

FOUR YEARS AFTER DUKE: WHERE DO WE STAND ON
CALIBRATING THE PRETRIAL PROCESS?

by
Steven S. Gensler* & Lee H. Rosenthal**

The current Civil Rules are built upon the expectation that judges will manage their cases. But the rules themselves provide little guidance on the critical questions of calibration and scale necessary to guide judges on how to manage. Are the rules designed for big cases, ordinary cases, or small cases? When should judges impose new limits or depart from existing ones, and in which direction? Judges are told to strive for proportionality, but benchmarks are not always apparent. This essay explores various ways that courts and rulemakers have tried to address the problems that arise from having a single set of rules in a system with a wide range of case types and sizes. We conclude that the best model is to calibrate the general civil rules to ordinary cases and use case management and special protocols for the smallest and largest of cases. And, ultimately, the key to such a system remains finding ways to help judges know not just how to tailor their cases but when tailoring is needed.

INTRODUCTION	644
I. THE CONTINUING CALL FOR CASE MANAGEMENT	647
II. SCHEME-BASED CASE-MANAGEMENT REFORM EFFORTS.....	650
A. <i>The General Rules</i>	651
B. <i>Special Schemes</i>	654
C. <i>Presumptive Limits</i>	657
III. THE PURSUIT OF PROPORTIONALITY	659
IV. THREE WAYS TO START	665
A. <i>Live Rule 16(b) Case-Management Conferences</i>	666
B. <i>Premotion Conferences</i>	667
C. <i>Oral Argument</i>	670
D. <i>The Reappearing Judge</i>	670
V. THE KRAVITZ WAY	671

* Welcome D. & W. DeVier Pierson Professor, University of Oklahoma College of Law.

** United States District Judge, Southern District of Texas. We want to thank the Lewis & Clark Law School and the Federal Judicial Center for hosting this Tribute to Judge Mark R. Kravitz and for the invitation to participate. We dedicate this Essay to his memory. It is our privilege to pay our own small tribute to a great judge, a terrific colleague in the rulemaking process, and a wonderful person and friend.

INTRODUCTION

In 2008, Judge Mark R. Kravitz had finished his first year as Chair of the Advisory Committee for the Federal Rules of Civil Procedure. The prior few years had seen a whirlwind of rulemaking activity. In 2008, the Advisory Committee published for comment two major proposals, one that would limit expert discovery under Rule 26 and another that would overhaul summary-judgment practice under Rule 56.¹ That work followed hard on the heels of the 2006 e-discovery amendments;² the massive project, completed in 2007, of “restyling” the Civil Rules from top to bottom, to clarify, simplify, and modernize them, all without changing substantive meaning;³ and another large project, the revision of the time-calculation provisions in all the procedural rules to make them consistent, clear, and workable with electronic filing.⁴ In 2008, the Civil Rules had moved into the current century, with improvements large and small. There was a lot for lawyers, litigants, judges, and the academy to absorb, and the Advisory Committee recognized the need for a breather.

Many a chair would have surveyed the recent work with satisfaction and given the Committee—and the Chair—a breather as well. But for Judge Kravitz, taking a breather did not mean a restful stay at some rule-making beach. Instead, Judge Kravitz saw an important opportunity. It had been nearly 20 years since the Civil Justice Reform Act of 1990 prompted any large-scale inquiry into what could be done to address recurrent complaints of undue costs, burdens, and delays in civil cases.⁵ And while so much had changed since then, two words say enough: the

¹ ADMIN. OFFICE OF THE U.S. COURTS, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE (2008), *available at* <http://www.uscourts.gov/uscourts/rules/rules-published-comment.pdf>.

² REPORT OF THE CIVIL RULES ADVISORY COMMITTEE TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (May 2005) (presenting for approval the package of e-discovery amendments), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf>. *See generally* Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167 (2006) (providing an overview and analysis of the 2006 e-Discovery amendments).

³ *See generally* Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761 (2004) (comprehensively discussing the history, goals, and limits of the restyling of the rules).

⁴ REPORT OF THE CIVIL RULES ADVISORY COMMITTEE TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (May 2008) (presenting for approval the time-computation project for the Civil Rules), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-2008.pdf>; *see also* SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (Sept. 2008) (discussing broader project to standardize time-computation across all the rules), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2008.pdf>.

⁵ *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471–482 (2012)).

computer. Its litigation child, electronic discovery, emerged and swiftly became a large and challenging presence. Not only discovery, but litigation in general, had changed as a result.

Judge Kravitz saw the need for a thoughtful, systematic overview of how well the Civil Rules scheme was operating and the opportunity in the “breather” to do that review well. Under his leadership, that insight became the Duke 2010 Conference on the Civil Rules. The Duke Conference generated a rich store of empirical data and analytical papers, drawing not only on experience in the federal courts but also in a number of state courts. The Duke Conference brought together a large and diverse group of stakeholders to ask whether the Rules, and the Advisory Committee tasked with monitoring them and proposing needed changes, were doing what they needed to do.⁶

This Essay honors Judge Kravitz and his contributions by looking at what the Duke Conference accomplished. The principal takeaways from the Duke Conference are easy to identify because they reflect such a clear and broad consensus. Many users of the current scheme—whether speaking from the perspective of plaintiffs or defendants, business or public interest, government or private litigants—complained that a wide variety of cases took too long and cost too much to resolve. But there was no enthusiasm for junking the current system and beginning anew. Instead, the top priority the users identified was to increase judicial engagement and supervision in the cases that need it, when it is needed. The remedy most prescribed at the Duke Conference for reducing unnecessary costs and delay was more and better judicial pretrial case management. The remedy reflected a strong, shared belief that judicial management is essential to tailoring the pretrial process to the reasonable needs of the case.

This message from the Duke 2010 Conference clearly conveyed user dissatisfaction, but not with the Civil Rules scheme itself. Rather, the dissatisfaction was with how that scheme was being implemented in individual cases. More precisely, it was with the judges’ *failure* to implement the scheme. The users complained that, although the rules provide judges many tools to tailor and stage discovery and motions to what is reasonable for specific cases, those tools are not consistently or sufficiently used. The Report to Chief Justice Roberts summed up the sentiment of the participants this way: “What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active,

⁶ See REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 1, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Report%20to%20the%20Chief%20Justice.pdf> [hereinafter DUKE REPORT] (“The Conference was designed as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation.”).

hands-on judicial case management.”⁷ No other message from the Duke Conference was stated as clearly, as often, or with such broad support.

This lesson from the Duke Conference led to an important threshold question. Is the need for more consistent, timely, and effective judicial case management a problem that rule amendment can help solve, or is something else needed instead of, or in addition to, changing rule text? Many proposals for changing the Civil Rules have been presented, before and since Duke. Case management and the discovery limits often referred to under the label “proportionality” have been an explicit part of the Civil Rules since 1983.⁸ In the years since, Rule 16 and Rule 26, the principal sources of the case-management tools in the rulebook, have been amended a combined six times to streamline the discovery process and reduce unnecessary costs and delay.⁹ Yet, as the Duke Conference revealed, those complaints persist, and, with electronic discovery added to the mix, have grown in volume and intensity. Since the Duke Conference, additional proposed solutions have emerged. This Essay examines what brought us here and what appear to be promising approaches to improvement.

This Essay proceeds in five short parts. Part I recaps the principal takeaway from the Duke Conference and then provides an overview of the resulting Duke Conference Subcommittee and its work. Part II then takes a closer look at one of the approaches explored by the Subcommittee: augmenting the one-size general scheme with special schemes “sized” to fit categories of cases. The main point we make here is that the purpose of the special schemes is not to replace judicial case management but to focus and enhance it. Part III turns to the continuing pursuit of proportionality in discovery. Here, the critical point is to reorient the proportionality debate so that it centers on where discovery should start rather than on where it should end. In Part IV, we briefly discuss some specific case-management practices that we think engage judges when and as needed for particular cases, serving the twin goals of streamlining the pretrial process *and* bringing judges back into the public view.

Part V concludes with some reflections on Judge Kravitz’s approach to rulemaking and case management. Judge Kravitz brought us the Duke Conference and began the work to address the problems it identified. The goals of the Duke Conference, the Duke Conference itself, and everything we talk about in this Essay found real-life expression in how he lived his professional life, as a judge and as a rulemaker. It is our responsibility, to him and to the Civil Rules, to continue that work.

⁷ DUKE REPORT, *supra* note 6, at 4.

⁸ See FED. R. CIV. P. 26 advisory committee’s note (1983). See generally Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 677–78 (2010) (discussing the 1983 amendments).

⁹ Rule 16 was substantively amended in 1993 and 2006. Rule 26 was substantively amended in 1993, 2000, 2006, and 2010. We do not count technical or restyling amendments. FED. R. CIV. P. 16; FED R. CIV. P. 26.

I. THE CONTINUING CALL FOR CASE MANAGEMENT

The Duke Conference did not identify, much less solve, all of the problems that many associate with the federal-court civil pretrial system. But that was never the goal. The goal was to see if we could identify areas of consensus about what was most in need of improvement and what steps were best calculated to achieve it. We could. We did.

One of the key consensus points confirmed something many of us had long believed to be true: in terms of its overall design, people are generally happy with the federal pretrial process. Happy is a strong word, but it applies. There was no call for a procedural revolution.¹⁰ There was no call to scrap the system and start over, or to switch to an alternate pretrial model with rules of pleading, discovery, motions, or trial changed in fundamental ways. Rather, the prevailing sentiment was that the federal pretrial scheme itself is basically sound. It just hadn't been living up to its potential. For some, this problem was most pronounced in the larger, more complex, and more document-intensive cases. The percentage of those cases on the average federal court docket is relatively low. However, the importance of such cases, the demands they place on the judges, the lawyers, and the litigants, and their institutional impacts, are high. But others provided the important reminder that unnecessary cost and delay can be just as crippling—if not more so—to the relatively smaller cases. The need to protect access and discovery rights applies to all litigants across the civil docket.

An equally strong consensus emerged about what would make the scheme work better: more and better judicial management.¹¹ What par-

¹⁰ DUKE REPORT, *supra* note 6, at 5 (“[T]here is no general sense that the 1938 rules structure has failed. While there is need for improvement, the time has not come to abandon the system and start over.”); *see also* EMERY G. LEE III & THOMAS E. WILLGING, ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 6–7 (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/\\$file/costciv2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf) [hereinafter ATTORNEY SATISFACTION REPORT] (compiling survey results and finding no group in any of the surveys who thought the Civil Rules should be rewritten in their entirety to address the needs of modern litigation); EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 70 (2009) (Survey participants overwhelmingly agreed with the statement that “[t]he procedures employed in the federal courts are generally fair.” (internal quotation marks omitted)).

¹¹ DUKE REPORT, *supra* note 6, at 10 (“Pleas for universalized and invigorated case management achieved strong consensus at the Conference.”). Various surveys conducted in preparation for the Duke Conference also found consistent and strong support for reinvigorated judicial case management. *See* ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 124–25 (2009) (Survey respondents overwhelmingly agreed that early intervention by judges helps to narrow the issues and control discovery.); FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 18–19 (2009)

ticipants wanted—what they said will make a difference—is an engaged judge. It was a point that people from across the spectrum of practice returned to again and again as different aspects of the pretrial process were examined. The things users identified as problems either would not be problems, or would be much smaller and short-lived, if judges gave them early and prompt attention.

After the Duke Conference, the Advisory Committee asked Judge John Koeltl to lead a subcommittee to follow up on the many ideas generated during the Conference.¹² What came to be known as the “Duke Conference Subcommittee” identified three major types of work. First, the Subcommittee would consider whether any of the goals identified during the Conference might be advanced through rule amendments.¹³ But the Subcommittee also quickly recognized that many of the insights about cooperation, proportionality, and case management did not identify a need for new rules but a need for new ways to get judges and lawyers to use the existing rules (and any new rules that might be developed).¹⁴ The Subcommittee carefully considered which suggestions would be better pursued outside the rule-amending process by providing different kinds of support for judicial case management.¹⁵ Rounding things out, the Subcommittee also worked with the Federal Judicial Center and others to explore and study innovative projects that might augment the existing case-management scheme. The Subcommittee determined, and we agree, that this combined approach offers the best promise of better case management and, with that, improved cooperation and proportionality.¹⁶

The four years of hard work since the Duke Conference has already produced much. In the wake of the Duke Conference, the Federal Judicial Center added a new section to the Benchbook for U.S. District Court Judges.¹⁷ This is the reference guide that every judge has and that most

(showing similarly strong support among respondents for active judicial case management). For a summary of the survey results, see ATTORNEY SATISFACTION REPORT, *supra* note 10.

¹² DUKE REPORT, *supra* note 6, at 12 (“[A] new subcommittee chaired by Judge John Koeltl has begun to study the many different kinds of projects needed to capitalize on the insights gained from the Conference.”).

¹³ ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK FOR APRIL 10–11, 2014, at 79, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf> [hereinafter APRIL 2014 DUKE SUBCOMMITTEE REPORT] (report of the Duke Conference Subcommittee presented at the meeting of the Advisory Committee on April 10 to 11, 2014); ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK FOR NOVEMBER 15–16, 2010, at 347, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2010-11.pdf> [hereinafter NOVEMBER 2010 DUKE SUBCOMMITTEE REPORT] (report of the Duke Conference Subcommittee presented at the meeting of the Advisory Committee in November 2010).

¹⁴ APRIL 2014 DUKE SUBCOMMITTEE REPORT, *supra* note 13, at 79.

¹⁵ See NOVEMBER 2010 DUKE SUBCOMMITTEE REPORT, *supra* note 13, at 347.

¹⁶ See APRIL 2014 DUKE SUBCOMMITTEE REPORT, *supra* note 13, at 79–80.

¹⁷ See FEDERAL JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES

keep close at hand. New judges in particular consult it often. The Benchbook never had a section on pretrial civil case management, despite the fact that most civil cases are resolved pretrial. The revised edition of the Benchbook includes a detailed section on civil pretrial case management, emphasizing the importance of judicial involvement to tailor discovery and motion practice to the needs of each case.¹⁸ The Federal Judicial Center has offered workshops and seminars on case-management techniques, either as stand-alone offerings or as part of seminars on types of cases ranging from employment disputes to multidistrict litigation. Other groups and individuals are also working on ways to promote and support active judicial case management.¹⁹

Around the country, district courts and individual judges continue to experiment with projects ranging from special rules to manage complex litigation and electronic discovery to “expedited trial” programs that let parties opt for a truncated pretrial process in exchange for a guaranteed early trial date.²⁰ Some of those projects grew directly out of the Duke Conference, including the Initial Discovery Protocols for Employment Cases Alleging Adverse Action²¹ and the Southern District of New York’s Pilot Project Regarding Case Management Techniques for Complex Civil Cases.²² State courts are also experimenting with robust and creative innovations tailored to their own needs.²³

189–204 (6th ed. 2013), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/\\$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf) [hereinafter BENCHBOOK].

¹⁸ *Id.* at 190–99 (describing active judicial case management as “an essential part of the civil pretrial process” and providing detailed and practical guidance for all phases of the pretrial process).

¹⁹ See, e.g., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., WORKING SMARTER NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES (2014), available at http://iaals.du.edu/images/wygwam/documents/publications/Working_Smarter_Not_Harder.pdf (collecting guidance and recommended practices from state and federal court judges from across the country); Jack Zouhary, *The Ten Commandments for Effective Case Management*, THE FED. LAW., Mar. 2013, at 38. We have tried to help the cause as well through a series of articles exploring various aspects and benefits of active judicial case management. See, e.g., Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517 (2012) [hereinafter Gensler & Rosenthal, *Managing Summary Judgment*]; Steven S. Gensler & Lee H. Rosenthal, *Measuring the Quality of Judging: It All Adds Up to One*, 48 NEW ENG. L. REV. (forthcoming 2014) [hereinafter Gensler & Rosenthal, *Measuring Quality*]; Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849 (2013) [hereinafter Gensler & Rosenthal, *The Reappearing Judge*].

²⁰ *Infra* notes 43–48 and accompanying text.

²¹ FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION 1 (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/\\$file/DiscEmpl.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf) [hereinafter EMPLOYMENT CASE DISCOVERY PROTOCOLS] (“This project grew out of the 2010 Conference on Civil Litigation at Duke University, sponsored by the Judicial Conference Advisory Committee on Civil Rules for the purpose of re-examining civil procedures and collecting recommendations for their improvement.”).

²² See REPORT OF THE JUDICIAL IMPROVEMENTS COMMITTEE: PILOT PROJECT

After four years and all of this activity, one thing has not changed. There remains a strong consensus that improved and reinvigorated case management is a key to making the federal civil pretrial system work. We've had four years to ponder whether the Duke Conference came to the right conclusion and to develop buyer's remorse over the call for more and better judicial case management. That has not happened. We hear no voices raised, not even whispers, suggesting that this effort is misguided. This is not to say that everyone agrees with everything that has been proposed in the wake of the Duke Conference. Some of the Duke Conference Subcommittee's published proposals for rule amendments elicited strong opposition.²⁴ But the support for case management continues.

Getting the rules themselves right is necessary. But it is simply not sufficient. Whatever amendments the formal rulemaking process yields, effective implementation of the existing and amended rules will require continued pursuit of more effective judicial case management.

II. SCHEME-BASED CASE-MANAGEMENT REFORM EFFORTS

We turn now to what we refer to as the "scheme-based" reform efforts inspired by the Duke Conference. These proposals and projects operate by adding to or altering the structure—not just the usage—of the pretrial scheme itself. They operate in two different ways. A few of the scheme-based reform efforts would amend the Civil Rules themselves, such as the Duke Conference Subcommittee's published proposal for additional presumptive limits for discovery. Most of the scheme-based reform efforts, however, are external to the rules. They are designed to operate side-by-side with the general Civil Rules and as a result do not require the formal Rules Enabling Act process to establish or change. They include, for example, the Seventh Circuit's Pilot Project on Electronic Discovery, the Southern District of New York's Complex Litigation Project, the Employment Case Protocols, and programs to provide for expedited trials.

REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES ii (2011), available at http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf [hereinafter SDNY COMPLEX LITIGATION PILOT PROJECT] ("The impetus for this project was the 'Duke Conference' sponsored by the Judicial Conference Advisory Committee on Civil Rules.").

²³ See, e.g., CORINA D. GERETY & LOGAN CORNETT, MEASURING RULE 16.1: COLORADO'S SIMPLIFIED CIVIL PROCEDURE EXPERIMENT (2012); PAULA L. HANNAFORD-AGOR ET AL., CIVIL JUSTICE INITIATIVE: NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES (2013); PAULA L. HANNAFORD-AGOR ET AL., SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS (2012) [hereinafter NCSC EXPEDITED TRIAL STUDY] (study of expedited trial programs in six states).

²⁴ See *infra* notes 68–70 and accompanying text.

The question we want to explore is how these scheme-based reform efforts fit into the Duke Conference's call for improved and invigorated judicial case management. We think there is a common theme, but it may be counterintuitive. Because the general Civil Rules are designed to apply transsubstantively across the many types of cases that comprise the federal civil docket, they typically establish general standards and leave the details to be worked out by the judge in individual cases. Under that structure, the Rules provide tools for working out the details, but the Rules do not give the parties or judges much that is concrete or specific. The bright-line directives are few and far between. We think the existing structure strikes the right balance between general guidance and detailed directives, leaving space that can and should be filled in by judges willing and equipped to manage cases. But we recognize that frustration with the long-standing gap between the tools and their effective application has led some to want more hard-and-fast rules and directives. These sentiments might also lead one to conclude that the scheme-based reforms are intended to fill this gap by dictating specific results. To put it another way, one might conclude that the purpose of the scheme-based reforms is to substitute fixed answers that displace a judge's managerial discretion.

Properly understood, however, the scheme-based reforms are all efforts to *enhance* judicial case-management, not to displace it. The point of the scheme-based reforms is not to impose a one-size-fits-this-setting model. It is not to create a set-it-and-forget-it scheme that leaves the judge with nothing to do but look up answers from a preset list and enforce them. The point of the scheme-based reforms is to give judges (and the parties) more case-and-context specific guidance than the general rules themselves can provide, to make management of those cases better and more predictable.²⁵ The scheme-based reforms are extensions of the case-management model. As discussed below, they can be an important part of making that model work.

A. *The General Rules*

To state the obvious—there is only one set of Civil Rules. With relatively few exceptions, they apply as an integrated set for all civil actions.²⁶ Some people think the Civil Rules are “too big.” Some contend that, over the years, the Civil Rules have evolved—especially those governing the

²⁵ See Gensler, *supra* note 8, at 732–34 (discussing suggestions for augmenting case management with subject-specific protocols, including suggestions made at the January 2009 meeting of the Standing Committee on Practice and Procedure); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 405 (2010) (stating that substance-specific protocols “would aid lawyers in advising their clients, and aid judges, by providing suggested standards to help inform their procedural decisions”).

²⁶ Gensler, *supra* note 8, at 697–706 (discussing general principle of transsubstantivity and listing exceptions in the Civil Rules).

discovery process—to reflect the needs of large, complex cases, to the point that they are now overkill in ordinary cases.²⁷ The colorful metaphor used to describe this phenomenon is that the rulemakers have created “Cadillac” rules, forgetting or ignoring the fact that most of us drive “Chevrolets.”

Those who characterize the Civil Rules as Cadillac in size are partly right. The Civil Rules are indeed “big” if you frame the inquiry in terms of the universe of tools available and their potential application. From the joinder rules to discovery to dispositive motion practice, the Civil Rules include provisions sufficient to accommodate the largest and most complex of cases. But if you frame the question in terms of *requirements* rather than availability, the Civil Rules can start to look very small. Party and claim joinder are largely permissive. So too is discovery. The Rules do require parties to make (and supplement) certain initial disclosures,²⁸ but the rest of the discovery process is optional. Nothing in the Rules requires any party to take a single deposition or serve a single interrogatory or document request. Finally, the Rules do not require any party to make any of the dispositive motions. As far as the Rules are concerned, the parties are free to go to trial without taking any discovery or filing a single motion.

Now back to reality. There are some cases in which the parties neither use any of the discovery mechanisms nor file any motions.²⁹ But in most civil cases at least some of the mechanisms provided in the Civil Rules are put to use. Indeed, the odds are good that one or both of the parties will end up feeling that the other side put them to too much use.³⁰ This is the dilemma of the general Civil Rules. As crafted, the Rules must include mechanisms and provisions sufficient to meet the needs of the full array of cases to which they might be applied. But as to any individual case, there is an ever-present risk that these mechanisms and provisions will be used in ways that impede rather than facilitate just, speedy, and inexpensive determination. Calibrating the Rules to individual cases is one good way to describe case management.

The Duke Conference reminded the Advisory Committee of the difficult tightrope it must walk. The need and opportunity to calibrate gen-

²⁷ See, e.g., Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 409 (2011) (“For many simple cases, discovery of the breadth permitted by the existing Federal Rules is not proportional, and its availability is an invitation to economic oppression.”).

²⁸ FED. R. CIV. P. 26(a).

²⁹ Cases decided on administrative records are obvious examples. Another example might be cases in which filing a complaint is incidental to what is essentially a claims-adjustment process, as often occurs with admiralty cargo-damage actions. Cases filed by prisoners or other unrepresented litigants present distinctive patterns and problems.

³⁰ The stereotypes are of a plaintiff claiming that the defendant is overusing dispositive motion practice with the defendant, in turn, claiming that the plaintiff is overusing discovery. Real parties, of course, do not always play to type.

eral rules to individual cases arise from the combination of three things: (1) having rules expansive enough to meet the needs of the widest range of cases; (2) counting on the parties to employ them wisely and judiciously;³¹ and (3) having judges willing to exercise discretionary authority to guide the parties and, where necessary, impose timely order and limits.³² Lawyers and judges do not always like the results they get under the Civil Rules. Complaints of “over-this” or “over-that” are not infrequent. But those same lawyers and judges are loath to give up the options and the flexibility the Civil Rules provide.

We begin with that familiar background for two reasons. First, it explains why we cannot look to the Advisory Committee—or the rules text it monitors and shapes—to calibrate the pretrial process to the needs of individual cases. The rules scheme cannot simultaneously be flexible and calibrated to the specific needs of individual cases. We are not going to achieve proportionality by rule design. That does not mean that we want or should be content with a system where every case gets exactly the same—and therefore often ill-suited or inadequate—pretrial process. But we must remember that the Advisory Committee is not looking for a set-it-and-forget-it size for the Civil Rules. The system we have assumes and requires judicial case management to fit the pretrial process to the needs of individual cases. The Advisory Committee’s goal is to design a scheme that puts judges, lawyers, and litigants in the best position to do just that.

Second, that familiar background also puts the scheme-based reform efforts in context. Whether they alter the Civil Rules themselves or operate side-by-side with the rules, the scheme-based reforms represent efforts to build upon or improve the case-management-driven structure of the Rules. They are designed to facilitate case management by providing helpful guidance, not to undermine it by imposing rigid dictates. At times, this guidance may take the form of default practices or presump-

³¹ The principal architects of the original Civil Rules—Charles E. Clark and Edson Sunderland—did not include extensive provision for case management because they thought the lawyers would regulate themselves out of self-interest. See Steven S. Gensler, *Some Thoughts on the Lawyer’s Evolving Duties in Discovery*, 36 N. KY. L. REV. 521, 524–25 (2009). That ideal has not proved to be sufficient in practice. Nonetheless, the system has not abandoned the idea that the parties and their lawyers share responsibility for using the rules appropriately. Since 1993, the Advisory Committee Note to Rule 1 has stated that “[a]s officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.” FED. R. CIV. P. 1 advisory committee’s note (1993). The proposed amendment to Rule 1 will now explicitly recognize that duty in rule text. APRIL 2014 DUKE SUBCOMMITTEE REPORT, *supra* note 13, at 92 (adding the phrase “employed by the court and the parties” to Rule 1). Speaking more broadly, the new Benchbook section on case management emphasizes to judges that, while judicial case management is an essential part of the civil pretrial process, “[t]he judge and the parties share case-management responsibility.” See BENCHBOOK, *supra* note 17, at 189.

³² See Gensler, *supra* note 8, at 674–88 (discussing the history and role of judicial case management under the Civil Rules).

tive limits, designed to promote the goals of the particular scheme or to conform to customary practice in a specific setting. Because they are targeted to particular settings, they can provide guidance at a level of detail not possible in the general transsubstantive rules. But the critical point remains that their purpose is not to tie the judge's hand but to help her exercise the discretion the general Civil Rules provide.

B. *Special Schemes*

It is useful to look at some of the specific, special schemes developed since the Duke Conference against the recognition that they represent efforts to enhance—not replace—judicial case management. The Southern District of New York started a pilot project in 2011 to “focus on complex cases and to develop procedures that would be implemented by the judges.”³³ As the title indicates, the project goal was not to write rules setting complex-case practice in stone. Rather, the goal was “to consider and recommend best practices for the *management* of complex civil cases.”³⁴ Even the quickest review of the project's recommendations shows they are anything but a rigid script. Nobody could read the pilot project materials and think that the Southern District of New York was trying to reduce the need for judicial discretion or for active engagement in managing complex civil cases.

Another special scheme that grew out of the Duke Conference was the development of the Initial Protocols for Employment Cases Alleging Adverse Action. One of the ideas discussed at the Duke Conference was whether discovery costs could be reduced by developing the equivalent of “pattern discovery” or “routine discovery” practices for specific types of cases. Building on a proposal made in a paper submitted by Joseph Garrison,³⁵ Judge Lee Rosenthal convened a group to experiment with that idea in employment cases. That subject was picked because employment discrimination cases are a large part of federal civil dockets across the country and involve recurring patterns of fact and law. Experienced employment lawyers expressed hope that they could develop “pattern” discovery practices. In November 2011, the Protocols were made available for districts or individual judges to adopt.³⁶

³³ SDNY COMPLEX LITIGATION PILOT PROJECT, *supra* note 22, at ii.

³⁴ *Id.* (emphasis added).

³⁵ See Joseph Garrison, *A Proposal to Implement a Cost-Effective and Efficient Procedural Tool into Federal Litigation Practice*, pt. II.C., available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Joseph%20Garrison%20Proposal%20to%20Implement%20a%20Cost-Effective%20and%20Efficient%20Procedural%20Tool.pdf>.

³⁶ EMPLOYMENT CASE DISCOVERY PROTOCOLS, *supra* note 21. Judges or districts interested in adopting the protocols for their cases should contact senior researcher Emery Lee at the Federal Judicial Center so those cases can be included in the FJC's evaluation of the protocols.

The principal effect of the Protocols is to require both plaintiffs and defendants to produce, without waiting on a request, a core set of materials that are staples of discovery practice in adverse-action cases.³⁷ The Protocols are a form of expanded initial disclosures, not limited to information helpful to the producing party. The disclosure of information the Protocols require is presumptively unobjectionable.³⁸ As a result, the information exchange is expected to occur without either side resorting to motions to compel or motions for protection. Importantly the Protocols do not displace party-initiated discovery or judicial case management.³⁹ But they do help reduce the costs of generating requests for each case—particularly for lawyers who are not regular federal court practitioners—and they reduce (and, anecdotally, effectively eliminate) fights about producing the core set of information and documents these cases require.⁴⁰ The parties and the judge are then free to focus on other aspects of discovery, for which case-tailored guidance is genuinely needed.⁴¹

A third example is the Seventh Circuit's Electronic Discovery Pilot Project.⁴² It is now accepted as modern gospel that preserving, searching for, retrieving, reviewing, and producing electronically stored information (ESI) can be complicated, costly, and risky. The 2006 E-Discovery amendments provided few fixed answers to those problems, in part because the technology that shapes the way specific problems are presented will certainly change quickly, but in uncertain ways. Instead, the Rule amendments created frameworks for identifying disputes early and getting them resolved timely—through judicial case management. The Pilot Project principles continue that theme, providing helpful additional guidance but ultimately relying on active engagement and informed management by the judge.

³⁷ *Id.* at 2.

³⁸ *Id.* at 5–6 (but preserving objections to inaccessibility under Rule 26(b)(2)(B)).

³⁹ *Id.* at 4.

⁴⁰ *Id.* (“The purpose of the pilot project is to encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.”).

⁴¹ An additional (and very helpful) byproduct of the Protocols is to help lawyers deal with clients who do not understand the discovery process or who otherwise might press the lawyers to take an overly technical and confrontational approach to what ought to be uncontroversial areas of discovery. Gensler, *supra* note 8, at 733 (discussing how protocols can help lawyers deal with client expectations); *cf.* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: CIVIL CASEFLOW MANAGEMENT GUIDELINES 14 (2009), available at http://iaals.du.edu/images/wygwam/documents/publications/Civil_Caseflow_Management_Guidelines2009.pdf (“Court-imposed limits on discovery provide lawyers with the ‘cover’ they need to practice limited discovery.”).

⁴² *Discovery Pilot: Seventh Circuit Electronic Discovery Pilot Project*, DISCOVERYPILOT.COM (2014), <http://www.discoverypilot.com/>.

The same phenomenon is found at the other end of the case spectrum—the Chevrolet-size cases and even the motorcycle- and bicycle-size cases. A number of districts and individual judges have started experimenting with expedited-trial options for cases that involve few parties, few issues, and are otherwise “simple.”⁴³ The current Chair of the Civil Rules Advisory Committee, Judge David Campbell, for example, has for several years included an “Expedited Trial Alternative” in his order setting the Rule 16(b) case-management conference.⁴⁴ The parties can elect to forego formal discovery and motion practice in exchange for a trial date in four to five months. Alternatively, the parties can propose a different expedited structure with limited discovery. In 2011, the Northern District of California adopted procedures for providing parties with an expedited trial alternative, which limits (but does not eliminate) discovery, expert witnesses, and pretrial motions.⁴⁵ Similar programs have since been adopted by the Western District of Washington⁴⁶ and the Western District of Pennsylvania.⁴⁷ The District of Minnesota has had an expedited trial program in place since 2001—limiting discovery, expert witnesses, and motion practice in exchange for a swift and short time to trial.⁴⁸

Expedited trial programs respond to the concern that the general Civil Rules are “too big,” at least for some cases. These programs provide an opportunity for the parties to opt out of the full-bore pretrial process and funnel their resources on trying the case rather than paying for costly discovery and motions or, more likely, settling to avoid those costs. The benefits extend not just to the parties but also to the civil-court system itself by helping to revive the American tradition of civil jury trials.⁴⁹

The question for our purposes is not whether parties should have this type of option, but rather to explore the relationship between expe-

⁴³ For a discussion of similar programs in the state courts, see NCSC EXPEDITED TRIAL STUDY, *supra* note 23.

⁴⁴ U.S. Dist. Court for the Dist. of Ariz., *Order Setting Rule 16 Case Management Conference*, available at <http://www.azd.uscourts.gov/sites/default/files/judge-orders/DGC%20Order%20Setting%20Rule%2016%20Scheduling%20Conference.pdf>.

⁴⁵ U.S. Dist. Court for the N. Dist. of Cal., *General Order No. 64: Expedited Trial Procedure* (June 21, 2011), available at <http://www.cand.uscourts.gov/filelibrary/791/GO64.pdf>.

⁴⁶ W.D. Wash. R. 39.2 (Individualized Trial Program), available at <http://www.wawd.uscourts.gov/sites/wawd/files/LocalCivilRules1-31-2014.pdf>.

⁴⁷ U.S. Dist. Court for the W. Dist. of Pa., *Pilot Program for Expedited Civil Litigation* (Mar. 3, 2014), available at <http://www.pawd.uscourts.gov/Documents/Forms/Expedited%20Trial%20Revised%20December%202013.pdf>.

⁴⁸ U.S. Dist. Court for the Dist. of Minn., *Rules of Procedure for Expedited Trials* (Dec. 1, 2009), available at <http://www.mnd.uscourts.gov/expedited-trial-rules.pdf> [hereinafter *Minnesota Expedited Trials*].

⁴⁹ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., A RETURN TO TRIALS: IMPLEMENTING EFFECTIVE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS 4–5 (2012), available at http://iaals.du.edu/images/wygwam/documents/publications/A_Return_to_Trials_-_Implementing_Effective_Short_Summary_and_Expedited_Civil_Action_Programs.pdf (discussing benefits).

dited trial programs and case management. One approach would be to have schemes of this sort displace not just the general pretrial rules but also the judge's case-manager role.⁵⁰ But the expedited schemes take a different approach. They do not handcuff the parties or the judge. They do not operate on a set-it-and-forget-it basis that the parties (and judge) must take or leave. Instead, they create scaled-back default mechanisms that the parties can alter by agreement or that the judge can modify as appropriate to the particular case. Indeed, the Expedited Trial Rules for the District of Minnesota *encourage* the parties to tailor the presumptive discovery limits to their needs.⁵¹ So what is the value of these provisions if they still leave room for custom tailoring? It is to provide setting-specific benchmarks, helping the parties form appropriate expectations and providing guidance for the judge to make proportional management decisions. That is good value, indeed.

C. *Presumptive Limits*

The last scheme-based mechanism we want to discuss is the use of presumptive limits on discovery. The Civil Rules have had presumptive limits on depositions and interrogatories since 1993.⁵² Although the Civil Rules do not presumptively limit requests to produce or requests for admissions, such limits can be found in local rules and individual-judge rules around the country.⁵³ Yet when the Advisory Committee published the Duke Subcommittee's proposals to reduce the presumptive limits on the number and length of depositions and the number of interrogatories, and to adopt presumptive limits on requests for admission, the opposition was strong. Those who did not oppose the proposals offered largely lukewarm support, primarily because the existing rules were not seen as creating problems. The Duke Subcommittee withdrew these proposals.⁵⁴

The question for our purposes is not to debate the merits of the proposals but to examine the relationship between presumptive limits and judicial case-management. At bottom, the question goes to the pur-

⁵⁰ See, e.g., Burbank & Subrin, *supra* note 27, at 410 (advocating "simple case" rules with very little pretrial case management and "nonnegotiable" discovery limits changeable only to prevent manifest injustice).

⁵¹ *Minnesota Expedited Trials*, *supra* note 48, at 2.

⁵² FED. R. CIV. P. 30 advisory committee's note (1993); FED. R. CIV. P. 33 advisory committee's note (1993).

⁵³ See, e.g., E.D. Okla. Civ. R. 36.1 (Admissions) (2006), *available at* http://www.oked.uscourts.gov/Local_Civil_Rules.pdf (setting presumptive limit of 25 for requests for admission). Judge David Campbell's standard case-management order sets presumptive limits of 25 for both document requests and requests for admission. U.S. Dist. Court for the Dist. of Ariz., *Case Management Order*, *available at* <http://www.azd.uscourts.gov/sites/default/files/judge-orders/DGC%20Case%20Management%20Order.pdf>.

⁵⁴ APRIL 2014 DUKE SUBCOMMITTEE REPORT, *supra* note 13, at 90.

pose of presumptive limits. One purpose might be to identify a number that would be sufficient in most cases. Under that approach, the presumptive limit effectively operates as a cap. Parties can ask the judge for permission to exceed the limit but must provide a reason to do so. Under this model, the presumptive limit has very limited value for achieving proportionality. If the number is set at what would be sufficient in most cases, the question of the “right” number will rarely come up. It is a set-it-and-forget-it approach. In most cases, it will be forgotten.⁵⁵

A different approach might be to try to set the presumptive limit at the “perfect number.” Perfection here is the right number for the greatest number of cases. That seems unworkable in practice. The cases that comprise the federal civil docket across the country are just too diverse and the mix varies too much from district to district—or even division to division—to find a national right number. The worst-case scenario would be to try to derive the right number based on averages, an approach all but guaranteed *not* to get the number right for most cases.⁵⁶

A third approach is to use the presumptive limits as a prompt for discussion and tailoring. Ironically, that approach could be most aggressively served by setting the presumptive limit at zero.⁵⁷ But a presumptive limit of zero would provide little guidance for judicial tailoring. If the presumptive limits are to serve as a prompt for discussion *and* facilitate tailoring, then it would appear necessary to pick a number that seems to be in the ballpark for most ordinary cases but then clearly say that it’s just a discussion point, not a “perfect” or set-it-and-forget-it point.

We think that was the spirit of the recently-proposed-but-not-forwarded amendments to the existing presumptive limits. The published proposed Committee Notes to Rule 30 emphasized the judge’s duty to consider the needs of the individual case and grant additional depositions when needed.⁵⁸ The published proposed Committee Note to Rule 33 emphasized that the purpose of the reduced number was to get “the parties to think carefully about the most efficient and least burdensome use of discovery devices,” with the judge having discretion to allow en-

⁵⁵ Cf. EMERY G. LEE III, EARLY STAGES OF LITIGATION ATTORNEY SURVEY 14–15 tbls. 21 & 22 (Mar. 2012) (finding that even in cases where a Rule 16(b) case-management conference was held, the judge discussed proportionality of discovery with the parties in only 24% of the cases and imposed discovery limits in only 16% of the cases).

⁵⁶ We are reminded of a joke. A doctor, a lawyer, and a statistician go deer hunting together. The doctor shoots first and misses five feet to the right. The lawyer shoots second and misses five feet to the left. The statistician puts down his gun and pumps his fist in celebration, saying “We got him!”

⁵⁷ This was the rule for document requests until 1970. FED. R. CIV. P. 34 advisory committee’s note (1970) (eliminating the requirement that a party seeking the production of documents file a motion and show good cause).

⁵⁸ PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE, 301–02 (Aug. 2013), *available at* <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>.

largements.⁵⁹ The Duke Subcommittee's Report at the April 2014 Advisory Committee meeting stated that "[t]he intent was to promote efficiency and *prompt a discussion*, early in the case, about the extent of discovery truly needed to resolve the dispute."⁶⁰

So why did the proposed reductions fail? In part, it may be a failure to communicate the message that the reduced limits were designed to prompt discussion rather than create a lowered ceiling that would be hard to break through.⁶¹ It is certainly true that some of the opposition was born of skepticism that judges would appreciate the subtlety of that distinction or be faithful to it. In retrospect, it may also reflect a practical reality that the difficulty of even identifying a number that can serve as a fair discussion prompt for the whole of the federal civil docket means that a set-it-and-forget-it limit-based model might be the best we can do in the general rules, leaving it to the realm of "special schemes" (such as the reduced presumptive limits in expedited trial programs) to provide more particularized guidance. If the subject of presumptive limits is to come up again—and there may be good reason to bring it up for requests for admission, for which no rules-based limit exists—the proponents must be clear about the underlying purpose and make sure the message is heard.

III. THE PURSUIT OF PROPORTIONALITY

If there is a buzzword in discovery management these days, it is "proportionality" (rivaled only by its sidekick, "cooperation"). The proportionality concept is far from new. It was added to Rule 26(b) in 1983 by an amendment requiring judges to limit discovery that was "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."⁶² Although the term "proportionality" did not appear in the Rule text, the Committee Note to the 1983 amendments states three times that the new provisions were designed to address the problem of "disproportionate" discovery.⁶³ Those

⁵⁹ *Id.* at 305.

⁶⁰ APRIL 2014 DUKE SUBCOMMITTEE REPORT, *supra* note 13, at 89 (emphasis added).

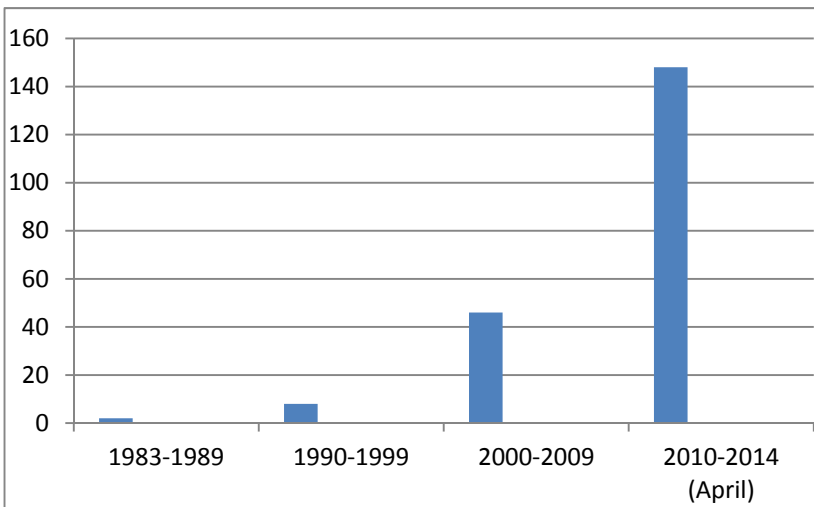
⁶¹ Would it have mattered if the term "Discussion Allowance" had been used instead of the traditional "Presumptive Limit"?

⁶² See 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26App.07[1] (2007) (providing text of Rule 26 as it was amended in 1983). Under the 1983 amendments to Rule 26, the "proportionality" limits were added as a second paragraph to Rule 26(b)(1), with the subsection title amended to read "Discovery Scope and Limits" instead of "Scope of Discovery." See *id.* The proportionality limits were not separated out into a distinct subsection—Rule 26(b)(2)—until 1993. See *id.* § 26 App.09[1].

⁶³ FED. R. CIV. P. 26 advisory committee's note (1983).

who wrote the 1983 amendments expressed their understanding of the new provisions as creating a proportionality standard for discovery.⁶⁴

What is new is the attention proportionality is receiving. For years, we heard about the proportionality limits only in laments that they were rarely mentioned and almost never enforced. Of late, judges and lawyers seem to talk of little else. To test this hypothesis, we conducted a Westlaw search for cases mentioning “proportionality” in the context of discovery under Rule 26.⁶⁵ That search yielded only two cases from 1983 through 1989. One—50%—was Magistrate Judge Wayne Brazil’s influential analysis of the 1983 amendments in *In re Convergent Technologies*.⁶⁶ During the 1990s, there were just eight cases. Things picked up in the 2000s. “Proportionality” appeared in 46 cases. But that pales compared to the last four years, when judges invoked proportionality 148 times (and counting) since January 1, 2010.



We understand that a single, basic Westlaw search falls well short of proving that federal judges across the land are leaping to join the pro-

⁶⁴ For example, Reporter Arthur Miller repeatedly spoke of the amendments addressing “disproportionality” in discovery in his Federal Judicial Center publication explaining the purpose behind the 1983 amendments. ARTHUR M. MILLER, FED. JUDICIAL CTR., *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 32–36 (1984).

⁶⁵ We searched for “proportionality /100 discovery /100 26” in the “All Federal Cases” database. We ran the search on May 8, 2014 and compiled case activity dated through April 30, 2014. We reviewed the cases and omitted any that did not concern the scope of discovery in civil litigation.

⁶⁶ 108 F.R.D. 328, 331 (N.D. Cal. 1985) (“The drafters of the 1983 amendments to sections (b) and (g) of Rule 26 formally recognized that [discovery is not “free”] by superimposing the concept of proportionality on all behavior in the discovery arena.”).

portionality bandwagon. But it is clear that something has changed. It is probably no coincidence that judges started talking more about proportionality in 2010, the year of the Duke Conference. Proportionality was one of the major points of consensus to emerge from the Conference.⁶⁷ Lawyers representing a wide range of interests encouraged the Advisory Committee to pursue ways to better achieve proportionality in discovery. The Duke Conference Subcommittee focused on ways to enhance the pursuit of proportionality by rule amendments.⁶⁸

But while everyone seemed to agree in principle on the need for greater attention to proportionality, turning principle into rule design proved more contentious and complex. One of the proposed changes published for comment was to move the concept of proportionality from Rule 26(b)(2), which identifies limits on discovery, to Rule 26(b)(1), which defines the scope of discovery.⁶⁹ Many in the plaintiff's bar and the academy responded with fierce opposition.⁷⁰ The Advisory Committee considered the concerns raised but ultimately rejected them and, at its April 2014 meeting, voted to continue with the proposal and forward the proposed change to the Standing Committee.

Here too, our focus is not on the merits of the proposal but on a more practical question. Even as judges increasingly invoke the concept of proportionality, how to know and achieve it in particular cases remains elusive. Some skeptics argue that the pursuit of proportionality is all but impossible—that it asks more from judges than they can realistically do. We agree that achieving proportionality is not always easy. But can it be done? Absolutely, if you approach it as a question of where to start rather than a question of where to end.

One concern with the proportionality analysis is that it asks judges to strike a balance between very different types of interests. For example, one of the factors to be considered is the importance of the issues at stake in the case. How can that be measured? How can it be compared to the amount in controversy or the parties' resources? How can those resources be given proper weight without imposing limitless discovery on wealthy litigants because they can bear the costs? These can be difficult problems not likely to be solved at the scheme or design level. This aspect of the proportionality analysis ultimately requires the judge to make case-specific determinations. Difficult though they may be, those deter-

⁶⁷ DUKE REPORT, *supra* note 6, at 8 (“There is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not accomplished what was intended. Again, however, there was no suggestion that this rule language should be changed. Rather, the discussion focused on proposals to make the proportionality limit more effective . . .”).

⁶⁸ APRIL 2014 DUKE SUBCOMMITTEE REPORT, *supra* note 13, at 81–85.

⁶⁹ *Id.* In its April 2014 Report, the Duke Subcommittee highlighted the history of proportionality in Rule 26, including the fact that proportionality originally appeared in Rule 26(b)(1) when adopted in 1983. *Id.* at 84.

⁷⁰ *See id.* at 81 (summarizing the opposition submitted in written comments and via live testimony at hearings).

minations are at the heart of judicial case management. We trust judges can and will rise to the task.

A different concern we have heard many times over the years is that proportionality is doomed to fail as a meaningful limit on discovery because judges lack the information they need to draw the boundaries between what is proportionate and allowed on the one hand, and what is disproportionate and therefore forbidden on the other.⁷¹ In this era of empiricism, that criticism strikes us as quite speculative, especially when made (or repeated) by academics, appellate judges, or others who do not personally or routinely oversee discovery management. In talking with trial court judges around the country who actively manage discovery in their cases, we have not found “lack of information” to be a widespread problem. In our experience, judges usually have little trouble getting the information they need to assess proportionality. The judges have the parties before them and, as discussed below, the ability to learn from the parties the information that is needed.

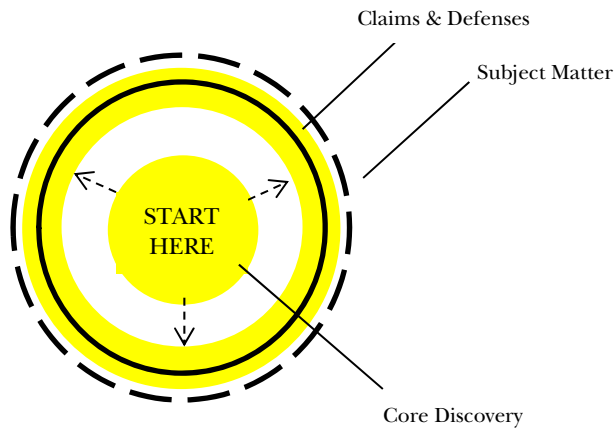
This “lack of information” critique is based on the premise that, at least at the beginning of the case, the judge does not have, and cannot get from the parties, the information needed to determine the point at which discovery becomes disproportionate. That is true in part, but irrelevant. It condemns the pursuit of proportionality for failing to achieve what it does not seek. The critique assumes that the judge’s and lawyers’ task is to define at the start what the outer boundaries of discovery will be throughout the case. That approach to proportionality—that approach to discovery management—defines the goal and the pursuit in exactly the wrong way. And it mistakenly transmogrifies an iterative process based on the judge’s exercise of discretion informed by exchanges with, and information learned from, the parties into a ham-fisted variation on the set-it-and-forget-it mentality that impedes rather than facilitates effective case management.

The key to achieving proportionality is not the early ability to find some clear line defining where discovery should end. Rather, proportionality requires making good judgments about *where and how discovery should begin*. In practically every case, at the Rule 16 initial pretrial con-

⁷¹ See, e.g., Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 638–39 (1989) (arguing that case management cannot work because judges do not have all the information they need to manage effectively); see also Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court Access, 94 IOWA L. REV. 873, 899–900 (2009) (“Judges face information and other constraints that impair their ability to manage optimally, especially in the highly strategic environment of litigation.”); Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 909–26 (2009) (providing a law- and economics-based analysis of the informational problems presented by a proportionality analysis); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 603–04 (2001) (arguing that proportionality limits are impractical because the trial court is not in a good position to assess whether the desired information is worth the cost).

ference, the parties and the judge can identify a core territory for discovery to begin. Who are the key people? What are the key documents or sources of information, and where are they to be found? Where is the “low-hanging fruit” that should be picked first and used to determine what other fruit is worth the added effort and cost to harvest? Targeted discovery is inherently proportional. When you start discovery by focusing on the best and most easily accessed sources of what appears to be the most important information, the benefit necessarily justifies the burden.

For decades, the rulemakers have struggled with defining the outer scope of discovery. Does discovery extend to all information relevant to the subject matter of the suit or just to the claims or defenses being asserted? If subject-matter discovery is allowed, under what conditions? In some cases, these questions will be important. But those are not the questions we should be asking first. Indeed, in most cases those questions will never need to be answered. If the parties focus initially on the core discovery, often that is all the discovery they will need to do. In some cases, the early discovery may reveal grounds for disposition. In all cases, it will provide the parties with critical data for assessing and pricing their positions. This is not urged as a way to promote settlement over other forms of disposition. It is a practical acknowledgement that most cases will settle once the parties have a clearer sense of the key facts about value and risk.



There is a second benefit to reorienting the focus of discovery from the perimeter to the center. This benefit is tied even more closely to the goal of proportionality and to invigorating effective judicial engagement. Describing this benefit requires a closer look at how, and how well, judges can get the information needed, particularly early in the case, to make decisions about how to limit discovery to work toward proportionality.

Under Rule 16, judges can, and the Benchbook encourages them to, hold “live” case-management conferences. We were and remain early advocates of this practice. A live Rule 16 conference lets the judge and the lawyers talk. The conversation may start with what the parties have writ-

ten in their discovery planning report. But the conversation is by no means limited to that information. The judge and lawyers can talk about the key facts and disputes for which discovery is needed. The judge and lawyers can talk about whether threshold issues need to be decided first and whether the motions and related discovery should be staged to do so efficiently. The judge and lawyers can talk about what the most promising and easily accessed sources of relevant and important information are likely to be. Discovery can be focused on the issues, motions, or sources these discussions reveal. The conversation naturally, routinely, and efficiently includes the nature and extent of the harm asserted, the importance of the case to and beyond the immediate parties, and the resources available to those parties. The boundaries on discovery are much more likely to be proportionate under those measures than the discovery that might have occurred absent judicial case management, particularly if one party had most of the documents and the other party had the leverage of one-way discovery. If additional discovery is needed, the results of the initial discovery will provide invaluable information to help the judge make proportionality decisions as discovery moves toward the perimeter.⁷²

How do we know this works? We have experience from the bench by judges who use these and similar techniques, adapted to their own styles and docket mix and local culture. We have experience from the lawyers who use these and similar techniques, again adapted to their own styles and local culture. And we have the reassurance provided by the fact that, in every discipline we can think of, people react to uncertainty by taking calculated first steps and using the information learned to plot their next steps.

We have one more point to make about discovery management and proportionality. If judges want the parties to join them in focusing on where discovery should start, they must make clear to the parties that they will later have a chance to explore where it should end. The judges must signal their commitment to an iterative process. This is another example of when and why the set-it-and-forget-it approach may seem clear and efficient but will not work to achieve the intended purpose. If the parties think they have only one shot to influence the court's definition of the scope of discovery, and if the parties believe that discovery's outer boundaries will be inalterably fixed then and there, they will indeed work hard to define those boundaries—the “end”—at the expense of finding and pursuing the reasonable and cost-effective “beginning.” The parties seeking discovery will ask for everything if they think this is the only

⁷² The “lack of information” critique of proportionality seems to assume that judges and lawyers define what is permissible (proportionate) discovery by focusing on whether to pursue the most marginal sources of the least important information just because it might be needed later. If this description is accurate, it makes rather than undercuts the urgent need for effective judicial case management that reorients the focus of discovery from the perimeter to the center.

chance to get anything. The parties resisting discovery will relinquish nothing if they think this is their only chance to protect anything. In short, we'll be where many think we are now in too many cases—a long way from proportionality.

The parties will take their lead from the judge. In order for the parties to comfortably focus on “first steps” to start, they must know they will get a chance to talk about possible “next steps” later.

IV. THREE WAYS TO START

Part of the Duke Conference Subcommittee's task after the Conference was to decide which of the many case-management ideas to pursue further, and how. Some of those ideas might find expression in rule amendments. But many of them would be better pursued through developing good-practice guides and protocols, and by creating forms of orders and similar documents that judges and lawyers could easily access and adapt to particular cases. Other ideas would be better pursued through expanding judge, lawyer, and litigant educational offerings.

Three specific case-management techniques provide examples of the choices presented. These techniques have much in common. Two of them—live Rule 16(b) conferences and pre-motion conferences for discovery disputes—were considered by the Duke Conference Subcommittee as grist for possible rule amendments. But the Subcommittee ultimately decided that these techniques, while generally helpful practices, were not appropriate for enshrinement in the national rules. While the concepts still appear in the Subcommittee's proposals (either in rule text or committee notes), they appear as suggestions rather than commands, intended to aid and complement efforts to educate judges and lawyers about the benefits of those techniques.

Consistent with the approach taken by the Subcommittee, the following three techniques are ones we urge judges to *consider* adopting in general, but always subject to the needs of individual cases. We think these techniques can be used to great advantage in many (perhaps most) cases, but they will not be appropriate for every situation or every case.

We endorse these techniques for two reasons. Initially, we focused on these techniques as ways of streamlining the pretrial process and reducing needless expense and delay. We still feel strongly about that. But we have since come to think of these techniques as serving a different but at least equally important set of values. Each of them creates an opportunity for a live interaction between the judge, the lawyers, and the parties. In this age of declining trials, they are important opportunities for judges to “reappear” to the public they serve.

A. *Live Rule 16(b) Case-Management Conferences*

Perhaps the most important thing judges can do to manage their cases is to hold live Rule 16(b) case-management conferences.⁷³ In person is best, but some form of video or other conferencing can be used. As technology improves, the options multiply and become more widely available and effective. From a telephone conference to a videoconference to voice-over-internet calls with live images of the speakers to whatever technology will provide next, there are increasingly more and better ways to have a good exchange of information. The key to that is live conferences, not merely electronic exchanges of papers.

There is no better opportunity than a live pretrial case-management conference for the judge to help the parties focus their efforts and establish priorities. Questions to be discussed may include: What are the genuinely contested claims and issues? Which ones will have the greatest bearing on how to resolve the case? What discovery do the parties really need? *Where should discovery start?*⁷⁴ Lawyers have understandably resented being required to attend short and perfunctory “scheduling” conferences that do little more than set some deadlines. But they welcome the opportunity for meaningful engagement with the judge early in the case about the issues and how best to investigate and resolve them.

We think it is fair to say that the Duke Conference Subcommittee shared these views about the benefits of holding live and meaningful Rule 16(b) case-management conferences. The Subcommittee considered amending Rule 16(b) to create a default or presumptive requirement that judges hold live Rule 16(b) case-management conferences.⁷⁵ Of course, a judge could have opted out on a case-by-case basis. The purpose of the proposal was not to dictate individual practices—any judge could choose not to hold a live conference in any case—but to recognize the benefits of early case management and work toward institutionalizing it.

Ultimately, the Subcommittee decided not to pursue that proposal as a national rule. The proposal prescribed too much in light of the variation of docket conditions, local practice and culture, and individual judges’ preferences.⁷⁶ That was a wise choice, at least for the present. On the other hand, the Benchbook, which is a good-practices guide and not a set of national rules, appropriately encourages live Rule 16 conferences and describes the benefits they can provide in many cases.⁷⁷ The Bench-

⁷³ Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 19, at 857.

⁷⁴ See *supra* note 71 and subsequent discussion.

⁷⁵ REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 6–7 (May 8, 2013) [hereinafter MAY 2013 CIVIL RULES REPORT], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf>.

⁷⁶ *Id.* at 7–8.

⁷⁷ See BENCHBOOK, *supra* note 17, at 192–97. Here is just one example: “Before issuing a scheduling order, most judges find it advisable to hold a case-management

book also recognizes the importance of individual judges' practices and preferences. Both the message and the method of conveying it strike us as right.

Nonetheless, the Subcommittee's support for early judicial case management finds clear expression in several of the rule amendment proposals that were approved for transmittal to the Standing Committee at the end of the public comment process. One proposal would amend Rule 16(b)(1)(B) to delete the reference to conducting the conference "by telephone, mail, or other means."⁷⁸ There is still no rule requirement to hold a Rule 16(b) conference before issuing the case-management order. If a judge does hold a conference, it can still be by telephone or videoconference. The proposed Committee Note advises, however, that "[a] scheduling conference is more effective if the court and parties engage in direct simultaneous communication."⁷⁹ Second, the proposed Committee Note to the "proportionality" amendment to Rule 26(b) reiterates the need for early judicial management of discovery in many cases.⁸⁰

These proposed rule amendments support external efforts designed to make it easier for judges to apply the case-management tools the rules do, and should, provide. The key words here are "tools"—not set-it-and-forget-it inflexible models—and "provide"—not prescribe. Prescribed and inflexible requirements are likely to be both unwelcome and unworkable efforts to achieve proportional discovery or the case management needed to work toward that goal. A range of tools that judges can use depending on the needs of the individual case is a far different proposition.

B. *Premotion Conferences*

Second, we strongly encourage judges to hold a conference (in-person or as live as technology, distance, and resources allow) with the parties to discuss certain motions or types of motions before they are briefed and filed.⁸¹ Some matters need to be raised in a motion and fully briefed by both sides. But we must break our addiction to moving on and briefing everything. It is an incredibly expensive habit. It takes a huge

conference with the lawyers—and sometimes the parties—to learn more about the case. The exchange with the lawyers, preferably face-to-face but by telephonic conference if circumstances require, is usually much more valuable for the court and the lawyers than just reviewing the parties' report. The exchange provides the court with the information it needs to develop a scheduling order or case-management order that is tailored to the needs of the case. The Rule 26(f) report, even when well done, is typically no substitute for a live dialogue in which a judge asks questions, probes behind the parties' representations, and fills in gaps." *Id.* at 192.

⁷⁸ See APRIL 2014 DUKE SUBCOMMITTEE REPORT, *supra* note 13, at 96 (internal quotation marks omitted).

⁷⁹ *Id.*

⁸⁰ See *id.* at 101–02.

⁸¹ Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 19, at 861–64.

amount of time and resources. It can freeze cases in their tracks as one side moves and briefs, the other side then responds with a brief, and perhaps there is a reply, and then the judge must read all the submissions. For many matters, this is entirely unnecessary.

We particularly encourage judges to require pre-motion conferences before allowing parties to file and brief discovery disputes. How many discovery disputes really require briefing? Most discovery disputes are matters of reasonableness, not high legal theory. At a pre-motion conference, the judge can hear the lawyers' views on what one side needs and the other side does not want to produce, ask questions, and—most of the time—rule on that basis. It saves the lawyers and litigants the time and cost that otherwise would go into lengthy briefs. It saves the judges and clerks the time and work that are required to plow through the lengthy briefs and the lengthier attachments and generate a written order.⁸² It keeps the case on track and keeps the parties focused on the disputes about the claims and defenses, not disputes about discovery.

We also encourage judges to hold pre-motion conferences before summary-judgment motions are filed and fully briefed.⁸³ Here, the question is less one of whether any motion will be filed but of the scope of what gets filed and briefed. We and others have noted elsewhere that summary-judgment motions are routinely over-briefed, often by both the moving and responding parties.⁸⁴ All too often they are “kitchen sink” affairs that address every claim and defense, raise every possible issue, and set forth page after page of fact assertions on even the tiniest details, all of which then requires volumes of “supporting” exhibits. And yet in most cases, the motion will turn on a fraction of that content. So why is it all there? Uncertainty and its cousin anxiety. The fear of being second-guessed (colloquially known as “CYA”) looms large here.⁸⁵ Absent any guidance from the judge, the parties cannot know in advance what will matter. The only safe strategy is to hit every conceivable target with all of the ammunition available.

Isn't it better for the judge and the parties to talk about intended motions before they are filed and briefed? The conversation may help

⁸² See *id.* at 862. On occasion, the initial conversation will indicate the need for full briefing on a particular issue, at which time the judge can ask for briefs directed to that issue. *Id.* (“Even when the judge decides that there are issues that do require legal research or briefing, the conference greatly narrows the issues.”).

⁸³ See *id.* at 863–64; Gensler & Rosenthal, *Managing Summary Judgment*, *supra* note 19, at 549–53.

⁸⁴ Gensler & Rosenthal, *Managing Summary Judgment*, *supra* note 19, at 549–53.

⁸⁵ *Id.* at 550–51. We recognize that many lawyers, especially defense lawyers, also may have a profit motive for drawing out the summary-judgment process. See D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 282 (2010) (“Some lawyer economic self-interest feeds the complexity, perhaps unintentionally.”); Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 250 (2011) (“Discovery and summary judgment are the engines of a lot of billing.”).

address concerns that some have expressed that summary-judgment motions are too often filed for strategic or even abusive reasons that can be unfair to the other side. The conversation may help avoid the concern judges sometimes express that motions are filed to “educate” the court.⁸⁶ Occasionally, the conversation may eliminate the need for the motion entirely.⁸⁷ More often, the conversation will reduce the scope of the motion. And in most cases, the conversation will help expose the genuinely contested matters, establish those things that are not in dispute (and therefore don’t need to be briefed), and focus the briefing on what really matters.⁸⁸

The Duke Conference Subcommittee considered whether to try to include in the rules a default or presumptive standard for promotion conferences, at least in discovery disputes. In the end, the Subcommittee concluded that this too was better left to case-specific judicial discretion.⁸⁹ But it did not discard the concept to the cutting room floor. Instead, it opted to include the concept as a suggestion to judges in Rule 16(b). The Subcommittee proposed, and the Advisory Committee voted to approve, amending Rule 16(b) to say that judges may, in their case-management orders, “direct that before moving for an order relating to discovery, the movant must request a conference with the court.”⁹⁰ The proposed Committee Note explains: “[m]any judges who hold such conferences find them an efficient way to resolve most discovery disputes . . . but the decision whether to require such conferences is left to the discretion of the judge in each case.”⁹¹ The Rule provides this as a tool for the judge to use as part of the case-management arsenal when it is helpful. The Benchbook already recognizes the practice.⁹² The complementary operation of rule and practice is promising indeed.

⁸⁶ Gensler & Rosenthal, *Managing Summary Judgment*, *supra* note 19, at 549–53.

⁸⁷ *Id.* at 552.

⁸⁸ *Id.* at 553. See also Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652, 1703 (2013) (endorsing promotion conferences as a hybrid between traditional procedural “gateways” and “pathways”).

⁸⁹ See MAY 2013 CIVIL RULES REPORT, *supra* note 75, at 8 (“The Subcommittee considered an alternative that would have required a conference with the court before any discovery motion. In the end, it concluded that at present it is better simply to encourage this practice.”).

⁹⁰ See APRIL 2014 DUKE SUBCOMMITTEE REPORT, *supra* note 13, at 96.

⁹¹ *Id.* at 98.

⁹² See BENCHBOOK, *supra* note 17, at 196; see also THE JUDICIAL CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 41 (2d ed. 2010) (“You should consider adopting a formal procedure for discovery motions, clearly stating that, in general, discovery motions may not be submitted without a prior telephone conference requesting your permission to file them.”).

C. *Oral Argument*

Finally, we encourage judges to consider giving parties more opportunities for oral argument on motions that are briefed.⁹³ In many ways, this is an extension of our belief that judges and lawyers have become too reliant on resolving pretrial matters through written submissions. Written advocacy has many virtues, which we recognize and applaud. It allows for reflection and thoroughness. The discipline and work of composing helps careful and critical thought. But briefing can be a curse if the writer knows that it will be her *only* opportunity for advocacy. Will it fuel a “leave no stone unturned” approach? Will it create an incentive to manufacture issues, forcing the other side to invest efforts responding or risk leaving them seemingly unchallenged? Will it result in briefs that are like the ships passing in the night, simply missing the points the other raised? Such briefs are work to read but do not help the judge understand how the parties respond to the other side’s arguments. Oral argument allows the parties to focus their briefs, knowing they can explain more when they come to court. And it can be of singular value to the judge’s understanding of the issues.⁹⁴

D. *The Reappearing Judge*

Over the years, we came to favor the three practices discussed above for multiple reasons. One reason is efficiency. All of these practices can help streamline the pretrial process, focus the parties’ efforts, and reduce cost and delay.⁹⁵ But efficiency is not the only benefit these practices offer, and it may not even be the most important benefit.

As we wrote in *The Reappearing Judge*, lawyers frequently lament that they no longer interact with the judges in their cases.⁹⁶ This lament reflects a growing sense that trial judges have become isolated, distant, and bureaucratic, holed up in their chambers while overseeing a largely paper process.⁹⁷ Consider the case-management practices discussed above as a response to that lament. They are all *interactive*, not isolating. They do not divide the bench from the bar. They reconnect the judge with the parties and the lawyers that represent them.

Case management in this sense—an engaged judge, working with the parties to move the case toward a reasonable, just, and efficient resolution⁹⁸—does not reduce the judicial role, as some have argued.⁹⁹ To the

⁹³ Gensler & Rosenthal, *The Reappearing Judge*, *supra* note 19, at 864–65.

⁹⁴ *Id.* at 865.

⁹⁵ *See id.* at 870–72 (discussing benefits of active case management).

⁹⁶ *Id.* at 849.

⁹⁷ Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 745 (2010) (“The faces of the United States district courts are fading.”).

⁹⁸ Over the years, case management has suffered from misconceptions about what it is and what it is not. Many of the criticisms of case management seem, to us, to be directed at practices that fall short of, or outside of, our conception of active

contrary, the type of case management we advocate is wholly compatible with the best model of a trial judge.¹⁰⁰ Such a judge is well equipped to resolve the disputed issues when and if they are raised in motions that require reasoned decision and explanation in opinions and orders. Such a judge is better equipped to do so than the judge whose first real engagement with the case came when the stack of dispositive motions was displayed on the computer screen or issued from the printer. And taking an active role during the pretrial process breaks no faith with the institution of the civil jury or the judge's role as presider over public trials. Judges do not have to choose between managing their civil cases and presiding over jury trials. As noted jury trial advocate Judge William Young once put it, "[t]he truth of the matter is that good management and traditional adjudication go hand in hand."¹⁰¹

The Duke Conference takeaway we began this Essay with told judges that lawyers want to see them earlier, more often, and when needed. The Reappearing Judge has heard the message and responded.

V. THE KRAVITZ WAY

It makes perfect sense to us that it was Judge Kravitz who first saw the opportunity and need for the Duke Conference. He came to the bench after years in a successful and challenging trial and appellate practice. When he became a judge in 2003, he remembered what he as a lawyer wanted a judge to do and be. When he became Chair of the Civil Rules Committee, he remembered what judicial case-management practices had been successful when he experienced them as a lawyer and later used them as a judge.

Judge Kravitz embraced case management with energy and enthusiasm. He was engaged. He talked to lawyers. He valued that aspect of being a judge. And he enjoyed it. He resolved issues before they became disputes, and he resolved disputes before they needlessly consumed time, money, and energy and left those on the receiving end feeling abused.

judicial case management. For example, case management is not a process by which judges push reluctant parties to settle. Nor is it about simply setting deadlines. For a full discussion of what we mean by case management, and what we do not mean, see Gensler & Rosenthal, *Reappearing Judge*, *supra* note 19, at 855–56.

⁹⁹ E.g., Judith Resnik, *Managerial Judges, Jeremy Bentham and the Privatization of Adjudication*, 49 SUP. CT. L. REV. 205, 211 (2010) (“The charge to judges to manage cases competes with and marginalizes the charter to adjudicate . . .”).

¹⁰⁰ Gensler & Rosenthal, *Measuring Quality*, *supra* note 19 (asserting that judges who engage in active case management promote the values of public judging). Cf. William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN ST. L. REV. 55 (2013) (arguing that measurements of judicial productivity should factor in time spent on the bench).

¹⁰¹ William G. Young, *An Open Letter to U.S. District Judges*, THE FED. LAW., July 2003, at 30, 33.

Lawyers loved appearing before him, whether he ruled in their favor or not, because he was accessible, he was efficient, and he was fair.

Judge Kravitz had heard the messages that emerged from the Duke Conference long before the Conference was held. He helped us all hear those messages and understand them. Can one be dedicated to case management and still be committed to public justice? Judge Kravitz was. He understood, and he helped us all understand, that dedication to case management is part of being dedicated to the civil justice system itself. That dedication is what he brought to the Duke Conference, to the Rules Committees, and to his work in law. That dedication continues to teach and to inspire.