NOTES & COMMENTS

CURBING JUDICIAL DISCRETION IN PRETRIAL CONFERENCES

by
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The Federal Rules of Civil Procedure were aimed at achieving uniformity in how cases made their way through federal courts throughout the country, but the drafters were also wary of a set of rules that was too technical or rigid to be applied practically across a transubstantive caseload. In Rule 16, the latter concern seems to have won the day, and as a result, the Rule is characterized by broad judicial discretion, unbound by substantive guiding standards. This Comment explores how Rule 16's conferral of nearly unfettered judicial discretion can work to erode the substantive fairness of pretrial conferences.

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INTRODUCTION

One of the motivations behind the creation of the Federal Rules of Civil Procedure was a desire for uniformity; the drafters wanted to create a federal court system in which practitioners could walk into any federal court and know what to expect without relying on extensive local rules or the costly wisdom of local practitioners.[1] Indeed, this goal of reducing disparities in the treatment of cases from court to court was a driving force behind the implementation of the Federal Rules.[2] At the same time, the drafters wanted to avoid the technicality and rigidity that characterized the procedural rules in many states.[3] Thus, the drafters envisioned a set of rules that allowed for flexibility, often in the form of judicial discretion,[4] without giving judges free rein to decide cases on an ad hoc basis.[5]

In the context of Rule 16, discretion seems to have won in this battle between uniformity and discretion.[6] Rule 16 grants judges almost unfet-

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[1] David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1974 (1989). Prior to the enactment of the Federal Rules of Civil Procedure, federal procedure was governed, in part, by the Conformity Act, Act of June 1, 1872, ch. 255, 17 Stat. 196, which required federal courts to conform to the procedures of the states in which they sat. As a result, uniformity in federal procedure was out of reach. *Id.* at 1973–74. For an in-depth discussion of the uniformity goal, see Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2001–07 (1989).

[2] Shapiro, *supra* note 1, at 1977.

[3] *Id.* at 1975.

[4] In this Comment, "discretion" refers to a trial court's freedom "from the constraints which characteristically attach whenever legal rules enter the decision process." Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971). Accordingly, a decision is discretionary when the judge is not compelled to decide the question one way or another—when there is no wrong answer. Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 300 (1991) (quoting Rosenberg, *supra* at 637).

[5] Shapiro, *supra* note 1, at 1977–78.

[6] *See* FED. R. CIV. P. 16(a) ("[T]he court *may* order the attorneys and any unrepresented parties to appear for one or more pretrial conferences *for such purposes as* . . . ." (emphasis added)); *id.* at 16(c)(2) ("[T]he court *may* consider and take appropriate action on the following matters . . . (P) facilitating *in other ways* the just, speedy, and inexpensive disposition of the action." (emphasis added)); *id.* at 16(e) ("The court *may* hold a final pretrial conference to formulate a trial plan . . . ." (emphasis added)); *see also* BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING

tered discretion in managing pretrial litigation.[7] Because the rule imposes few "decision constraining" rules, the judge can "do no wrong, legally speaking, for there is no officially right or wrong answer."[8] As a result, the process is more efficient, but the cost of this increased efficiency is a reduction in the fairness of the proceedings.[9]

Unfortunately, uniformity is closely tied to fairness, and accordingly, the triumph of discretion in Rule 16 has led to some unfairness in the pretrial process. Because no concrete rules or standards govern judicial decision-making in the realm of pretrial conferences, such decision-making varies significantly from case to case and jurisdiction to jurisdiction.[10] Moreover, Rule 16 decision-making often occurs outside the public view,[11] so it is difficult to analyze or critique such decisions or predict how they will be made in the future. Additionally, a deferential standard of review, combined with the harmless-error and final-judgment rules, make many Rule 16 decisions effectively unreviewable.[12] This is particularly problematic because Rule 16 conferences often represent a make-or-break phase in litigation, where judges have substantial power to determine the outcome of the case by, for example, influencing the terms and amount of settlements, defining the scope of claims and defenses, managing discovery, and sometimes ruling on dispositive motions.[13] And the hyper-discretionary nature of Rule 16 means that judges have little guidance on how to evaluate these issues. This lack of guidance results in an unpredictable pretrial system, where judges are free to develop conflicting practices. Some courts have even interpreted Rule 16 to allow judges conducting pretrial conferences to strong-arm parties into making unfavorable stipulations or entering into undesired settlements.[14] In this way, Rule 16 erodes three important pillars of substantive fairness in litigation: litigant autonomy, consistency, and notice.[15]

COURT RULES § 4.2.A, at 29 (4th ed. 2004) (explaining that "may" is a word that confers discretion).

[7] *See infra* Part II.A.

[8] Rosenberg, *supra* note 4, at 637.

[9] *See infra* Part IV.

[10] Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 548 (1986); Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1269–70 (2010).

[11] Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982).

[12] Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 76 (1995); Thornburg, *supra* note 10, at 1270.

[13] Peterson, *supra* note 12, at 81; *see infra* Part III.B.

[14] *See infra* Part III.

[15] *See infra* Part IV.

All of this is not to say that discretion must be eliminated. Rule 16 and pretrial procedure are indispensable to modern litigation, and discretion is a necessary part of how the pretrial process works. As one of Rule 16's main proponents, Professor Edson Sunderland, explained before the Rule's enactment, pretrial conferences are imperative to defining and narrowing the issues in a case:

> Since the fundamental problem is to ascertain before trial what needs to be tried, and for that purpose to determine whether or not there is a prima facie foundation for the various assertions and denials of the pleadings, there is no direct solution except to make a preliminary examination of the evidence which the parties have at their disposal. If this can be done conveniently and inexpensively it will supply a basis for the elimination of issues which are so insubstantial as to deserve no consideration at the trial, and may even bring about an immediate and final disposition of the whole case.[16]

However, unbridled judicial discretion is not necessary for Rule 16 to achieve the purposes described by Professor Sunderland. This Comment does not call for the elimination of judicial discretion or Rule 16. But constraining Rule 16 discretion and making the decision-making process more transparent would bolster the rule of law, provide more consistent results, and help litigants shape their expectations to the realities of pretrial practice. To that end, this Comment proposes reforming Rule 16 by: (1) making judicial decision-making in the context of Rule 16 more transparent; (2) providing real guidelines and standards to confine the exercise of judicial discretion; and (3) providing for more meaningful appellate review of Rule 16 decisions.

Basic principles of justice and fairness dictate that litigants know the rules that will govern their dispute.[17] In the current state of pretrial conferences—where almost anything goes—litigants are disadvantaged by the unfettered exercise of judicial discretion.

Part I begins with an historical overview of case management in England and the United States, which reveals the compelling motivations behind the promulgation of Rule 16. Part II describes the contemporary version of Rule 16 and explains the benefits and problems associated with the discretionary nature of the Rule. Part III provides some concrete examples of how Rule 16 practice varies significantly from district to district and from judge to judge. Part IV relies on classic legal conceptions of substantive fairness to demonstrate how Rule 16 is unfair to litigants.

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[16] Edson R. Sunderland, *The Theory and Practice of Pre-trial Procedure*, 36 MICH. L. REV. 215, 218 (1937).

[17] Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 459, 467 (2008) ("Fairness dictates that disputants who choose to adjudicate must know the rules of the game . . . .").

Part V concludes with some brief suggestions about how to rein in judicial discretion in an effort to increase the substantive fairness of Rule 16.

I. THE HISTORY OF PRETRIAL MANAGEMENT

In both England and the United States, early civil procedure was characterized by party presentation of the issues, with very little judicial activity during the pretrial phase.[18] Both countries also developed increasingly comprehensive pretrial procedures in response to concerns about efficiency.[19] In the United States, Rule 16 was the centerpiece of this process, and as the Rule evolved, more and more emphasis was placed on pretrial management. As Rule 16 developed, so did a wide range of practices under it, and much of the inconsistency in its application remains today.

A. Pretrial Management in England

Civil procedure in England from the Norman Conquest until the early 20th century was characterized by party presentation.[20] Thus, the litigants framed their own controversies and presented them to the court, and judges were unconcerned with the possibility of baseless allegations or defenses.[21] In the party-presentation system, the only way to define and constrict the issues of a case was through pleading, which lacked any real method for testing the factual basis for the pleaders' claims and defenses or filtering out sham claims.[22] In his famous 1937 discussion of pretrial procedure, Professor Sunderland described the system as economically extravagant and wasteful because each case required preparation for the "major engagement" of trial, despite the possibility that the other side would be unable to back up its claim.[23]

The roots of pretrial procedure in England go back to 1831, when the first attempt was made at providing for pretrial definition of the issues, embodied in an act to authorize and regulate interpleader in common-law actions.[24] The statute provided that when a defendant was sued for money or property in which the defendant had no interest, and to which a third party also made a claim, the court could order the third party to appear and describe the nature of his or her claim.[25] The court

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[18] Sunderland, *supra* note 16, at 215.

[19] Resnik, *supra* note 11, at 395.

[20] Sunderland, *supra* note 16, at 215.

[21] *Id.*

[22] *Id.* at 216.

[23] *Id.* at 215–16.

[24] *Id.* at 219.

[25] 1 & 2 Will. 4 1831, c. 58 (Eng.); *see also* Sunderland, *supra* note 16, at 219.

would hear the competing claims to the money or property and actively frame the issues for trial.

The next step in the development of pretrial process in England occurred in 1868, when Parliament introduced a new requirement in Scottish courts that allowed the judge to amend the issues after the pleadings were filed.[26] Under this procedure, after the pleadings were filed, the judge would conduct a hearing to determine whether the pleadings needed to be changed. At the hearing, the judge would require the parties to state whether they were ready to dispense with any proof or, if not, to submit the issues that they wanted to try.[27] The judge would then make rulings on the proof and set the case for trial.[28]

This Scottish practice likely informed a similar procedure adopted in England in 1883.[29] English pretrial practice expanded in scope throughout the early 20th century, and by 1932, the county had developed what was called the "New Procedure."[30] Under the New Procedure, the same judge heard all the matters relating to an individual case, beginning with the summons and ending with trial.[31] Judges on the New Procedure list had the power to, among other things, make orders regarding the pleadings, particulars, discovery, and the mode by which particular facts could be proved at trial.[32] The New Procedure was very successful in reducing expense and delay, and it inspired the expansion of pretrial procedure throughout England.[33]

B. Pretrial Management in the United States

Today, active case management is a defining characteristic of civil litigation in the United States,[34] but this top-down managerial style of judging has not always prevailed. In the United States, the development of pretrial procedure followed a similar path as that in England.[35] As in England, the system of adjudication in the United States was adversarial rather than inquisitorial.[36] Thus, the parties controlled case presentation,

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[26] 31 & 32 Vict. 1868, c. 100, § 27 (Eng.); Sunderland, *supra* note 16, at 220.

[27] Sunderland, *supra* note 16, at 220.

[28] *Id.*

[29] *Id.*

[30] Sunderland, *supra* note 16, at 221–22.

[31] Rules of the Supreme Court, Order 38 A (1935) (Eng.); Rules of the Supreme Court, Order 30 Rules 1 & 2 (1935) (Eng.); *see also* Sunderland, *supra* note 16, at 221–22.

[32] Sunderland, *supra* note 16, at 222.

[33] *Id.* at 222–23.

[34] Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 674 (2010).

[35] Resnik, *supra* note 11, at 380; Sunderland, *supra* note 16, at 215.

[36] Resnik, *supra* note 11, at 380.

and the fact-finder only received evidence that was selected and presented by the parties.[37] The limited role of the judge in the adversarial system reflected the views of the drafters of the U.S. Constitution, who were reacting against the King's autocratic judiciary.[38] The drafters envisioned a system that vested significant adjudicatory power with the people and restricted judicial power with, among other measures, a commitment to open judicial decision-making in public trials.[39] Before the introduction of the Federal Rules of Civil Procedure, federal judges did not play a significant role in the development of their cases. Judges did not become involved in the pretrial phase until the parties requested judicial action, and it was common for the parties to undertake discovery and settlement discussions without any judicial scrutiny whatsoever.[40]

Starting in the early 1900s, judges in the United States began experimenting with increasingly managerial[41] styles of judging in response to criticisms of their efficiency.[42] The first real attempt to provide for something similar to the modern pretrial conference occurred in the Circuit Court of Wayne County, Michigan, in 1929.[43] Prior to the development of the new pretrial procedure, the Detroit court had been experiencing significant delays in trying cases, but judges in that jurisdiction observed that 50% of cases were settling before trial.[44] The judges believed that a pretrial examination of the cases with an eye toward facilitating settlement would result in fewer and simpler trials, easing the delay.[45] To that end, the trial court itself instituted a procedure that required pretrial meetings between judges and counsel.[46] These meetings were informal, and judges examined the pleadings to determine whether amendment was necessary to state the true issues and encouraged both admissions as to matters not actually in dispute and settlements.[47]

A large number of disputes were disposed of during these new pretrial hearings, and the new procedure significantly reduced the wait time

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[37] *Id.* at 381.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 384.

[41] "Managerial judging" is a term coined by Judith Resnik in her influential article on modern changes in the judicial role. *See id.* at 378.

[42] *Id.* at 395.

[43] FRANK E. COOPER, UNIV. OF MICH. LEGAL RESEARCH INST., SIXTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN: PRE-TRIAL PROCEDURE IN THE WAYNE COUNTY CIRCUIT COURT 61–75 (1936); Sunderland, *supra* note 16, at 225.

[44] Sunderland, *supra* note 16, at 225.

[45] *Id.*

[46] *Id.*

[47] *Id.*

for trials.[48] Prior to the implementation of the new procedure, cases waited 45 months for trial; after the pretrial hearings began, cases reached trial within 12 months, without adding any additional judges.[49] After observing Detroit's success with the pretrial hearings, the Superior Court of Suffolk County in Boston, Massachusetts, adopted the same system in 1935 and saw similar results.[50] The first Advisory Committee cited to these successes as support for the enactment of the original Rule 16 in 1938.[51]

In 1934, Congress authorized the Supreme Court to promulgate a set of federal rules for civil procedure,[52] and the Rules were enacted in 1938 with the express goal of providing for "the just, speedy, and inexpensive determination of every action."[53] The Rules reoriented what was previously a trial- and pleading-focused litigation system towards pretrial and discovery.[54]

The first version of Rule 16 set the stage for the increasingly managerial style of judging that would develop as the Rule matured.[55] Professor Sunderland was a strong proponent of Rule 16, and his goal was to encourage judges to aid the parties in sharpening and simplifying the issues of law and fact before a case went to trial.[56] However, the debates on various drafts of the Rule reveal that its drafters neither intended to require judges to hold pretrial conferences nor envisioned a rule that would allow judges to eliminate issues even after protest.[57] The Rule was designed to provide a procedure for narrowing issues for trial and expediting proof. But because the Rule embodied the competing goals of flexibility and discretion, judges would only be encouraged to act, not required to do so.[58] At the same time, however, the drafters did not intend to vest judges with the power to use pretrial conferences coercively.[59]

A wide range of practices developed within the framework of Rule 16 from the time of its enactment until it was amended in 1983.[60] In some districts judges rarely made use of the Rule; other districts developed complex local rules, requiring pretrial conferences in almost all cases.

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[48] *Id.* at 225–26.

[49] COOPER, *supra* note 43, at 64; Sunderland, *supra* note 16, at 226.

[50] THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK 227 (1937); Sunderland, *supra* note 16, at 226.

[51] FED. R. CIV. P. 16(a) advisory committee's note to 1938 enactment.

[52] Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1976)).

[53] FED. R. CIV. P. 1.

[54] Peterson, *supra* note 12, at 64.

[55] *Id.*

[56] Shapiro, *supra* note 1, at 1978.

[57] *Id.* at 1979.

[58] *Id.* at 1981.

[59] *Id.*

[60] *Id.*

Some judges held multiple pretrial conferences, beginning in the early stages of a case. Some judges even saw Rule 16 as a tool to compel parties to produce information that had not been sought in routine pretrial discovery. Others used pretrial conferences to rid the case of frivolous or insubstantial issues, whether or not such narrowing of the issues was requested the parties. Finally, although the original version of the Rule did not refer to settlement,[61] many judges saw Rule 16 as a device to aid in settlement, with the court playing a significant role in that process.[62]

As now, the original version of the Rule imposed no real limits on the subject matter considered during Rule 16 conferences. As one district court explained, "the ultimate parameters of pretrial practice are left to the sound exercise of the court's discretion"; "the matters suitable for discussion at such conferences are limited only by the diligence and imagination of the participants."[63]

Although the first version of Rule 16 provided district judges with substantial new power in the realm of pretrial process, many judges did not take advantage of this newly acquired power on a large scale until decades after the Rule was enacted.[64] In the early years of practice under the Rules of Civil Procedure, cases were not assigned to a particular judge until they were ready for trial.[65] Instead, they were put on the "master calendar."[66] Under the master-calendar system, judges shared the responsibility of resolving pretrial matters—when issues or problems arose, they were presented to whichever judge was scheduled to perform the task at hand for that day.[67]

Federal district court judges really began to embrace their managerial power with the shift from the master calendar to individual case assignment in the 1960s.[68] In the individual-assignment model, each case is assigned to a single judge, who manages the case through every phase of trial-level litigation.[69] The shift in models gave individual judges a new sense of ownership over their cases and a greater incentive to exercise managerial authority over their caseloads.[70] In this new managerial role,

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[61] FED. R. CIV. P. 16 (1938).

[62] Shapiro, *supra* note 1, at 1982.

[63] United States v. Int'l Bus. Mach. Corp., 68 F.R.D. 358, 359 (S.D.N.Y. 1975).

[64] Peterson, *supra* note 12, at 64–65.

[65] Gensler, *supra* note 34, at 674–75.

[66] *Id.* at 675.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 676.

judges began to learn much more about their cases earlier than they had in the past, and they exercised more control in shaping the litigation.[71]

The 1983 amendments to Rule 16 were aimed at combatting excessive cost and delay, and they provided another substantial turning point in the history of judicial case management.[72] Rule 16 was substantially rewritten at that time, and judicial case management became an express goal of the Rule for the first time.[73] The Advisory Committee explained that the amendments were intended to shift "the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery."[74] To accomplish these goals, the rule makers introduced a new pretrial scheduling-order requirement;[75] expanded on the list of appropriate subject matter for the pretrial conference;[76] suggested timing for the final pretrial conference;[77] and added a new subdivision to address sanctions.[78] These changes transformed Rule 16 "from a rule principally directed at trial preparation to one that encouraged—and in some respects required—trial court judges to take a hands-on approach to managing their cases during the life of the suit."[79] Amendments in 1993 and 2006 solidified the new focus on hyper-discretionary pretrial management.[80]

II. AN INTRODUCTION TO THE CONTEMPORARY RULE 16

Discretionary language abounds in Rule 16, in part because such language is necessary to achieve a pretrial conference that is tailored to the characteristics of individual cases. Without some level of discretion, a transubstantive rule like Rule 16 would have to be so broad that it would be ineffective. However, unbridled discretion—such as that which prevails in Rule 16—is unfair to litigants, who have no clear legal rules or standards from which to form coherent expectations about the pretrial proceedings.

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[71] Resnik, *supra* note 11, at 378.

[72] FED. R. CIV. P. 16 advisory committee's note to 1983 amendment.

[73] 6A ALAN WRIGHT, ARTHUR MILLER & MARK KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1521 (perm. ed. 2015).

[74] FED. R. CIV. P. 16 advisory committee's note to 1983 amendment.

[75] FED. R. CIV. P. 16(b) (1982) (repealed 1993).

[76] FED. R. CIV. P. 16(c) (1982) (repealed 1993). Significantly, the 1983 amendments expressly adopted settlement in the list of permissible subjects for consideration at the pretrial conferences. *Id.*

[77] FED. R. CIV. P. 16(d) (1982) (repealed 1993).

[78] FED. R. CIV. P. 16(f) (1982) (repealed 1993).

[79] Gensler, *supra* note 34, at 677.

[80] Peterson, *supra* note 12, at 70–71.

A. Sources of Discretion in Rule 16

The contemporary version of Rule 16 begins with language describing the vast set of purposes for the pretrial conference. Section (a) provides that the court "may" order pretrial conferences for "such purposes as . . . ."[81] The language in the first sentence of the rule sets the tone for what follows, and discretion is the name of the game. Section (a) is discretionary in two major respects. First, although it lists five express purposes for which pretrial conferences may be held, the "such purposes as" wording also leaves open the possibility for conferences with purposes not listed in the rule. Such broad, inclusive language is an open invitation for unbridled judicial discretion. Second, the word "may" is an inherently discretionary word because it imposes virtually no obligation on the trial court one way or the other.[82] "[A]ppellate courts reason that if the trial court *may* do something under the Rules, it also may not. That means the court has choice, *ergo* discretion."[83]

Section (a) is not the only place in which Rule 16 relies on the word "may." In fact, the Rule uses the word nine times.[84] One important example is section (c)(2), which lists "matters for consideration" at the conference. That section provides, "At any pretrial conference, the court *may* consider and take appropriate action on the following matters . . . ."[85] The Rule then lists several specific matters for consideration, including: "formulating and simplifying the issues, and eliminating frivolous claims or defenses"; "obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence"; "determining the appropriateness and timing of summary adjudication under Rule 56"; and "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule."[86] Notably, the final catchall "matter for consideration"—"facilitating in other ways the just, speedy, and inexpensive disposition of the action"[87]—provides an open invitation for judicial creativity and discretion. In essence, this catchall provision allows courts to consider or take action on *any* matter that facilitates the efficient disposition of the case, even actions that are not enumerated in the Rule.

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[81] FED. R. CIV. P. 16(a).

[82] *See* GARNER, *supra* note 6, § 4.2.A (explaining that the word "may" confers discretion).

[83] Rosenberg, *supra* note 4, at 655.

[84] *See* FED. R. CIV. P. 16(a), (b)(3)(B), (b)(4), (c)(1), (c)(2), (c)(2)(L), (e), & (f)(1).

[85] FED. R. CIV. P. (c)(2) (emphasis added).

[86] *Id.*

[87] FED. R. CIV. P. 16(c)(2)(P).

The Rule itself provides very little guidance regarding the procedural aspects of the conference, with one exception: timing.[88] As a result, pretrial conferences vary significantly: some are extremely formal, with elaborate hearings in open court; others are more casual, conducted in the judge's chambers—sometimes with a court reporter, sometimes without.[89] In fact, timing and scheduling are the only features of the pretrial conference for which Rule 16 provides any meaningful instruction. The Rule provides that the court "*must* issue a scheduling order,"[90] that the judge "*must* issue the scheduling order as soon as practicable,"[91] and that the final conference "*must* be held as close to the trial as is reasonable."[92] Thus, Rule 16's only definite standards apply to scheduling and attendance, but not to the substance of the conference—the subjects most likely to affect litigants' substantive rights.[93]

Importantly, the Rule does not require judges to hold pretrial conferences, and it provides no guidelines whatsoever as to *how* the court should address the listed matters. Indeed, the only requirement that Rule 16 imposes on judicial action pursuant to a pretrial conference is that the action be "appropriate."[94] Thus, with respect to "settling the case," for example, the Rule provides no meaningful guidance as to how involved the pretrial judge should be in procuring a settlement. Can the judge require the parties to settle? Can she sanction parties for refusing to settle? The Rule does not answer these basic questions. The Rule provides no guidance as to how a judge should act with respect to any of the listed matters.[95] Thus, under the plain language of the Rule, a judge has virtually unlimited discretion to determine the "appropriate action," and to take it.

B. Advantages and Disadvantages of Discretion

The prevalence of discretion in Rule 16 has several advantages. The Advisory Committee has explained that pretrial conferences "improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise, and improving, as well as facilitating, the settlement process."[96] And much of the pretrial conference's success in increasing the efficiency of

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[88] *See* FED. R. CIV. P. 16(b).

[89] WRIGHT, MILLER & KANE, *supra* note 73, § 1524.

[90] FED. R. CIV. P. 16(b)(1) (emphasis added).

[91] FED. R. CIV. P. 16(b)(2) (emphasis added).

[92] FED. R. CIV. P. 16(e) (emphasis added).

[93] *See* FED. R. CIV. P. 16.

[94] FED. R. CIV. P. 16(c)(2) ("[T]he court may consider and take *appropriate* action on the following matters . . . ."(emphasis added)).

[95] *See* FED. R. CIV. P. 16.

[96] FED. R. CIV. P. 16 advisory committee's note to the 1983 amendment.

litigation is a function of Rule 16's discretionary nature. Discretion allows the court to tailor the conference—and the structure of the litigation more generally—to the specific needs of a particular case.[97] Indeed, the flexibility that comes with judicial discretion "permits more compassionate and more sensitive responses to differences."[98] Because Rule 16 is intended to govern a broad range of transubstantive disputes, these tailored responses are nearly impossible if judges are not afforded significant discretion.[99] "Discretion in this sense allows the individualization of law and permits justice at times to be hand-made instead of mass-produced."[100]

However, the kind of free-flowing discretion granted by Rule 16 is problematic in terms of fairness to the litigants. In the words of David Shapiro, "discretion to depart from a norm is one thing; discretion standing alone, with nothing to measure it against, is a different, more dangerous, other thing."[101] The hyper-discretionary language of Rule 16 looks more like "discretion standing alone." And although Rule 16 gives judges significant power, it also lacks traditional restraints on judicial authority. The conferences frequently occur "beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review."[102] Most Rule 16 decisions are unwritten and unreported; and they are often private and informal.[103] As a result, in addition to being unconstrained by the Rule itself, judges acting on their Rule 16 power have little or no precedent to guide them.[104] Judges are thus free to make decisions on an ad hoc basis, creating their own rules as they go.

In addition, there is very little appellate review of decisions made in Rule 16 conferences.[105] The fact that many decisions are off the record makes them nearly impossible to review.[106] Even those decisions that are on the record are subject to an abuse-of-discretion standard of review, which provides a significant buffer against reversal. Indeed, the Federal Courts Study Committee has noted:

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[97] Thornburg, *supra* note 10, at 1263; *see also* Brunet, *supra* note 4, at 300 ("Discretion permits a court or agency to tailor an approach to the unique circumstances presented and, in so doing, fashion customized justice impossible with broad, universally applied rules.").

[98] Rosenberg, *supra* note 4, at 642.

[99] *Id.*

[100] *Id.*

[101] Shapiro, *supra* note 1, at 1977.

[102] Resnik, *supra* note 11, at 378.

[103] *See id.*

[104] Peterson, *supra* note 12, at 76.

[105] *Id.* at 77; Resnik, *supra* note 11, at 378.

[106] Peterson, *supra* note 12, at 77.

> There are no standards for making these "managerial" decisions, the judge is not required to provide a "reasoned justification," and there is no appellate review. Each judge is free to consult his or her own conception of the importance and merit of a case and the proper speed with which it should be disposed. This, in turn, promotes arbitrariness.[107]

This kind of managerial judging is less visible and less susceptible to appellate review, and at the same time, few procedural safeguards protect litigants from abuse of that authority.[108] In short:

> Cases are made and broken by judges at the pretrial stage. A district judge can substantially determine the outcome of a case, including the amount and terms of the settlement, by defining the scope of a claim or permissible defenses, controlling and regulating discovery, and then encouraging and directing settlement negotiations. Without guidelines or appellate review to regulate the pretrial process, similar cases will have decidedly different outcomes.[109]

The following Section provides specific examples of how Rule 16's free-flowing discretion can result in inconsistent practices under the Rule.

III. RULE 16 IN PRACTICE

Today, the specific manner in which pretrial conferences are conducted varies from district to district and from judge to judge.[110] Some pretrial conferences are formal, with complex hearings in open court, attended by both counsel and their clients.[111] Judges often take an active role in the pretrial conference, encouraging agreement on as many matters as possible in order to simplify the pending trial.[112] Other judges play a more passive role and allow attorneys to direct the conferences.[113] Rule 16 does much to encourage judicial discretion in coming to an efficient solution, but it does not place any meaningful limits on the court's ability to intrude too far into the realm of party autonomy. The cases and examples discussed in this Section demonstrate how the abundance of discretion that Rule 16 affords to trial courts results in an unpredictable pretrial system. As is demonstrated below, not only does the Rule's unbridled discretion result in conflicting practices, it also allows judges to

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[107] 1 FED. COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 55 (1990) (footnote omitted).

[108] Resnik, *supra* note 11, at 380.

[109] Peterson, *supra* note 12, at 81.

[110] WRIGHT, MILLER & KANE, *supra* note 73, § 1524.

[111] *Id.*

[112] *Id.*

[113] *Id.*

invade party autonomy by intruding into the realm of trial strategy and making it nearly impossible for litigants to predict what kind of treatment they will receive.

A. Strong-Armed Stipulations

One example of a Rule 16 intrusion on litigant autonomy is the practice of judges ordering parties to stipulate to specific facts during pretrial conferences. Courts certainly have the power to—and, in many cases, should—request that parties consider stipulating to certain facts.[114] But ordering such a stipulation involves the substitution of the judge's own judgment for that of the parties on a matter of case strategy.[115] Still, this practice is not universally rejected.

The current version of Rule 16 provides that "the court may consider and take appropriate action on . . . obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence."[116] The language of the rule itself is unclear about whether a judge may "order" stipulations or simply "request" that parties consider them. Courts have interpreted the language differently. While some courts have held that the judge may request that parties consider stipulating to undisputed facts but may not require them to do so, other courts have "not accepted that limitation on their authority."[117]

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[114] *Id.* § 1525.1; FED. R. CIV. P. 16(c)(2) ("At any pretrial conference, the court may consider and take appropriate action on the following matters: . . . (C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence . . . .").

[115] WRIGHT, MILLER & KANE, *supra* note 73, § 1525.1.

[116] FED. R. CIV. P. 16(c)(2)(C).

[117] WRIGHT, MILLER & KANE, *supra* note 73, § 1525.1; *see, e.g.*, Holcomb v. Aetna Life Ins. Co., 255 F.2d 577, 580 (10th Cir. 1958), *cert. denied*, 358 U.S. 879 (1958) ("A pre-trial conference is more than a mere conference at which the court seeks to eliminate groundless allegations or denials and the court has the power to compel the parties to agree to all facts concerning which there can be no real issue."); Berger v. Brannan, 172 F.2d 241, 243 (10th Cir. 1949), *cert. denied*, 337 U.S. 941 (1949) ("The spirit of a pre-trial procedure is not only to call the parties together and ask them to stipulate as to all matters concerning which there can be no dispute, but to compel them to stipulate."); Brinn v. Bull Insular Lines, Inc., 28 F.R.D. 578, 579 (E.D. Pa. 1961) ("If the pre-trial procedure is to have any meaningful purpose whatever, it is incumbent on the Court to narrow the issues reasonably and with discretion. In a case such as this where it is completely obvious that this plaintiff is free from contributory negligence; where neither the pre-trial memorandum nor any other documents in the case raised that question; where the parties, facetiously or otherwise, admitted that it was a clear question as to who caused the accident as between defendant and third-party defendant, the issue should and will be narrowed to liability as between defendant and third-party defendant and damages.").

More than 50 years ago, the Tenth Circuit held in *Berger v. Brannan* that the court has the power to "compel [the parties] to stipulate and agree as to all facts concerning which there can be no real issue."[118] Although the Tenth Circuit noted that the pretrial conference could not be used as a device for one litigant to compel his opponent to reveal facts upon which his claim or defense is based, it held that the court could, in its discretion, compel such stipulations.[119]

Berger involved a claim under the Emergency Price Control Act of 1942 against the defendant for selling rice at prices that exceeded the maximum price established by the regulations.[120] After the initiation of the proceedings, the plaintiff prepared an exhibit listing various sales and prices.[121] The defendant claimed that the statistical data contained in the exhibit were incorrect because the plaintiff had failed to take into account specific classifications that were necessary for calculating the relevant prices.[122] Because the data that the defendant claimed had been omitted from the exhibit were actually reflected in the defendant's books, the court ordered the defendant to produce the records containing the missing information.[123] The defendant objected on the ground that the order would compel him to prove the plaintiff's case.[124] After the defendant refused to stipulate to the information contained in his books, the district court entered summary judgment in favor of the plaintiff, treating the information contained in the exhibit as true.[125]

The issue on appeal was whether the district court had the power to order the defendant to stipulate to the items reflected in his book at the pretrial conference.[126] The Tenth Circuit upheld the trial court's grant of summary judgment, noting that the pretrial conference "is more than a mere conference at which the court seeks to obtain an elimination of issues or withdrawals of groundless allegations or denials."[127] The court explained:

> The spirit of a pre-trial procedure is not only to call the parties together and ask them to stipulate as to all matters concerning which there can be no dispute, but to compel them to stipulate and agree as to all facts concerning which there can be no real issue. The court has a right to compel the parties to do this . . . . Unless the

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[118] *Berger*, 172 F.2d at 243.
[119] *Id.* at 242–43.
[120] *Id.* at 241.
[121] *Id.*
[122] *Id.* at 242.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* at 243.

> court has such power, a pre-trial conference is indeed innocuous and of little help. Without Rule 16, the court always has had the power to ask the parties to meet and request them to try and get together on all such matters. The purpose of the pre-trial procedure is to compel them to do this.[128]

Although the Tenth Circuit has issued similar rulings since *Berger*,[129] not all circuits agree.

The Seventh Circuit came to the opposite conclusion in 1976, holding that Rule 16 does not allow the court to compel the parties to stipulate to specific facts.[130] In *J.F. Edwards*, the court explained:

> Rule 16 permits a trial court to direct attorneys for the parties to appear before it for a pre-trial conference to consider five prescribed matters and "[s]uch other matters as may aid in the disposition of the action." Under this catch-all clause and paragraph 3 of Rule 16, [the district judge] was clearly within his rights in asking counsel for the three parties to try to stipulate all possible facts. By all means, such stipulations should be encouraged. Yet, on the other hand, nothing in Rule 16 empowers a court to compel the parties to stipulate facts.[131]

In that case, the district court entered a Standing Order, directing the parties to confer in advance of a scheduled pretrial conference for the purpose of entering into a written stipulation agreeing to all uncontested facts.[132] Three parties were involved in the case, and they complied with the order by conferring.[133] However, only two of the parties were able to agree to a final stipulation of facts; the third refused to sign the stipulation.[134] In response, the district court struck all of the third party's pleadings, dismissed its complaint against one of the other parties, and entered judgment against the third party on two of its claims.[135] The Seventh Circuit described the district court's order as "draconian," and reversed, explaining, "On its face, Rule 16 . . . does not authorize a court to force parties to stipulate facts to which they will not voluntarily agree."[136]

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[128] *Id.*

[129] *See, e.g.*, *Holcomb*, 255 F.2d at 580 ("A pre-trial conference is more than a mere conference at which the court seeks to eliminate groundless allegations or denials and the court has the power to compel the parties to agree to all facts concerning which there can be no real issue.").

[130] J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1325 (7th Cir. 1976) (per curiam).

[131] *Id.* at 1322 (footnote omitted) (first alteration in original).

[132] *Id.*at 1321.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* at 1322.

These cases demonstrate how pretrial judges have relied on Rule 16 to intrude into the realm of party autonomy by compelling stipulations. They also demonstrate the difficulty that inexperienced litigants may encounter in attempting to predict the rules and procedures to which they will be subjected as part of the pretrial conference. The following Section provides more examples of conflicting Rule 16 practices, which serve to further muddy the waters of the pretrial conference.

B. Dismissal of Claims, Not Based on Rules 12 or 56

Under Rule 16(c)(2), district courts may "consider and take appropriate action" on matters related to the formulation and simplification of issues and the elimination of frivolous claims or defenses.[137] At least one legal scholar has suggested that this language implies that Rule 16 itself provides a device by which courts may independently dispose of entire lawsuits if they appear frivolous.[138] The Advisory Committee notes provide some support for this position. According to the Committee, the intention of subsection (c) was to "to encourage better planning and management of litigation" based on its understanding that "[i]ncreased judicial control during the pretrial process accelerates the processing and termination of cases."[139] With respect to what is now subsection (c)(2), the committee explained:

> The reference in Rule 16(c)(1) to "formulation" is intended to clarify and confirm the court's power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone. The notion is emphasized by expressly authorizing the elimination of frivolous claims or defenses at a pretrial conference. There is no reason to require that this await a formal motion for summary judgment. Nor is there any reason for the court to wait for the parties to initiate the process called for in Rule 16(c)(1).[140]

Courts have struggled with how far this language reaches, and the case law described in this Section demonstrates that its potential reach is substantial.

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[137] FED. R. CIV. P. 16(c)(2).

[138] *See, e.g.*, Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599, 606 (1989) ("This arguably implies the existence of a device, independently rooted in Rule 16, by which a court may pare away the frivolous or superfluous elements of a lawsuit. Indeed, the language arguably suggests that a court may dispose of the entire lawsuit under Rule 16, should the entire lawsuit appear 'frivolous.'").

[139] FED. R. CIV. P. 16 advisory committee's note to 1983 amendment.

[140] *Id.* (citation omitted).

In *Lynn v. Smith*, the Third Circuit disapproved of the district court's sua sponte dismissal of the plaintiff's claims following a pretrial conference.[141] On appeal, the plaintiff claimed that the district court had erred in resolving factual questions that required resolution by a jury.[142] The Third Circuit agreed and observed:

> What the District Court did, in effect, was to grant a summary judgment although neither party had moved for a summary judgment nor had they taken any steps in that direction in accordance with the specific requirements of Rules 12(b) and 56(c) of the Federal Rules of Civil Procedure, 28 U.S.C.
>
> The appellate tribunals in the federal judicial system have frequently pointed out to trial courts that the resolution of factual issues is always for the jury where causes are not tried to the court and that summary judgments cannot be granted when there is a genuine issue as to a material fact presented by either of the parties to an action.
>
> Further, we are compelled to observe that pre-trial conferences are not intended, nor have they ever been, to serve as a substitute for the regular trial of cases. Nor, may we add, were pre-trial conferences intended to transfer to the presiding judge the traditional jury function of resolving factual issues.[143]

The Third Circuit concluded that the plaintiff had put several factual questions at issue, and the district court committed reversible error when it "usurped the jury function" in making findings on those factual issues.[144] In making its findings, the district court in *Lynn* put significant weight on the oral testimony of an unsworn witness, the receipt of which was directed by the district court itself.[145] The Third Circuit disapproved of this practice as well, explaining, "In our view the receipt of 'oral statements' by 'witnesses' in a pre-trial conference opens a Pandora's box not in contemplation by those who so wisely conceived pre-trial procedures as a medium of expediting the trial of cases and not as a substitute for the regular trial process."[146]

The Eleventh Circuit came to a similar conclusion in *Williams v. Georgia Dept. of Health*, holding that a trial judge erred by granting a "directed verdict" before conducting a trial.[147] In that case, the defendants requested permission to move for summary judgment during a pretrial

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[141] Lynn v. Smith, 281 F.2d 501, 506 (3d Cir. 1960).

[142] *Id.* at 502.

[143] *Id.* at 506 (citations omitted).

[144] *Id.*

[145] *Id.*

[146] *Id.* at 507.

[147] 789 F.2d 881 (11th Cir. 1986) (per curiam).

status conference.[148] The trial judge responded by explaining that he was "uneasy" with motions for summary judgment because of the high probability of getting overturned based on the presence of a genuine issue of material fact.[149] The judge then asked the parties to submit all the evidence that they would put on if a trial were held and explained that he would evaluate whether, considering all of the evidence, the parties had presented enough evidence to go to trial.[150] The plaintiff's counsel objected to this procedure, but the trial judge explained that empaneling a jury would be an imposition on everyone and asked the parties to agree that the court would consider all the evidence as if it had been presented at trial.[151] "The judge said, 'To me, when there's a question as to whether or not you've really got a cause of action, this is a time and money saving procedure. I've done it two or three times.'"[152] After reviewing affidavits, depositions, medical records, and briefs submitted by both parties, the court issued an order granting a "directed verdict" against the plaintiff.[153]

The Eleventh Circuit rejected the district court judge's practice of granting a directed verdict based on evidence presented at a pretrial conference.[154] The Eleventh Circuit relied on *Fidelity & Deposit Co. of Md. v. Southern Utilities*,[155] a case in which it had previously rejected the same procedure conducted by the same district judge.[156] The court—once again—held that "[w]here a party in a civil case has requested a trial, the district court has no power to grant a 'directed verdict' prior to trial."[157] It went on to explain:

> The district court may of course entertain a motion for summary judgment, provided that the court strictly adheres to the procedures required under Rule 56. We note that in this case plaintiff's testimony, viewed in the light and with all reasonable inferences most favorable to the plaintiff, creates issues of material fact. It is not clear, however, that a rational trier of fact could find that Dr.

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[148] *Id.* at 882.

[149] *Id.* The district judge explained: "Well, let me tell you, I'm always uneasy, as I've probably told both of you, about Motions for Summary Judgment. The rule, to me, just doesn't fit this type of situation because it presupposes no genuine dispute of material fact. Then you argue what is a material fact, and what is an immaterial fact and it is a cinch on appeal for some law clerk working for—like my good law clerks—working for an appellate judge to suggest to the judge, 'Gee, Judge, this case should have been tried.' 'Yeah, genuine issue of material fact, try it.' They just come back wholesale, not just mine but everybody's." *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 883.

[155] 726 F.2d 692, 693 (11th Cir. 1984).

[156] *Williams*, 789 F.2d at 883.

[157] *Id.*

> Colon's alleged misconduct rises to the level of "deliberate indifference," and thus creates a "genuine issue for trial."[158]

The Ninth Circuit disapproved of a similarly egregious abuse of the discretion granted by Rule 16 in *Sanders v. Union Pacific Rail Road Co.*[159] In that case, the judge issued a scheduling order for a final pretrial conference, requiring the parties to submit certain documents 14 and 21 days before the trial.[160] Counsel for one of the parties, however, failed to submit several of the documents and submitted others late.[161] The conference proceeded as scheduled, except that the judge's law clerk presided.[162] At the conference, counsel requested an opportunity to explain to the judge why he had been unable to comply with the order, but the court dismissed the case with prejudice a few days after the conference, without providing counsel an opportunity to be heard.[163] The Ninth Circuit reversed, explaining, "Counsel was plainly derelict in meeting his Rule 16 obligations, but so was the district judge."[164] The court did note, however, that "where the district court exercises its own discretion in a deliberate, informed and reasonable way, we would accord it considerable deference."[165]

These cases demonstrate that district judges can be creative in their reading of the authority granted to them by Rule 16. These cases are admittedly severe, but with an abuse-of-discretion standard of review, such extreme cases are the only ones that generate appellate opinions. And several appellate courts have determined that Rule 16 does not provide an independent basis upon which a district judge can enter judgment absent compliance with the formal mechanisms contained in Rules 12 and 56.[166] However, not all circuits agree with that determination.

The Ninth Circuit, for example, has held that district judges possess limited authority to grant sua sponte summary judgments in the context of pretrial conferences.[167] In *Portsmouth Square Inc. v. Shareholders Protective Committee*, the district judge dismissed a case sua sponte at the final pre-

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[158] *Id.* (citation omitted).

[159] 193 F.3d 1080 (9th Cir. 1999).

[160] *Id.* at 1081.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *See* Fleming v. Kane County, 116 F.R.D. 567, 568 n.1 (N.D. Ill. 1987) (rejecting Rule 16 dismissal of particular claim because "Rule 16 does not confer the power to enter judgment").

[167] 770 F.2d 866 (9th Cir. 1985).

trial conference after several years of litigation.[168] At the conference, the judge raised the question of whether the plaintiff had stated a claim even though the judge had not notified the parties in advance that he intended to raise the issue.[169] During the conference, the judge pressed the plaintiff's counsel to show how the facts set forth in the plaintiff's proposed findings of fact supported the plaintiff's claim.[170] After a lengthy dialogue, the court denied the plaintiff's motion for a continuance and indicated that it would enter judgment in favor of the defendant.[171] The district court labeled its order "judgment on the pleadings treated as a Motion for Summary Judgment under Rules 12(c) and 56 of the Federal Rules of Civil Procedure."[172] The plaintiff challenged the district court's dismissal of its claim, arguing that the court had no power to dismiss its claim sua sponte and that, even if it could enter summary judgment sua sponte, the court violated Rule 56, which requires at least 10 days' notice for a hearing on a summary-judgment motion.[173]

But the Ninth Circuit approved of the district court's dismissal.[174] The Ninth Circuit described two situations in which courts may grant sua sponte motions for summary judgment: (1) "where one party moves for summary judgment and, after the hearing, it appears from all the evidence presented that there is no genuine issue of material fact and the *non-moving* party is entitled to judgment as a matter of law[,]" and (2) where a district court converts a Rule 12 motion to dismiss into a motion for summary judgment by considering evidence outside of the pleadings and motions themselves.[175] The Ninth Circuit noted that district courts have "similar limited authority to grant summary judgment sua sponte in the context of a final pretrial conference."[176] The Ninth Circuit explained:

> One purpose of the Rule 16 pretrial conference procedure is to promote efficiency and conserve judicial resources by identifying litigable issues prior to trial. If the pretrial conference discloses that no material facts are in dispute and that the undisputed facts entitle one of the parties to judgment as a matter of law, a summary disposition of the case conserves scarce judicial resources. The court

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[168] *Id.* at 868.
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.* at 869.
[174] *Id.* at 868.
[175] *Id.* at 869 (citation omitted).
[176] *Id.*

> need not await a formal motion, or proceed to trial, under those circumstances.[177]

Although the Ninth Circuit acknowledged that when district courts grant summary judgment without a formal motion, "[a] litigant is entitled to reasonable notice that the sufficiency of his or her claim will be in issue," it concluded that the plaintiff "was afforded a full and fair opportunity to make its case."[178] The Ninth Circuit reasoned that because (1) the merits of the parties' claims and defenses are a legitimate subject of pretrial discussion under Rule 16(c)(1);[179] (2) the parties had disputed the validity of the plaintiff's claim throughout the course of litigation; and (3) the plaintiff had a full opportunity to develop its case because discovery was complete at the time of the final pretrial conference, the plaintiff was adequately notified that it might have to defend the sufficiency of its claim.[180] As a result, the district judge's sua sponte dismissal of the plaintiff's claim was proper.[181]

The Ninth Circuit is not alone in its approval of Rule 16 as a device to facilitate the disposal of issues over which there is no genuine dispute concerning material facts. Several courts have, in essence, found that Rule 16 provides judges with the power to issue sua sponte summary judgment.[182] *Pifcho v. Brewer* provides an example. [183] There, a pro se prisoner brought an action against the prison warden challenging the conditions of his confinement.[184] The warden filed a motion to dismiss and a motion for summary judgment.[185] Both were denied.[186] Then the parties participated in a Rule 16 pretrial conference, after which the court en-

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[177] *Id.* (citation and footnote omitted).

[178] *Id.*

[179] The relevant version of Rule 16(c) provided: "The participants at any conference under this rule may consider and take action with respect to (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses . . . ." FED. R. CIV. P. 16(a)(1982) (repealed 1993).

[180] *Portsmouth*, 770 F.2d at 869–70.

[181] *Id.*

[182] *See, e.g.*, Diaz v. Schwerman Trucking Co., 709 F.2d 1371, 1375 n.6 (11th Cir. 1983) (recognizing the district court's power under Rule 16 to summarily dispose of case at pretrial conference if no genuine issue of material fact is present on evidence, notwithstanding lack of summary judgment motion); Newman v. Granger, 141 F.Supp. 37, 39 (W.D. Pa. 1956) (noting agreement for all "necessary and relevant facts" meant "a decision on the merits may be entered without formal trial"); *see also* Richey, *supra* note 138, at 601–02.

[183] Pifcho v. Brewer, 77 F.R.D. 356 (M.D. Pa. 1977).

[184] *Id.*

[185] *Id.* at 356–57.

[186] *Id.*

tered judgment on the merits in favor of the warden.[187] The district court explained that although "pretrial conference is never to be used as a substitute for trial [and] the Court is not empowered to resolve disputed issues of fact and render a decision after presentation of the issues," the court "may render judgment on immaterial issues and issues for which there is no dispute of material fact."[188] The court noted that the plaintiff had been given ample opportunity at the pretrial conference to present the facts he sought to prove at trial.[189] The court concluded based on the facts presented in the pleadings and at the pretrial conference that there was no reason to go through the inconvenience and expense of selecting a jury and presenting the plaintiff's case at trial "only to be required . . . to direct a verdict for defendant and dismiss the jury."[190]

Pifcho provides a strong example of how the language of Rule 16 is problematic when it comes to shaping litigant expectations. In that case, the plaintiff had already survived motions to dismiss and motions for summary judgment that were properly filed and considered under Rules 12 and 56, so it is unlikely that he entered the pretrial conference with the expectation that he would have to defend his claim for a third time.[191] Indeed, the fact that different jurisdictions have conflicting practices with respect to the disposition of claims pursuant to a pretrial conference makes predicting what will happen at such a conference even more difficult.

C. Divergent Settlement Practices

Another Rule 16 context in which significant discretion has led to divergent practices is settlement. Rule 16 allows judges to participate in settlement procedures, but it does not provide any guidance to judges or counsel as to what kinds of procedures are appropriate.[192] Many scholars have commented on the propriety of judicial encouragement of settlement during Rule 16 conferences,[193] but the emphasis of this Comment is not on whether settlement should be promoted during pretrial conferences. Rather, this Part simply illustrates the variety of settlement practices that has emerged under Rule 16. As a result of this wide variety of

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[187] *Id.* at 359.

[188] *Id.* at 357.

[189] *Id.*

[190] *Id.* at 357–58.

[191] *See id.* at 356–57.

[192] Campbell Killefer, *Wrestling with a Judge Who Wants You to Settle*, LITIGATION, Spring 2009, at 17, 18.

[193] *See, e.g.*, Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Resnik, *supra* note 11, at 445; Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 745 (1989).

practices, litigants may be caught off guard during pretrial conferences if they encounter unexpected pressure to settle.

As Rule 16 acknowledges, there are benefits to judicial involvement in settlement. Indeed, Rule 16 expressly identifies "facilitating settlement" as a goal of pretrial conferences[194] and "settling the case" as an appropriate matter for consideration.[195] Still, litigants may be at a loss when it comes to forming expectations for judicial involvement in the settlement process.[196] A judge's attempt to encourage settlement may take any number of different forms, "ranging from a formal judicial mediation to an evaluative pretrial comment that a party's case 'looks weak.'"[197]

Importantly, Rule 16 does not address how a judge should shape or facilitate settlement.[198] Because Rule 16 does not provide any guidance as to proper settlement methods, judges resort to ad hoc management, in which pretrial settlement procedures are handled by each judge in an individualistic style.[199] The range of informal techniques that judges employ to encourage settlement or early resolution of litigation is significant. These techniques include:

> (1) acting as a catalyst to stimulate settlement discussions; (2) acting as a check on unreasonable negotiating positions; (3) reminding the parties of the risks and costs of litigation; (4) reducing the uncertainty of litigation by suggesting or actually ruling on particular issues; (5) speaking to the parties separately and suggesting various options; (6) threatening sanctions; and (7) threatening adverse decisions on the merits.[200]

Several district courts have attempted to encourage early participation in settlement by adopting local rules that impose costs as a sanction for last-minute settlement when courts have already incurred the expense of empaneling a jury.[201]

Courts have also been known to use alternative dispute resolution ("ADR") techniques including mediation, arbitration, early mutual evaluation, court mini-trials, and summary jury trials, in an effort to encourage ultimate resolution.[202] One area in which courts have disagreed is whether the district court has the power to compel parties to participate

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[194] FED. R. CIV. P. 16(a)(5).

[195] FED. R. CIV. P. 16(c)(2)(I).

[196] Killefer, *supra* note 192, at 18.

[197] Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 232 (2002–2003).

[198] *See* Tornquist, *supra* note 193, at 746.

[199] *Id.* at 752.

[200] Peterson, *supra* note 12, at 74.

[201] *Id.*

[202] *Id.*

in summary jury trials. A summary jury trial is an ADR technique in which the opposing attorneys present an abbreviated version of their case to a mock jury, which then renders a nonbinding verdict.[203] The Seventh Circuit held that Rule 16 does not permit the court to compel participation in summary jury trials,[204] but subsequent revisions have cast some doubt on the validity of that holding.[205] The Sixth Circuit has similarly held that Rule 16 does "not permit compulsory participation in settlement proceedings such as summary jury trials."[206] There the court noted that "judges should encourage and aid early settlement, however, they should not attempt to coerce that settlement."[207] The First Circuit, by contrast, has held that courts may require litigants to participate in nonbinding mediation procedures.[208] There, the court noted that Rule 16 permits such compelled mediation if it is authorized by statute or local rule, but it also noted that even in the absence of such a rule, the court may compel mediation pursuant to its inherent powers.[209] The First Circuit is not alone in that determination.[210]

The issue of compelled mediation is troubling in two respects. First, the decision about whether to participate in settlement negotiations is one of strategy, so compulsion in this area is a severe intrusion into litigant autonomy. Second, because of the diverse treatment, it is difficult for litigants to predict how their case will be treated.

Courts may also select from a wide variety of court-directed settlement procedures, including settlement conferences with the judge assigned to the case, settlement conferences with a judge not assigned to the case, court-connected mediation with staff mediators, court-connected mediation with volunteer mediators, and private mediation.[211] Because such a wide variety of practices exists, it is difficult for litigants to form reasonable expectations about how the issue of settlement will be addressed in their case. And not only are there many different proce-

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[203] *In re* Atl. Pipe Corp., 304 F.3d 135, 143 n.5 (1st Cir. 2002).

[204] Strandell v. Jackson County, 838 F.2d 884, 887 (7th Cir. 1987).

[205] *See* FED. R. CIV. P. 16(a) advisory committee's note to 1993 amendment ("The [amended] rule does not attempt to resolve questions as to the extent a court would be authorized to require [ADR] proceedings as an exercise of its inherent powers.").

[206] *In re* NLO, Inc., 5 F.3d 154, 157 (6th Cir.1993).

[207] *Id.*

[208] *Atl. Pipe Corp.*, 304 F.3d at 138.

[209] *Id.* at 142, 145.

[210] Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988) (holding that the district court has power to mandate participation in summary jury trials); Fed. Reserve Bank v. Carey–Canada Inc., 123 F.R.D. 603 (D. Minn. 1988) (holding that the district court has power to mandate participation in summary jury trials without parties' consent).

[211] Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. DISP. RES. 271, 276 (2011).

dures—but each procedure varies according to the judge and the court. For example, a judge may hold a settlement conference only at the request of the parties, or he or she may hold the conference on his or her own accord.[212] Some will not hold settlement conferences in their own cases if a bench trial is scheduled; others will hold conferences for all cases assigned to them, regardless of whether they are bench or jury cases.[213] So even if litigants are aware that the judge will conduct a settlement conference, they may nevertheless go into the process without any knowledge about how the settlement conference will proceed.

Allowing the judge to participate in settlement raises some serious issues with respect to litigant autonomy because litigants are very likely to make key strategy choices based on cues they receive from the judge during settlement discussions.[214] The failure of Rule 16 to provide any guidance about how the court should handle settlement is particularly unsettling given the fact that many federal judges see themselves as being in the business of settling cases as much as (if not more than) being in the business of trying cases.[215] The wide range of judge-directed settlement conferences and ADR techniques forces litigants to engage in an additional and costly new phase of litigation, and "the judge has almost unbounded discretion to conduct such proceedings whether or not the parties think it useful."[216] In short, "trial judges are moving into what was once the uncontested turf of lawyers and beginning to regulate what was once entirely a matter for the lawyers and their clients."[217]

As this Part shows, the discretionary nature of Rule 16 has resulted in a wide range of practices. Some of these practices allow the court to intrude on litigant autonomy. And without a rule or precedent to guide expectations, litigants may encounter difficulty in planning and preparing for pretrial litigation. The next Part shifts the discussion from the specifics of Rule 16 to a discussion of broader theoretical conceptions of fairness in order to provide more concrete evidence for the proposition that Rule 16 confers too much discretion to the trial judge.

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[212] *Id.* at 277.

[213] *Id.*

[214] *See infra* Part VI.A.

[215] Resnik, *supra* note 10, at 528.

[216] Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 657 (1994).

[217] *Id.* at 656.

IV. DEFINING THE CONTOURS OF SUBSTANTIVE FAIRNESS IN THE CONTEXT OF RULE 16

Rule 16 attempts to balance two, at times inapposite, values: fairness and efficiency. Indeed, due process requires a careful balancing of the two values.[218] And the two values can certainly work together, with efficiency often enhancing the fairness of the system. However, past a certain point, as efficiency erodes, so does fairness. Because our system seems to have determined that efficiency trumps fairness, judicial discretion abounds throughout Rule 16.[219] But when the legal system endows judges with unbridled discretion in the name of increasing efficiency, substantive fairness may well suffer.

The idea of "substantive fairness" encompasses a bundle of fairness policies, each of which is essential to achieving justice in the rule.[220] Although this is not a comprehensive list, the fairness policies most at risk in the context of Rule 16 are litigant autonomy, consistency, and notice.[221] As has been demonstrated throughout this Comment, the discretionary nature of Rule 16 results in intrusions into each of these three fairness values.

A. Litigant Autonomy

A crucial aspect of fairness in the pretrial stage of litigation is litigant autonomy—the "right to personally select litigation strategies."[222] Thus, litigant autonomy includes not only the right to decide which claims and defenses to bring forth and the right to select the best forum, but also the ability to determine the scope of the case and to make smaller-scale decisions such as determining which facts to stipulate to and which to contest. As previously noted, Rule 16 shifted a significant amount of control over litigation from the parties and their representatives to the judge, and it permits the judge to play a major role in shaping how the litigation

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[218] Mathews v. Eldridge, 424 U.S. 319, 333, 335 (1976) (establishing a due process standard that requires balancing fairness factors against the government's interest in efficiency); *see also* Connecticut v. Doehr, 501 U.S. 1, 11 (1991) (expanding the *Mathews* test and requiring "due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections").

[219] *See* Brunet, *supra* note 4, at 297 ("The predominance of efficiency further increases the great discretionary authority of federal judges. This increase of discretion is a by-product of efficiency concerns; discretion is the management tool needed to implement efficiency goals.").

[220] *Id.* at 283.

[221] *Id.* at 283–84.

[222] *Id.* at 284.

unfolds.[223] Thus, a side effect of hands-on case management under Rule 16 is "a transfer of power away from individual parties and their lawyers, and also from juries or appellate courts who would review decisions on the merits when and if rendered."[224] But without the freedom to make key decisions, "litigants will be regimented and regulated in a fashion certain to be perceived as less than fair."[225]

Indeed, courts have recognized the importance of party autonomy in the context of Rule 16.[226] In *Identiseal Corp. of Wisconsin v. Positive Identification Systems, Inc.*, the Seventh Circuit held that the district court lacked authority under Rule 16 to compel the plaintiff to conduct involuntary discovery.[227] In that case, the district court had ordered the plaintiff to conduct discovery that would provide facts to be contained in a detailed final pretrial report, and the judge dismissed the plaintiff's complaint when the plaintiff failed to provide the report.[228] The plaintiff objected to conducting discovery so early in the case because it intended to develop its case at trial.[229] The Seventh Circuit acknowledged that Rule 16 grants trial judges wide discretion to "advance the cause and simplify the procedure before the cause is presented to the jury," but it noted that that discretion is not unlimited.[230] The court explained:

> The language of the rule does not, by its terms, confer upon the court the power to *compel* the litigants to obtain admissions of fact and of documents even if it is clear that such admissions would simplify the trial of the case. Instead, the rule requires the parties to appear and *consider the possibility* of admissions which would lessen their task at trial.[231]

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[223] John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 558 (1978).

[224] Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 62 (1997).

[225] Brunet, *supra* note 4, at 284; *see also* Thibaut & Walker, *supra* note 223, at 558 ("Our analysis would predict that such a major shift of process control from the disputants to the judge would diminish the justice of the outcome.").

[226] *See, e.g.*, Identiseal Corp. of Wis. v. Positive Identification Inc., 560 F.2d 298, 302 (7th Cir. 1977); J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976) (per curiam) (holding that the district court lacks authority under Rule 16 to dismiss an action because one of the parties would not agree to a stipulation of facts).

[227] *Identiseal Corp.*, 560 F.2d at 302.

[228] *Id.* at 301.

[229] *Id.*

[230] *Id.* at 302 (citation omitted).

[231] *Id.* (emphasis in original).

The court explained that its decision was based on "the traditional principle that the parties, rather than the court, should determine litigation strategy."[232]

As is demonstrated in the preceding Part, judges can use their Rule 16 power in a way that significantly impedes litigant autonomy. As described above, in some circuits, courts may use their Rule 16 power to force parties to stipulate to certain matters, a practice that clearly invades parties' ability to control the course of litigation.[233] Courts may also "coerce settlements and intimidate counsel into abandoning litigation theories or defenses."[234] This pressure can be explicit, but it may also be very subtle, and parties are more likely to submit to settlement negotiations that are proposed or supported by the judge. Although the Advisory Committee notes on the 1983 amendments to Rule 16 explain that the Rule was not intended "to impose settlement negotiations on unwilling litigants," trial courts seem to be doing just that, albeit in a slightly less explicit manner.[235] "Some judicial 'suggestions' are understood as more than that—as implicit comments that litigants who insist upon trial are acting inappropriately."[236] Indeed, "a judge who expresses an opinion about the value of a case, coupled with the suggestion that the parties settle for that figure, wields real and apparent power."[237] It seems clear, then, that when judges become involved in settlement activities, they assert varying degrees of pressure on litigants.[238] This pressure intrudes on litigant autonomy and therefore erodes the substantive fairness of the proceedings.

B. Consistency

Another essential element of substantive fairness is consistency—the idea that "like cases should be afforded like treatment."[239] Prominent legal philosophers share this idea that consistent treatment is essential to the achievement of substantive fairness. Lon Fuller, for example, points to several consistency-related ideas in his list of characteristics ("routes to disaster") that are problematic in the creation and maintenance of a just legal system.[240] Fuller's first, "and most obvious," route to disaster is a "failure to achieve rules at all, so that every issue must be decided on an

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[232] *Id.*

[233] *Supra* Part III.A.

[234] Peterson, *supra* note 12, at 78.

[235] FED. R. CIV. P. 16 (1946) (repealed 1983).

[236] Resnik, *supra* note 10, at 552.

[237] Tornquist, *supra* note 193, at 753.

[238] Resnik, *supra* note 10, at 552.

[239] Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 243 (1991).

[240] LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969).

ad hoc basis."[241] Friedrich A. Hayek has echoed this sentiment, arguing that "discretion left to the executive organs wielding coercive power should be reduced as much as possible. . . . [U]nder the Rule of Law the government is prevented from stultifying individual efforts by *ad hoc* action."[242] As demonstrated above, Rule 16 provides for so much ad hoc managerial power that, in many ways, Rule 16 represents a failure to achieve a rule at all. Rather, it functions more like a list of suggestions and guidelines, which the judge may choose to ignore, follow, or embellish.

Another of Fuller's routes to disaster is "a failure of congruence between the rules as announced and their actual administration."[243] Consistency is at the root of both of these routes to failure—they each describe a legal system that fails to produce consistent results, and as a result, litigants have no way to shape their expectations for the adjudication. Rule 16 does just this. John Rawls's work also reflects the idea that consistency is indispensable to a fair legal system.[244] In Rawls's conception of "formal justice," the laws are "impartially and consistently administered by judges and other officials"—that is, "similar cases are treated similarly."[245]

Unfortunately, consistency—an essential element of fairness—is lacking in Rule 16 practice. Because guiding precedent, concrete rules, and appellate review are all absent, virtually all decision-making in the context of Rule 16 occurs on an ad hoc basis. Although the cases described in the preceding Part do not paint a picture of a system in which the rules as announced are inconsistent with their administration, they do demonstrate how the various administrations of the rule are inconsistent with each other. In short, under Rule 16, similar cases are not treated similarly. This is equally problematic in terms of litigant fairness because the result is the same—litigants do not know what to expect during Rule 16 proceedings.

C. Notice

Closely related to the idea of consistency is the principle that in order for a legal system to be fair, parties must have notice about what rules will be applied to their case. In other words, "[f]airness dictates that disputants who chose to adjudicate must know the rules of the game."[246] In a

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[241] *Id.*

[242] FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72–73 (1944).

[243] Fuller, *supra* note 240, at 39.

[244] JOHN RAWLS, A THEORY OF JUSTICE 50–51 (rev. ed. 1999).

[245] *Id.*

[246] Brunet & Johnson, *supra* note 17, at 467.

just system, "[w]ithin the known rules of the game the individual [should be] free to pursue his personal ends and desires, certain that the powers of government will not be used to deliberately frustrate his efforts."[247] Rule 16 is the rule of the game when it comes to preparing for litigation or settlement. But while the Rule is hefty, it offers litigants little in the way of notice about what to expect from the all-important pretrial conference—and the result is unfair, especially for inexperienced litigants.

Lon Fuller cites the "failure to publicize, or at least to make available to the affected party, the rules he is expected to observe" as an impediment to a fair legal system.[248] The publication of legal rules and standards is important not only because it provides notice to litigants about what to expect from the litigation, but also so that the rules and standards themselves may be subject to criticism.[249] Fuller is not alone in his emphasis on publication and notice in the creation of a fair legal system. As John Rawls explains, "The publicity of the rules of an institution insures that those engaged in it know what limitations on conduct to expect of one another and what kinds of actions are permissible. There is a common basis for determining mutual expectations."[250] Thus, in a fair legal system, litigants know exactly what is expected of them and what is expected of others.[251] Likewise, Hayek has argued that in a fair society, the government must be "bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[252]

That "common basis for determining mutual expectations" is absent from Rule 16 proceedings. Because Rule 16 decision-making is largely unguided by precedent or any other concrete legal rules, Rule 16 fails to publicize the standards that guide the exercise of judicial decision-making. As a result, litigants are unaware of the rules that will guide the judge's decision-making. This is problematic because "every experienced attorney knows that to predict the outcome of cases it is often essential to know, not only the formal rules governing them, but the internal procedures of deliberation and consultation by which these rules are in fact applied."[253] The ad hoc nature of Rule 16 decision-making is also trou-

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[247] Hayek, *supra* note 242, at 73.

[248] Fuller, *supra* note 240, at 39.

[249] *Id.* at 51 ("The laws should also be given adequate publication so that they may be subject to public criticism, including the criticism that they are the kind of laws that ought not be enacted unless their content can be effectively conveyed to those subject to them.").

[250] RAWLS, *supra* note 244, at 49.

[251] *Id.* at 48.

[252] Hayek, *supra* note 242, at 72.

[253] Fuller, *supra* note 240, at 50.

bling because when a judge is the only person aware of the rules and standards guiding his or her decision, there is no check against abuse.[254]

Up to this point it is clear that the huge amount of discretion in Rule 16 is inconsistent with the idea of substantive fairness. The next Part briefly explores potential solutions to the problem of free-wielding discretion in Rule 16.

V. CHECKING JUDICIAL DISCRETION IN RULE 16

The preceding Parts have demonstrated that Rule 16 is problematic with respect to substantive fairness. Judicial decision-making in the realm of the pretrial conference is not guided by any concrete rules or standards, and as a result, the ad hoc decision-making varies from case to case.[255] Moreover, Rule 16 judging often occurs outside the public view,[256] so it is difficult to analyze, critique, or predict how these decisions are made. A deferential standard of review, combined with the harmless-error and final-judgment rules, make many Rule 16 decisions effectively unreviewable.[257] Many of Rule 16's woes could be alleviated by implementing changes aimed at (1) making judicial decision-making in the context of Rule 16 more transparent, (2) providing real guidelines and standards to confine the exercise of judicial discretion, and (3) providing for more meaningful appellate review of Rule 16 decisions.

A few simple additions to Rule 16 would make judicial decision-making more transparent. One important solution to the problems associated with the lack of visibility would be to require a court reporter to record the contents of all pretrial conferences.[258] Recording the conferences alone, however, is insufficient to make Rule 16 decision-making transparent if the judge does not fully explain how he or she arrived at a particular conclusion. Thus, to achieve the goal of transparency, it would also be helpful to require the court to explain the basis for its decisions.[259] These simple changes to the Rule would incorporate the "public dimen-

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[254] *See id.* at 51 ("It is also plain that if the laws are not made readily available, there is no check against a disregard of them by those charged with their application and enforcement.").

[255] Resnik, *supra* note 10, at 548; Thornburg, *supra* note 10, at 1269–70.

[256] Resnik, *supra* note 11, at 378.

[257] Peterson, *supra* note 12, at 77; Thornburg, *supra* note 10, at 1270.

[258] *See* Thornburg, *supra* note 10, at 1291 (noting that "the [Judicial Conference of the U.S. Civil Litigation Management Manual] recommends that the judge have a transcript made of the final pretrial conference").

[259] *See id.* (noting that a significant problem with respect to transparency is the "lack of explanation for the basis of a court's decision").

sion" that exists with adjudication as well as the accountability and education that flows from its visible nature.[260]

The more difficult and intensive solutions to Rule 16 discretion involve providing explicit norms and standards to rein in the now free-flowing discretion in the Rule. As Ronald Dworkin has eloquently explained, "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."[261] As it currently stands, Rule 16 does not provide the surrounding "doughnut" to confine judicial discretion; rather, that discretion exists in a vacuum. Some level of discretion is necessary for the effective functioning of transubstantive procedural rules, but Rule 16 does not provide any meaningful checks on that discretion. Simply providing explicit lists of factors to be considered in evaluating specific issues would go a long way toward solving this problem. Additionally, including in the Rule a set of rebuttable presumptions about what should be done in certain scenarios would be an effective way to tighten the "belt of restriction" on judicial discretion in Rule 16.[262]

Determining the specific legal standards and rules that would be appropriate is beyond the scope of this Comment, but one example of this type of revision would be the creation of meaningful standards and procedural requirements to guide the judge in determining whether sua sponte dismissal is appropriate. Thus, the Rule could incorporate an explicit standard, under which sua sponte dismissal is appropriate only if the judge determines that the summary-judgment standard has been met, notifies affected parties, and provides litigants an opportunity to be heard on the issue and to present disputed facts. This type of standard would alleviate many of the challenges to substantive fairness: by providing a clear standard to guide judicial decision-making, it would result in more consistent administration of the Rule and provide notice to the parties about the standards by which their controversy will be evaluated. Incorporating this type of standard to other contentious Rule 16 issues—such as judicial involvement in settlement and judicial intrusion into strategy choices, like stipulations—would significantly improve the substantive fairness of the Rule.

The preceding two suggestions—increasing the transparency of Rule 16 decision-making and confining judicial standards through explicit standards and presumptions—would go a long way towards making appellate review more substantive. Providing for more visible decision-making will increase the viability of appellate review because it will pro-

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[260] Resnik, *supra* note 10, at 553–54.

[261] Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32 (1967).

[262] *See id.* at 32; Shapiro, *supra* note 1, at 1995–96 ("In many situations, I believe, 'principles of preference'—rebuttable presumptions about what should be done—can go a long way toward confining discretion so that both the judge's own conscience and appellate review can effectively contain it.").

vide the appellate court with a clear record of the factors that the judge considered in coming to his or her conclusion. Likewise, the imposition of standards and presumptions will provide clear rules against which appellate courts can measure the trial judge's decision. Two other revisions that would increase the ability to appeal a Rule 16 decision are providing a mechanism by which pretrial decisions can be reviewed and to implement a standard of review that is less deferential than abuse-of-discretion.[263]

CONCLUSION

The best way to maximize substantive fairness in Rule 16 is to make the entire process more visible and to limit the discretion of the trial judge. The ultimate goal of the suggested revisions is to provide litigants with some idea about what to expect from their pretrial conferences. Basic principles of justice and fairness dictate that litigants know the rules that will govern their dispute. In the current wild-west version of Rule 16, litigants are at a disadvantage. In short, several revisions to Rule 16—ranging in ease of implementation—would go a long way toward confining judicial discretion in the pretrial conference and increasing substantive fairness to litigants. These changes will bolster the rule of law, provide for more consistent results, and ultimately maximize substantive fairness.

[263] *See* Peterson, *supra* note 12, at 91 ("To solve the problem of increasingly unchecked trial court power, it will be necessary to return in some form to the framers' model, which controls both the primary and secondary discretion of district judges. This objective requires: (1) restoring a precedent or rule-based structure to pretrial decision-making; (2) providing review of pretrial decisions; (3) dividing the authority exercised by district judges and distributing some of it to other officials to prevent abuses of authority; and (4) looking for ways to increase judicial accountability without excessively impinging on judicial independence.").