

175. See, e.g., Smith v. Psychiatric Sols., Inc., 750 F.3d 1253, 1262 (11th Cir. 2014) (recognizing that district courts' authority to manage their dockets and individual cases is "unquestionable" and "broad"), cert. denied, 135 S. Ct. 1417 (2015); Grayson v. O'Neill, 308 F.3d 808, 817 (7th Cir. 2002) (en banc) (finding that the "notoriously crowded dockets" of federal district courts necessitate significant autonomy and control on the judges' part over their dockets).

176. FED. R. CIV. P. 16(a) (authorizing pretrial conferences and placing no limitation on the number of conferences a judge may schedule or the topics that a judge may address at the conferences).

The fact that a judge may not exercise discretion perfectly is not a reason to limit judges to non-discretionary tasks. As fallible humans, we must expect that judges will exercise their discretion imperfectly (and perhaps sometimes with motives of which we do not approve). However, if we cannot trust the majority of our judges to exercise their judgment competently and in good faith, then our system needs much more than a decision on active versus passive judges. If we do not trust our judges, we need to change the way we choose, train, and monitor them—not strip them of all discretionary powers.

### C. A Call for Mandatory Ongoing Interaction

Incompetence and malfeasance aside, some cases will proceed better with active management by the judge, and some cases will proceed satisfactorily, or even better, without active management. Distinguishing these two categories requires—of course—a judge to exercise discretion. There are many circumstances that might flag a case that will require more active management: significant discrepancies between the parties' resources; one party having significantly more ESI than the other; delay being particularly disadvantageous to one party; a lack of cooperation between the parties; fee shifting provisions such as that found in 42 U.S.C. § 1983; and the significance of the stakes, among other things.

The question is, how does the judge determine whether a case will proceed better with active management, and if so, the optimal level and type of management? It seems obvious that judges cannot make this determination accurately in the isolated confines of their chambers. Rather, judges must gain some understanding of the dynamics of each case. The optimal tool for gathering the necessary information is already in the Rules—conferences under Rule 16.<sup>177</sup>

The data suggest, however, that judges are not using this tool.<sup>178</sup> In more than half of the cases, the judge did not even conduct an initial Rule 16 conference before entering the CMO.<sup>179</sup> Thus, despite the fact that survey data strongly advocate a more efficient and satisfactory process through more active judicial involvement,<sup>180</sup> the majority of judges are simply defaulting to passive case management without any consideration of case particulars.<sup>181</sup>

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177. *Id.* (allowing the court to schedule unlimited pretrial conferences to address any relevant topic or learn more about a particular case).

178. FJC REPORT, *supra* note 16, at 13.

179. FJC REPORT, *supra* note 16, at 13.

180. ABA SURVEY, *supra* note 29, at 126.

181. *Id.*

Given the underutilization of Rule 16 conferences to shape the pretrial process, the Rules need to be amended to require more interaction between judges and the parties, or at least to set more interaction as the default—permitting and merely encouraging more interaction has proven ineffective.<sup>182</sup> That is not to say that the Rules should mandate micromanagement. Rather, the Rules should mandate enough interaction that the judge can assess the proper amount of judicial management. If the judge's interactions with the parties persuade the judge that the parties are fully capable of managing the process themselves and are proceeding appropriately, the judge can make an informed decision to stay out of the way. But it should be an informed decision after some interaction with the parties, and the judge should monitor the case as it proceeds to ensure that it is proceeding appropriately without the judge's assistance.

The precise form and frequency of these interactions should be flexible, since we have one set of rules that is applicable to cases of all shapes and sizes. At a minimum, the judge should be required to conduct an initial Rule 16 conference prior to issuing the initial CMO and another conference at the end of fact discovery. These junctures are the major planning and shaping points of the process. Periodic conferences during discovery for all but the simplest cases with the lowest stakes and very short discovery periods would yield additional time and cost-saving benefits.

These conferences could be in person or by telephone, depending on the lawyers' locations and the nature of the case and conference, but they should not be by email or written submission. This real-time exchange requires the judge to engage with the lawyers and take some action, even if the outcome is a simple statement to the effect that "things seem to be going fine, carry on."

Additionally, the judge should conduct a conference when a party is planning to file a contested motion. Many judges already have

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182. A variant on this proposal would be to give either party the right to request that the judge conduct regular conferences and require the judge to do so upon such a request. Under this approach, if any party feels that the process is not working optimally, it can trigger greater judicial involvement. Conversely, if all parties believe that they are proceeding appropriately and do not need the judge's oversight and management, they can forego their right to request greater judicial involvement. At the same time, the judge would retain the discretion to conduct any conferences she deems appropriate, even if the parties do not request additional judicial involvement. This approach entails a risk that some judges might disfavor requests for regular conferences and might discourage the party from making the request. Ultimately, though, we need to trust judges to conduct their duties with integrity and in good faith.

practices along these lines. For example, the Southern District of New York implemented a pilot program that required such conferences.<sup>183</sup> At the pre-motion conference, the judges may discuss the nature of the motion and their preliminary reactions and thoughts about it. That process has the potential to focus and streamline the briefing and even to eliminate the motion altogether if either party concludes it is likely to lose. For discovery motions, the judges could also explore the nature and extent of the parties' meet and confer as required by Rules 26 and 37 to confirm that it was meaningful.<sup>184</sup>

For example, suppose one party is planning to file a summary judgment motion. At the pre-motion conference, the judge might ask the parties to explain their positions. If the judge thought that one factual issue seemed to be genuinely disputed, the judge might ask the moving party how it planned to demonstrate that there was no dispute as to that issue. That dialog might lead the parties to focus the briefing on that one disputed issue, or it might persuade the moving party that it was doomed to lose the motion. Either way, the process becomes more efficient through the pre-motion conference.

The objective of such conferences is not to eliminate motion practice altogether. Just as a judge should not coerce a party to settle a case against its will, neither should a judge coerce a party not to file or oppose a motion. So long as the process is not coercive, it can make the litigation process more efficient.

These conferences need not increase the cost of litigation. Although the conference is another event that the lawyers must prepare for and attend, the legal fees for attending such a conference should be more than offset by the savings achieved by streamlining the process. Furthermore, if the judge concludes that the parties are managing the litigation process well themselves without the need for much active intervention, the conferences could simply be short telephone conference calls to confirm that status. Ultimately, the more involved the judge is in the pretrial process, the better able she is to manage its course.

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183. See JUD. IMPROVEMENTS COMM., PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES 8 (2011), [http://www.nysd.uscourts.gov/cases/show.php?db=notice\\_bar&id=261](http://www.nysd.uscourts.gov/cases/show.php?db=notice_bar&id=261).

184. See FED. R. Civ. P. 26(f) (requiring parties to meet and confer to create a discovery plan for submission to the court before seeking form discovery); FED. R. Civ. P. 37(a)(1), (d)(1)(B) (requiring parties to meet and confer with the opposing party before moving for an order compelling disclosure or discovery, or moving for sanctions for failing to attend one's own deposition, answer interrogatories, or respond to request for inspection).

## CONCLUSION

The goal of our federal judicial system is articulated in Rule 1: “the just, speedy, and inexpensive determination of every action and proceeding.”<sup>185</sup> In some cases, that goal is achieved by efficient and effective pretrial proceedings that allow the parties to prepare for and get to trial quickly and inexpensively. In other cases, it may entail allowing the parties to discover the information necessary to reach an appropriate settlement. In still others, it may mean weeding out meritless claims or defenses through appropriate motion practice. Customizing the pretrial process to facilitate these goals requires the exercise of discretionary judgment.

In our adversarial system, that customization is enhanced by the involvement of a neutral third party—the judge. The data suggest that lawyers and clients believe that active participation by the judge makes litigation quicker, less costly, and more satisfying.<sup>186</sup> At the same time, although the current Federal Rules of Civil Procedure allow judges to actively manage their cases, the Rules do not require active management. While some judges may be quite active, the majority of judges are just the opposite.<sup>187</sup>

We also know that inefficiencies and excessive cost in the pretrial process are barriers to justice. Plaintiffs choose not to bring cases for which they cannot justify the high cost of litigation.<sup>188</sup> Defendants settle cases with little merit to avoid those same high costs.<sup>189</sup> Moreover, a growing number of parties are choosing private dispute resolution alternatives over formal litigation.<sup>190</sup> Privatizing litigation has many risks, including lack of appellate safeguards, loss of the development of common law, lack of transparency, and loss of public confidence and benefit.<sup>191</sup>

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185. FED. R. CIV. P. 1.

186. See ABA SURVEY, *supra* note 29, at 126 (finding that most lawyers and litigants believe greater judicial management leads to greater party satisfaction and efficient case resolution).

187. See, e.g., FJC REPORT, *supra* note 16, at 13 (noting that most judges entered a case management order without first holding a Rule 16 pretrial conference).

188. See ABA SURVEY, *supra* note 29, at 9, 172 (reporting that almost ninety percent of plaintiffs’ lawyers turn away cases that are not cost effective).

189. See *id.* at 2, 157 (reporting that high litigation costs force over ninety-three percent of defendants’ lawyers to settle cases that should not be settled on the merits).

190. See Bennett et al., *supra* note 7, at 307 (asserting that the number of civil trials is declining in part due to the growing popularity of alternative dispute resolution).

191. See, e.g., Marcus, *supra* note 158, at 30 (identifying the public nature of jury trial as central to the legitimacy of the American judicial system).

If public litigation is to avoid extinction, it must evolve and adapt to the new litigation environment. One important step is to increase “sustained, active, hands-on judicial case management.”<sup>192</sup> To achieve this, we must embrace case management as a tool for justice instead of fearing it as an impediment. We must select judges for their abilities to manage cases fairly and effectively. We must orient their education toward case management. We must mandate that they manage their cases diligently, fairly, and transparently. And we must evaluate them on their case management.

The Federal Rules of Civil Procedure were conceived to be flexible enough to handle cases of all size and substance, but they were never designed to be static. Rather, we have a Standing Committee tasked with the continual evaluation of the rules’ efficacy<sup>193</sup>—a recognition that things change in the world of litigation and that the rules must evolve in parallel. The need for active judicial case management and the reluctance of many judges to manage their cases voluntarily warrant an amendment to the Rules—building case management into the federal system.

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192. CIVIL LITIGATION REPORT, *supra* note 20, at 4.

193. See *How the Rulemaking Process Works*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> (last visited Dec. 1, 2015) (explaining that the Judicial Conference’s Committee on Rules of Practice and Procedure, commonly known as the Standing Committee, constantly oversees the operation of the federal rules and evaluates proposals to improve the rules from its five Advisory Committees (on Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules), which, if accepted, are ultimately recommended to the U.S. Supreme Court).