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Are Civil Jury Trials Going the Way of the Dodo? Has Excessive Discovery Led to Settlement as an Economic and Cultural Imperative: A Response to Judge Higginbotham and Judge Hornby

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Judge Higginbotham laments the decline of trials and accurately describes the transformation of judges from presiding over trials to being case-managers who administer pretrial schedules, decide motions and promote settlements.[1] Judge Hornby suggests, despite steadily increasing civil filings, that our "customers" no longer expect or want trials, but that cases are filed in federal court by plaintiffs and removed to federal court by defendants for other reasons—none of which include the expectation of a trial.[2]

These comments from the trenches follow a path:

1. The decline in trials has resulted in large part from the emphasis on settlement;

2. Trials serve important social purposes and are worth preserving.

3. Settlement is often more economically attractive than incurring the costs of discovery and attorneys fees;

4. Federal courts are frequently avoided because of our perceived inability to control the costs of discovery;

5. Case management is not just a fashionable shibboleth and should include active judicial control of discovery.

Like the Sirens of Greek mythology, who enticed sailors to rocky cliffs along the Mediterranean coast, wrecking their ships, the culture of settlement is enticing lawyers to settle, and in the process, attorneys surrender the benefits of trial experience; we have a generation of "litigators" who will never have a civil trial.

My thesis is that active judicial case management, with as much emphasis on controlling discovery as on encouraging settlement, will result in lower costs, still many settlements, but

[1]Hon. Patrick Higginbotham, The Present Plight of the United States District Courts: Is the Managerial Judge Part of the Problem or of the Solution?, 59 **Duke L.J.** _____ (2010).

[2]D. Brock Hornby, The Business of the U.S. District Courts, 10 **Green Bag 2d** 453 (2007).

more trials.

A. The Emphasis on Settlement Has Succeeded

Judges Higginbotham's and Hornby's prescient analyses are accurate, but only a hermit could be surprised by the decline in trials.[3] The administration of civil cases in federal courts is largely devoted to achieving settlements. Judges actively and continually try to settle all civil cases on their docket. A large portion of the "time chart" of district court judicial officers is devoted to settling cases. The fact that so many cases now settle, and so few cases go to trial, is not evidence of any failure, but rather a testament to the success of this allocation of resources. Our "customers," the parties and their counsel, obviously prefer to settle rather than go to trial. Consider the following "suspects" for causing this turn of events:

1. The Civil Justice Reform Act of 1990 and other legislation strongly bless the allocation of time and effort towards the settlement of civil cases.[4]

2. Private use of alternative dispute resolution is widespread, with many former

[3]On Google, the phrase "disappearing trial" warrants 416,000 "hits," and the phrase "vanishing trial" gets over one million hits, indicating that they are frequent phrases in print. Note that the Administrative Office reports' breakdown of federal case dispositions do not specify the number of cases that settled. See **Admin. Office of the U.S. Courts, Judicial Business of the United States Courts 2005**, at 155 tbl.C-1 (2005), available at http://www.uscourts.gov/judbus2005/appendices/c1.pdf. Instead, the chart published on its website only breaks cases down into "Pending," "Commenced," and "Terminated." See id. Several scholarly articles, however, have accessed the original data that underlie that table, and analyzed the data to calculate the settlement rate. See, e.g. Kevin M. Clermont, Litigation Realities Redux, 84 **Notre Dame L. Rev.** 1919 (2009). Cornell University Professor of Law Kevin M. Clermont has analyzed the 271,753 civil cases terminated in all federal districts during Fiscal Year 2005, and calculated that "approximately 67.7% were coded as settled in one way or another." Id. at 1955. Clermont clarifies that "[t]o make th[e] distinction from contested judgments, [he] defin[ed] settlement rate in the district courts to include the plaintiff's abandonment or the defendant's concession, as well as compromise by private negotiations or through ADR." Id. n.180.

[4]See The Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471 et seq. (1990); S. Rep. No. 101-416 (1990), reprinted in 1990 U.S.C.C.A.N. 6803.

judges serving as mediators.[5]

3. The federal judiciary has a strong policy of enforcing arbitrations through interpretation of the Federal Arbitration Act.[6]

4. Similar state court holdings strongly enforce arbitration agreements.[7]

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[5]Shelby A. Linton Keddie, Outsourcing Justice: A Judge's Responsibility When Sending Parties To Mediation, 25 **Penn St. Int'l L. Rev.** 717, 718 (2007). Keddie notes that "[i]n an effort to resolve disputes before they reach a courtroom, many federal judges have become more like 'managers' rather than adjudicators, requiring parties to use other forms of dispute resolution such as court-ordered mediation, arbitration, or mandatory settlement conferences." Id. (footnote omitted). Keddie further states: "In fact, federal judges' encouragement of the widespread use of alternative dispute resolution (ADR) has moved many cases outside of courts altogether." Id. (footnote omitted). See also Kenneth F. Dunham, Is Mediation the New Equity?, 31 **Am. J. Trial Advoc**. 87, 109 (2007) ("Although mediation theorists believe facilitative mediation to be the purest form of mediation, research reveals that the style most mediators use is a combination of both evaluative and facilitative, depending upon the circumstances confronting the mediator. Retired judges, often the most successful mediators from a financial standpoint, are usually more evaluative in their approach to mediation.").

[6]Although proceeding to arbitration results in a non-judicial trial, it reflects the parties' pre-dispute agreement to avoid a public court. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) (The FAA created a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," and "establishe[d] that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like to arbitrability."); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (The provisions of the FAA manifest a "liberal federal policy favoring arbitrations agreements."); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (Courts should "rigorously enforce agreements to arbitrate"); AT&T Techs., Inc. v. Commc'n Workers of Am., 475 U.S. 643 (1986) ("[I]t has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–583 (1960))); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) ("[I]t is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act.").

[7]As an example, New York and Pennsylvania courts strongly endorse arbitration. The New York Court of Appeals has stated: "We have repeatedly recognized New York's 'long and strong public policy favoring arbitration[.]' Indeed, 'this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties. Therefore, New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration.'" Stark v. Molod Spitz DeSantis & Stark, P.C., 876 N.E.2d 903, 907-08 (N.Y. 2007) (internal citations and quotation marks omitted). Similarly, the Pennsylvania Superior Court has stated: "Pennsylvania law . . . encourages arbitration. As early as 1968, the Pennsylvania Supreme Court stated that '[Pennsylvania] statutes

5. Books and well-attended continuing legal education programs on settlement procedures and strategies, and the advantages of mediation or arbitration, abound.[8]

6. Corporate counsel groups, such as the Association of Corporate Counsel, sponsor programs emphasizing settlement techniques.[9]

7. All circuit courts appoint a settlement mediator to reach out to parties on appeal, who, by definition, did not settle their disputes in the district court. Circuit judges, even while hearing argument, may suggest that counsel consult the circuit court's mediator, and the court's decision in the case is delayed until the mediator reports back that mediation efforts have been unsuccessful.[10]

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encourage arbitration and with our dockets crowded and in some jurisdictions con[g]ested[,] arbitration is favored by the courts.' Arbitration is considered a 'necessary tool for relieving crowded dockets and ensuring the swift and orderly settlement of disputes.'" Thibodeau v. Comcast Corp., 912 A.2d 874, 881 (Pa. Super. Ct. 2006) (quotation marks and citations omitted).

[8]See, e.g., National Arbitration Forum, Judicial Benchbook: Arbitration and Mediation Practice and Procedure (2007), available at http://www.adrforum.com/users/naf/resources/Benchbook-Final1.pdf.

[9]See, e.g., Association of Corporate Counsel, Litigation, http://www.acc.com/practiceareas/litigation.cfm?paid=175 (last visited Nov. 20, 2009).

[10]Pursuant to Federal Rule of Appellate Procedure 33, all Circuit Courts have developed their own intracircuit procedures and established fully staffed programs to address the mediation and settlement of certain appeals. See **1st Cir. R.** 33.0, available at http://www.ca1.uscourts.gov/files/rules/rulebook.pdf (First Circuit's Civil Appeals Management Program discussed further at http://www.ca1.uscourts.gov/ (follow "Settlement Program," then "General Information" hyperlink)); **2d Cir. Handbook** 18–22, available at http://www.ca2.uscourts.gov/Docs/COAManual/everything%20manual.pdf (discussing the Second Circuit Civil Appeals Management Plan); **3d Cir. R.** 33, available at http://www.ca3.uscourts.gov/2008%20LARs%20APPENDIX.pdf (Third Circuit's Appellate Mediation Program discussed further at http://www.ca3.uscourts.gov/medhome.htm); **4th Cir. R.** 33, available at http://www.ca4.uscourts.gov/pdf/rules.pdf (Fourth Circuit Mediation Program discussed further at http://www.ca4.uscourts.gov/ (follow "Mediation" hyperlink)); **5th Cir. R.** 15.3.5, available at http://www.ca5.uscourts.gov/clerk/docs/frap2007.pdf (Fifth Circuit Appellate Conference Program discussed further at http://www.ca5.uscourts.gov/clerk/docs/pracguide.pdf); **6th Cir. R.** 33, available at http://www.ca6.uscourts.gov/internet/rules_and_procedures/pdf/rules2004.pdf (Sixth Circuit's Office of the Circuit Mediators discussed further at http://www.ca6.uscourts.gov/internet/mediation/index.htm); **7th Cir. R.** 33, available at http://www.ca7.uscourts.gov/Rules/rules.pdf (Seventh Circuit's Settlement Conference Program discussed further at http://www.ca7.uscourts.gov/conf_aty/); **8th Cir. R.** 33A, available at http://www.ca8.uscourts.gov/newrules/coa/localrules.pdf (Eighth Circuit's Pre-Argument Settlement Conference Program discussed further at http://www.ca8.uscourts.gov/settle.pdf); **9th Cir. R.**

8. In the class action realm, although settlement procedures have been refined to protect members of the class and to deter abusive practices by some counsel,[11] the great majority of class actions settle. A judge faced with a large class action, its heavy load of motions, and its difficult management challenges, may consciously or unconsciously encourage, indeed pressure,

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33-1, available at http://www.ca9.uscourts.gov/rules/FRAP/frap.pdf (Ninth Circuit Mediation Program discussed further at http://www.ca9.uscourts.gov/mediation/mediators.php); **10th Cir. R.** 33.1, available at http://www.ca10.uscourts.gov/downloads/2009-rules.pdf (Tenth Circuit's Circuit Mediation Office discussed further at http://www.ca10.uscourts.gov/cmo/index.php); **11th Cir. R.** 33-1, available at http://www.ca11.uscourts.gov/documents/pdfs/FRAP33APR09.pdf (Eleventh Circuit's Kinnard Mediation Center discussed further at http://www.ca11.uscourts.gov/offices/mediation.php); **D.C. Cir. R.** app. III, available at http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20Mediation%20-%20Program%20Description%20and%20Court%20Order/$FILE/appellate_mediation_program_nov_2009.pdf (discussing the D.C. Circuit's Appellate Mediation Program); **Fed Cir. R.** 33, available at http://www.cafc.uscourts.gov/pdf/rules.pdf (Federal Circuit's Appellate Mediation Program discussed further at http://www.cafc.uscourts.gov/mediation.html).

[11] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial. But other specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." (citation omitted)); Ortiz v. Fibreboard Corp., 527 U.S. 815, 848–49 (1999) ("When a district court, as here, certifies for class action settlement only, the moment of certification requires 'heightene[d] attention,' Amchem, 521 U.S., at 620, to the justifications for binding the class members. This is so because certification of a mandatory settlement class, however provisional technically, effectively concludes the proceeding save for the final fairness hearing. And, as we held in Amchem, a fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule 'designed to protect absentees,' ibid., among them subdivision (b)(1)(B)."); see also, e.g., In re Ins. Antitrust Litig., 579 F.3d 241, 257 (3d Cir. 2009); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008); In re Cendant Corp. Litig., 264 F.3d 201, 264–65 (3d Cir. 2001); John Bronsteen, Class Action Settlements: An Opt-In Proposal, 2005 **U. Ill. L. Rev**. 903, 910 (2005) ("Few class actions actually go to adjudication; nearly all of them settle."); Samuel Issacharoff & Richard A. Nagareda, Symposium, Class Settlements Under Attack, 156 **U. Pa. L. Rev.** 1649, 1650 (2008) ("Settlements dominate the landscape of class actions. The overwhelming majority of civil actions certified to proceed on a class-wide basis and not otherwise resolved by dispositive motions result in settlement, not trial." (citing **Robert H. Klonoff et al., Class Actions and Other Multi-Party Litigation** 415 (2d ed. 2006))); Richard A. Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 **Colum. L. Rev.** 149, 151 (2003) ("Settlements, not judgments after trial, stand overwhelmingly as the end result of actions certified to proceed on a classwide basis that are not resolved on dispositive motions." (citations omitted)).

the parties to reach settlement.[12]

9. The Judicial Conference has recommended, and Congress has approved, additional magistrate judges in all districts. In many districts, their principal duty in civil cases is to conduct settlement conferences.[13]

10. Judges often exert pressure on parties to settle, and have wide latitude on how to conduct settlement conferences. How much should a lawyer or the lawyer's client risk insisting on a trial, when the judge is pushing for settlement?[14] The judge has the power to make rulings that will pressure, whether inadvertently or purposely, the client to approve an unfavorable

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[12]See, for example, the Third Circuit's recent discussion in In re Hydrogen Peroxide Antitrust Litigation:

> Careful application of Rule 23 accords with the pivotal status of class certification in large-scale litigation, because
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> > denying or granting class certification is often the defining moment in class actions (for it may sound the "death knell" of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . . .
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> Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001); see id. at 167 ("Irrespective of the merits, certification decisions may have a decisive effect on litigation."); see also Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978). In some cases, class certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23 advisory committee's note, 1998 Amendments. Accordingly, the potential for unwarranted settlement pressure "is a factor we weigh in our certification calculus." Newton, 259 F.3d at 168 n. 8.

552 F.3d 305, 310 (3d Cir. 2008).

[13]See Hon. Tim A. Baker, The Expanding Role of Magistrate Judges in the Federal Courts, 39 **Val. U. L. Rev**. 661, 661 (2005). Magistrate judges have "assume[d] active, pretrial roles in case management and settlement—the mainstay of modern federal court practice," id. at 661, as part of the overall focus on mediation and alternative dispute resolution methods, and are a "reason for the decreased number of trials," id. at 673. Judge Baker opines that magistrate judges are "particularly well suited to handle settlement conferences." Id.

[14]See Campbell Killefer, Wrestling with the Judge Who Wants You to Settle, **ABA Litig. News**, at 1 (Spring 2009), available at http://www.abanet.org/litigation/litigationnews//mobile/article_judge-settlement.html (last visited Oct. 28, 2009). There are many reasons why the judge assigned to try a case should not always conduct the

settlement. A few reported decisions discuss judicial settlement conduct that may be characterized as overly aggressive in forcing settlement.[15]

11. Significant debate exists over whether Federal Rule of Civil Procedure 68 should be revised or revoked. Many commentators have debated Rule 68's impact on settlement, but it remains the only civil rule on the topic.[16]

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settlement conference.

[15]A few cases will illustrate the issue:

In Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985), the Second Circuit remanded with instructions to vacate a district court judge's imposition of sanctions on a physician who failed to offer $20,000 to settle a medical malpractice claim, even though the claim was settled after one day of trial for the same amount, and the physician's attorney changed his evaluation of settlement after listening to the patient's testimony at trial. Id. at 668-69. The Second Circuit found the district court's "coercion . . . especially troublesome because the district court imposed sanctions on [the physician's attorney] alone," when in fact the settlement process is complex. Id. at 669. The Kothe court clarified that "pressure tactics to coerce settlement simply are not permissible," and that Federal Rule of Civil Procedure 16 "was not designed as a means for clubbing the parties–or one of them–into an involuntary compromise." Id.

In Dodds v. Commission on Judicial Performance, 906 P.2d 1260 (Cal. 1996), the California Supreme Court evaluated a superior court judge's attempts to coerce settlement by continuously interrupting the parties and pressuring the parties to arrive at a settlement figure. Id. at 1266. The judge under review contended that his "'assertive' judicial 'style' is desirable because it enables him to effect settlements in difficult cases." Id. at 1270. The Court, despite finding that the judge engaged in "prejudicial conduct," found that "public censure was not warranted because the judge's actions did not rise to a sufficient level of seriousness." Id. at 1269, 1271. Commentators see this case as illustrating the need for "clearer standards and disciplinary guidelines" in the Model Code of Judicial Conduct. Jaclyn Barnao, In Pursuit of Settlement: Deciphering Judicial Activism, 18 **Geo. J. Legal Ethics** 583, 594 (2005).

In Pitts v. Francis, No. 07-0169, 2007 WL 4482168, at *1 (N.D. Fla. Dec. 19, 2007), a high profile civil case in which the plaintiff alleged that when she was sixteen, Joseph R. Francis and his business entity "Girls Gone Wild" coerced her into exposing her breasts on film. Francis contended, and the media reported, that presiding Judge Richard Smoak's impartiality was called into question because he "forced Francis to settle the civil lawsuit under the threat of incarceration." Francis filed a motion requesting that Judge Smoak recuse himself from the case. Judge Smoak denied the motion on the basis that his order only "unambiguously required that Joe Francis mediate his case in good faith after [the court] found him in civil contempt for exploiting a court-ordered mediation proceeding to threaten and abuse the other party in the civil lawsuit." Id. at *5. Judge Smoak determined that he was attempting to further the objectives of the alternative dispute resolution process which the judiciary has embraced, and that the threat of sanction was reasonable in requiring a party to obey a court order. Id. at *9.

[16]See Robert G. Bone, "To Encourage Settlement": Rule 68, Offers of Judgment, and the History

12. Would a fee-shifting regime make trials more attractive? Is this topic within or without the Rules Enabling Act? A study compared the European and English allocation of private civil litigation costs, in which "the loser is typically forced to bear the winner's legal expenses," with the American system, in which "each litigant traditionally bears his own costs."[17] Research indicates that differences in information parties have about the merits of the case drastically affect the likelihood of settlement, and "predicts that broadening the definition of costs to include attorneys' fees and extending the rules to offers made by either litigant will increase their effectiveness in encouraging settlement."[18] New Jersey has already adopted such an approach by implementing a cost-shifting rule that allows either litigant to issue a pre-trial settlement offer and abolishing the $750 cap on attorneys' fees.[19]

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of the Federal Rules of Civil Procedure, 102 **NW. U. L. Rev.** 1561, 1614-15 (2008). Bone urges the Advisory Committee or Congress to "start[] from scratch rather than amending existing Rule 68," which could risk distracting "committee members of interested members of the public [by causing them] to dwell on the deficiencies of the current Rule." Id. at 1614, 1618. In particular, Bone advises the Committee to "specifically identif[y]" and provide empirical evidence of any "obstacle to settlement bargaining" sought to be overcome, evaluate the comparative costs and benefits, and impact on the quality of settlements of conditional fee shifting, "direct trial judge intervention in the bargaining process," and "tailor[]conditional fee-shifting rules to the circumstance of different case types." Id. at 1618-19. Bone then observes that such "principles will make it difficult for the committee to adopt a conditional fee-shifting rule," "[b]ut that is as it should be," given the complex and difficult nature of "[t]inkering with settlement incentives." Id. at 1619.

[17]Kathryn E. Spier, Pretrial Bargaining and the Design of Fee-Shifting Rules, 25 **RAND J. Econ**. 197, 197 (1994).

[18]Id. at 198, 211. See also Bone, "To Encourage Settlement," supra note 15, at 1569 n.33 (collecting articles arriving at similar conclusions). Spier's paper impliedly suggests that a narrower definition of costs may disincentivize settlement.

[19]N.J. Court Rule 4:58. See Albert Yoon & Tom Baker, Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East, 59 **Vand. L. Rev.** 155 (2006). Yoon and Baker found that although the average damage award did not change significantly, cases settled an average of 2.3 months faster, and accordingly concluded that "allowing a substantial cost-shifting mechanism would be an effective means of increasing the efficacy of offer-of-judgment rules." Id. at 159. See also Anna Aven Sumner, Note, Is the Gummy Rule of Today Truly Better Than the Toothy Rule of Tomorrow? How Federal Rule 68 Should Be Modified, 52 **Duke L.J.** 1055 (2003) (arriving at similar conclusions with respect to California's bilateral offer-of-settlement rule). But see David A. Anderson, Improving Settlement Devices: Rule 68 and Beyond, 23 **J. Legal Stud.** 225, 245

B. Trials Are Important

Settlement is a good result in many cases, but the time and resources devoted to settlement may have become disproportionate to the societal cost of virtually eliminating trials. In some courts, and before some judges, the culture of litigation, however contentious, is expected to result in a settlement, akin to a cultural imperative, and counsel who refuse to settle are outcasts. A concerted effort by trial judges to encourage trial, as a relevant factor in case management decisions, particularly when the cost of pretrial discovery will be high relative to the facts of the case, will cure the disease of the disappearing trial.

At retail, on a case-by-case basis, settlement of cases appears attractive. However, considering the pervasiveness of settlement of civil suits, the impact on the administration of civil justice is devastating. Societal values may favor a trial by jury to determine the community's verdict on a particular course of conduct. Judges should facilitate trial in these cases and refrain from encouraging settlements across the board.

Trials serve important purposes and are essential to preserve the transparency of the judicial system. Judges who decide cases on written motions, or even after oral argument, do their work largely hidden from public view. Judicial chambers are not a place for spectators, but courtrooms are. A trial is the appropriate venue to air disputes. The drama of a trial has positive impact on a public interested in the outcome. Although a routine right angle collision might not provide a juicy trial, an antitrust trial will be of interest to business people and regulators, a securities trial will be of interest to investment bankers and corporate insiders, a

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(1994) ("[N]either one-sided nor two-sided forms of Rule 68 are found to encourage settlement for risk-neutral litigants in cases that would otherwise continue to trial," and "a sincerity rule and final offer auctions [may] increase the relative fairness and frequency of settlements.").

products liability trial will be of interest to engineers, and a patent trial will be of interest to scientists. Even though such individuals may not attend trials day-by-day, the press (including special interest publications) pays attention to big civil cases and the results are widely disseminated to various private interest groups.

A transparent and public court system promotes legitimacy of the courts and the entire judicial system. Jury trials are the primary expression of the public sitting in judgment of a dispute. The verdict of a jury in a complicated civil case has societal value, more so than the mere enunciation of a decision by a trial judge, or following an appeal to an appellate court. The disappearing trial equates to the disappearing trial lawyer. The skill of trial advocacy before a jury is a value worth preserving, yet an entire generation of attorneys are losing this exposure.

As our judicial system promotes the ascension of substantive rights of minorities, trial courts are an important place for women and minority lawyers to gain legitimacy and equal footing, where white males have long dominated. Having a diverse trial bar requires trials. In addition, trial judges must be particularly welcoming of trials that involve contentious issues. The nurturing of trial lawyers, resulting in the thrill of a trial, even in mundane civil disputes, will help maintain a trial bar with the skills necessary to try cases of great public importance.

Some issues in our society benefit from the introduction of evidence and the taking of testimony and a jury (or non-jury) verdict. The burden of proof, an integral part of every trial, puts pressure on the trial lawyer to persuade, as well as write good briefs. Some trials concern community values, more important than the day-by-day evidence. Particularly when a case has public overtones, such as racial segregation, freedom of speech, rights of the disabled, toleration of obscenity, etc., a jury trial is the best way for the public to experience competing values, the

discovery of truth by cross examination, the honing of arguments by lawyers in their closing address to the jury, and by a judge's explanation of the law.[20]

These issues lead us further – why have settlements virtually eliminated trials, and why have private dispute companies gained so much business?

C. We Have Competitors ― Do We Care That They Are Gaining?

We need to consider two points of view―the customer's and the court's. We are "sellers" of services for the resolution of disputes. Our main competition is the steadily increasing alternative dispute resolution ("ADR") market (many of whose participants are former colleagues of ours).

Federal district courts are at risk of losing our reputation as the forum of choice for the most serious and complex commercial cases. As competitors in the marketplace for dispute resolution, we are often not regarded in high esteem. Why else would ADR firms be doing so much business? The reasons are varied. In many districts the judicial system is overloaded because of unique local problems. Southern border courts are inundated with immigration matters, and many courts in large cities process a high volume of serious drug and gun prosecution cases (the federal system is favored by prosecutors because of pretrial detention, and stronger and swifter punishment). These priorities result in civil litigation left unresolved in time frames our customers expect―so they avoid our system and seek out our competitors. Anecdotally, it appears that the flight to private ADR is mainly in commercial litigation; civil

[20]Relying heavily on the philosophy of Jeremy Bentham, Yale Professor Judith Resnik's article "Courts: In and Out of Sight, Site and Cite," Vol. 53 Villanova Law Review 771 (2008) discusses the philosophical underpinnings of the advantages of resolution of disputes by public trial.

rights cases, class actions, and many cases in which statutory fee shifting applies still need the judicial system for implementation of full relief to successful plaintiffs. Without this flight to our competitors, many district courts would be even more swamped.

Many of our consumers think that our "costs" of litigating are too high. They complain about delays, excessive discovery, and high attorney fees. We are a constitutional court, with statutory requirements, rules of procedure, and a code of ethics. Our independence is cherished and must not be obfuscated by statistics. Now that our court dockets are approximately one-third consumed with cases arising out of the employment relationship (usually alleging various forms of discrimination), because Congress has deemed that these are important cases deserving our time and effort, are we doing the most to make sure that trials of these cases are available for parties who want them?[21]

C. Case Management: Should We Do Better?

[21]Although a few employment cases are class actions, most feature an individual plaintiff against a business entity, and the damages reflected in settlement agreements and the seldom trial are modest. Summary judgment motions are filed in almost every case; a trial may take less time than review of all the summary judgment papers. Although settlement is often the most economical result for the court and the parties in some cases, one party may insist on a trial for non-monetary reasons (e.g., deterrence of other suits or retribution for improper conduct).

Managing a complex case to trial is somewhat like staging Wagner's "Ring" – stimulating start, intrigue, repetition, dramatic finish, but some boredom in the middle. Judge Higginbotham complains that judges have become mere case managers. He notes the threat posed by the Supreme Court's recent decisions in Bell Atlantic Corp. v. Twombly[22] and Ashcroft v. Iqbal[23] and predicts, as a result, even fewer trials in our civil courtrooms.[24] Prior to Twombly and Iqbal, pleading standards would not bear mentioning in a discussion about case management. However, a shift from notice pleading to fact pleading, or "plausibility" pleading, may make Rule 12 motions more often determinative. The most questionable impact of Twombly and Iqbal is not their holdings—which can be justified considering their unique facts—but these troublesome doses of dictum:

1. The broad language endorsing, if not mandating, fact pleading;

2. The Supreme Court's failure, in both the majority and dissent in Iqbal, to distinguish or even cite, let alone discuss, three strong precedents upholding notice pleading in a variety of cases;[25] and

3. Justice Souter's out of the blue remark, without supporting citations, that "[t]he common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."[26]

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[22]550 U.S. 544 (2007).

[23]556 U.S. —, 129 S. Ct. 1937 (2009).

[24]Twombly and Iqbal are detailed in many papers presented at the Duke Conference. The holdings need not be articulated here.

[25]See Swierkiewicz v. Soremana, N.A., 534 U.S. 506 (2002); Crawford-El v. Britton, 523 U.S. 574 (1998); Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993). Leatherman and Swierkiewicz are discussed in Twombly. One interpretation of Iqbal's omission of these three cases is that Iqbal is more about qualified immunity than pleading. Iqbal's broad dicta, however, may encourage case-by-case avoidance of Rule 8 by trial judges who believe that thinly pleaded complaints should be dismissed at the get-go. It still seems troubling that no Justice thought that omission worthy of comment. Did the Supreme Court intend such a sub-silentio weakening of the rules-making process?

[26]Twombly, 550 U.S. at 559. Iqbal also refers to "rejection of the careful case-management approach." 129 S.Ct. at 1953. Are these comments, in essence, suggesting that district judges should be better case managers by limiting discovery – and that case management, to date and in general, has been

Judge Higginbotham is not alone in his concern about judges acting as case managers.[27] Nonetheless, in the post-millennium world, the active case manager/judge has become a paradigm for the federal judiciary. A docket with few undecided motions and no cases older than one year attracts admiration from colleagues. Good case managers get the most interesting cases from the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407.

Judge Higginbotham infers that the case management techniques of many individual federal district judges need improvement. This often unspoken truth is not just background noise for improvement in case administration. Most judges facing a large stack of summary judgment papers will find even a lengthy and tendentious settlement conference a more attractive alternative. With a little push-pull, the resulting settlement is a welcome escape from a difficult, and possibly appealable, decision on summary judgment papers.

1. Schedule Court Appearances and Oral Arguments

Judge Higginbotham bemoans the lack of personal appearances before a district judge, the long time taken for briefing and then ruling on summary judgment, the lack of oral argument on motions, as well as the dearth of trials. These all reflect missed opportunities. In the circuit courts, oral argument takes place in most cases resulting in precedential opinions, and in the Supreme Court for all cases in which signed opinions are issued. Some district judges, however, seldom schedule an argument. Should there be a requirement of oral argument, before granting

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unsuccessful?

[27]Professor Resnik's article Managerial Judges, 96 **Harv. L. Rev.** 376 (1982), noting the dangers in encouraging judges to be managers of cases more than adjudicators of disputes, was followed by her article Trial as Error, Jurisdiction for Injury: Transforming the Meaning of Article III, 113 **Harv. L. Rev.** 924 (2000). In part reflective, philosophical, and anecdotal, her perception that the more judges become consumed with managing cases, the less time judges have for deciding such cases, may be reflected in

any motion for summary judgment, unless the question presented is a pure issue of law? A circuit court could require this of district judges within the circuit as a matter of judicial administration.[28]

2. Trial Dates Are Essential

Judge Higginbotham's complaints about the absence of trial dates can be easily remedied. Many judges set a trial date at the Rule 16 conference, because it requires the lawyers and their clients to focus on this date from the start. Although an initially-scheduled trial date can be and often is postponed, a trial date always on the calendar conveys a message that trial is the goal.[29]

3. Adopt "Best Practices"

A common management principle, "Best Practices" requires constant monitoring of new ideas and techniques by others performing similar tasks. Judges apply "Best Practices" by continuing the learning process which started in "Baby Judge School." The marketplace is brimming with publications about case management for both judges and lawyers. The Judicial Panel on Multidistrict Litigation[30] and the Federal Judicial Center's booklet, entitled "Ten Steps to Better Case Management," although specifically designed for judges handling multidistrict cases, has helpful suggestions:

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settlement trends.

[28]The Third Circuit has enunciated an administrative requirement that district judges granting summary judgment state the reasons for their order "to permit the parties and th[e reviewing] court to understand the legal premise for the court's order." Vadino v. A. Valey Eng'rs, 903 F.2d 253, 259 (3d Cir. 1990). Other circuits have adopted similar rules. See, e.g., Vermont Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 245 (2d Cir. 2004); Pasquino v. Prather, 13 F.3d 1049, 1051 (7th Cir. 1994). However, no circuit court has a blanket administrative rule requiring oral argument in the district court.

[29]"Trial pool" is a customary term in the Philadelphia legal market; the attorneys must be prepared to go to trial on short notice following that date. Seldom does the trial start after the trial pool date with less than a week's notice.

[30]The MDL Panel sponsors an annual seminar for transferee judges, which focuses on best

1. rule promptly on motions;

2. hold regular telephone conferences with counsel;

3. encourage an early mediation process; and

4. decide pretrial issues, particularly those that will facilitate settlement, or if the issue is a legal one, assist the parties in assessing what issues remain for trial or can be presented by a motion for summary judgment.

What are some of the causes of poor case management? Some judges are not interested in moving cases, compelling parties to focus on trial, and adjudicating pretrial motions in a timely manner. In these instances, lawyers and their clients don't know what will happen next, or when a trial is likely to occur. Lawyers are used to winning and losing motions; the only decision that is unfair to a lawyer and a client is the one that was never made.

4. Reassignment of Cases That Need Better Case Management

What should be done about complex cases which require better case management? Would more public exposure of individual judicial delay be good or bad? Some district court judges astutely avoid appearing on the infamous "six-month list"[31]—seemingly ignoring our independence and Article III lifetime tenure.

Many district courts' local rules give the chief judge authority to remedy breakdowns in the disposition of cases.[32] A chief judge often reassigns cases from a judge who becomes ill – and the same procedure can be employed for the judge too overloaded or just considerably

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practices, with round table discussions led by judges with experience in complex litigation.

[31] See 28 U.S.C. § 476 (requiring each district court to report semiannually for publication the names of judges who have pending motions undecided for over six months or more).

[32] See, e.g., Local Civil Rule 40.3.1, E.D Pa (designating the Chief Judge as "Calendar Judge" with specific responsibilities, including the reassignment of cases if "a judge falls appreciability farther behind in trial work than the other members of the court, and in the interest of justice to litigants and fairness to the court as a whole, such reassignments are deemed appropriate").

behind in deciding outstanding motions. Some districts have a mechanism for allowing lawyers with complaints about untried motions and long-delayed cases, to present their grievances in a dignified manner.[33]

Independence of the judiciary is not in peril if a chief judge were to review another judge's case management procedures. Does the judge, for instance, make effective use of computer-accessible pleadings and dockets? Judges can fall behind not necessarily because they are poor managers, but by the "luck" of the wheel—they have several huge cases, a multidistrict case or a large patent or antitrust case—and, as a result, other cases languish. In these situations, there is no damage to judicial independence, or the sanctity of random assignment, for some cases to be returned to the "wheel" for reassignment; or when a judge falls far behind, for that judge to be temporarily taken off the "wheel."

5. Judicial Control of Discovery

Many critics of federal courts, who often seek refuge in private ADR shops, cite the costs and excesses of discovery as reasons to avoid federal courts. Every judge should develop a "bag of tricks," enhancing judicial control over discovery.

a. Strong Adoption of the Concept of Proportionality

[33]Our district holds an annual bench bar conference attended by approximately 250 federal court litigators and most district judges. The chief judge gives a short talk on the "state of the court" and often mentions a mechanism for grievances about a particular judge—not whether a particular motion has been won or lost, but inattention by the judge is causing prejudice to lawyers' clients. The lawyers who have such cases should telephone the chief judge's chambers and identify the situation—and some action will be taken.

Under Rule 26(b)(2)(C)(iii), a judge should consider the costs and burdens on a party in determining the extent of discovery. "Proportionality" has become the new buzzword for keeping discovery in-bounds and curbing discovery where it is unnecessary, unhelpful, or too expensive.[34]

Electronically stored information ("ESI") is also viewed as a new culprit for increased discovery costs. Although carefully added to the discovery rules in the 2005 Amendments, has ESI gotten out of hand? Do judges adequately understand what ESI is all about? Should judges appoint masters, skilled in ESI technology to advise on discovery concerning ESI, to reduce costs in appropriate cases?[35]

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[34]For a general discussion of the proportionality principle set forth in Rule 26(b)(2)(C), see 8 **Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure** § 2008.1 (2d ed. 1994 & Supp. 2009). See also, e.g., In re Cooper Tire & Rubber Co., 568 F.3d 1180, 1188–90, 1193–95 (10th Cir. 2009); Surles ex rel. Johnson v. Greyhound Lines, Inc., 474 F.3d 288, 304–06 (6th Cir. 2007); Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 357–65 (D. Md. 2008). For a few recent examples of how courts have applied this principle in various contexts, see Bowers v. Nat'l Collegiate Athletic Ass'n, Civ. A. No. 97-2600, 2008 WL 1757929, *4–6 (D.N.J. Feb. 27, 2008) (denying plaintiff's motion to compel certain requests for additional discovery as "disproportionate to the needs of the case" because 1) "[p]laintiff . . . had more than ample opportunity to explore the issues she seeks to probe" with the proposed discovery, and 2) "evidence pertaining to [the matter at issue] beyond that which [p]laintiff has already discovered is at best only marginally relevant to [p]laintiff's stated need for the evidence" (internal quotation marks omitted)); Am. Intern. Specialty Lines Ins. Co. v. NWI-I, Inc., 240 F.R.D. 401, 412–13 (N.D. Ill. 2007) (ordering the parties, in light of the relevance of the discovery request and the burdens faced by each party with respect to it, to work together to develop a discovery plan for the documents at issue in the request and to share equally in the fees and costs associated with carrying out that discovery); Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 571–77 (N.D. Ill. 2004) (developing a standard for determining when and how costs of electronic discovery should be shifted to account for the proportionality of a given request, and concluding that in the case before it, considering the high expense of production and the limited benefit it would likely yield, the plaintiff seeking production should bear "75% of the discovery costs of restoring the tapes [in question], searching the data, and transferring it to an electronic data viewer").

[35]See, e.g. In re Diet Drugs, 582 F.3d 524, 530 (3d Cir. 2009); United States v. Simels, 2008 WL 5383138, at *3 (E.D.N.Y. Dec. 18, 2008); Bro-Tech Corp. v. Thermax, Inc., 2008 WL 5210346, at *1 (E.D. Pa. Dec. 11, 2008); Gutman v. Klein, 2008 WL 4682208 (E.D.N.Y. Oct. 15, 2008); In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 2006 WL 1997471, at *1 n.1 (S.D.N.Y. Jul. 18, 2006). In addition, courts have also issued "creative cost- and burden-shifting agreements and decisions" as a means of reigning in burdensome discovery of ESI. Jerold S. Solovy, et al., Protecting Confidential Legal

A recent publication makes the following suggestion for an early case management order concerning ESI:

> At the initial pretrial conference, or before the initial pretrial conference when requested by the parties, the judge and the parties should discuss the manner in which electronically stored information is stored and preserved. When the parties cannot agree, the court should issue an order governing electronic discovery that specifies which electronically stored information should be preserved and addresses the scope of allowable electronic discovery and allocation of cost among parties.[36]

b. The Use of Contention Statements

Courts can require the parties, midway during discovery, or prior to the deadline for dispositive motions, to state their "contentions" in limited, numbered paragraphs with record support, with the opposing party making a substantive response.[37]

In all but the most simple case, contention statements can serve a valuable purpose. The complaint may not contain a detailed statement of the parties' allegations, and usually does not detail what evidence the party is likely to rely upon at trial. The defendant's answer and affirmative defenses are usually just denials. As a result of a party's own investigation, or as a result of discovery received from other parties in the case or third parties, the plaintiff may eliminate some allegations or add others, but at some point allegations must morph into

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Information: A Handbook for Analyzing Issues Under the Attorney-Client privilege and the Work Product Doctrine, in **Insurance Coverage 2009: Claim Trends and Litigation** 797, at 225, 232-33 (PLI Litig. & Admin. Practice, Course Handbook Series No. 18542, 2009) (collecting cases).

[36] **Inst. for the Advancement of the Am. Legal Sys. at the Univ. of Denver**, **21st Century Civil Justice System: A Roadmap for Reform Civil Caseflow Management Guidelines** 11 (2009). The Seventh Circuit has just adopted these principles as a circuit-wide pilot project. See http://www.seventhcircuitbar.org. The Federal Judicial Center will report on a broad nationwide survey of lawyers and judges on ESI at the Duke Conference.

[37] **Manual for Complex Litigation (Fourth)** § 11.473 (2004). The judge can specify whether the contention statements are binding or have preclusive effect.

supportable contentions.

Although discovery rules require a party to divulge its own information to opposing parties, there is no rule requiring that one party divulge to the other side, pretrial, the contentions it will make at trial. Allegations made in the complaint may be "history" at trial. Indeed, a cherished strategy of many good litigators is to maintain silence about the theory of their case, the evidence that they have gathered, and how it will impact the trial. A summary judgment motion will not necessarily flush out each party's contentions. In responding to a defendant's motion for summary judgment, the plaintiff is likely to focus entirely on defeating that motion rather than outlining the exact and precise nature of the contentions it will present at trial. The value of a pretrial contention statement, ideally made in the middle of discovery so that the parties may adjust their discovery tools to account for newly developed contentions, is very high, particularly in any case with complex facts or legal issues.

c. Early Decisions on Legal Issues

Courts can expedite rulings on legal question, such as those pertaining to statutes of limitations, or claim preclusion. Adoption of a legal standard governing these issues can be helpful even if factual issues remain.[38]

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[38]See **Manual for Complex Litigation**, § 11.32; see also, e.g., Hakim v. Accenture U.S. Pension Plan, 2009 WL 2916842, at *13 (N.D. Ill. Sept. 3, 2009) ("For these reasons, the Court cannot find, at this early stage of the case and on the present record, that Plaintiff's § 204(h) claims accrued prior to June 27, 1998. Accordingly, Defendants' motion to dismiss Plaintiff's § 204(h) claims as untimely is denied."); Burnette v. Bureau of Prisons, 2009 WL 3415301, at *1 n.1 (W.D. La. Feb. 6, 2009) ("Given the early stages of this case, raising the defense of res judicata through a motion to dismiss does not appear to have resulted in unfair surprise to the plaintiff."); Shell Oil Co. v. Hennessy, 639 F.Supp. 626, 629 (D. Mass. 1986); ("The Court recognizes that . . . the remedy of specific performance sought by Shell in the present circumstances is equitable in nature and may be granted only in the Court's sound discretion. In light of these principles, the Court rules that, while certain factual issues remain, the undisputed record before the Court is ample to fashion an equitable remedy herein. . . . Accordingly, Shell may have specific performance . . . .").

d. Erecting a "discovery fence" – periodic Rule 16 and Rule 26 conferences allow the judge to expand or contract discovery (particularly ESI) sought by one side or the other as unnecessary given the complexities/value of the case, i.e., the concept of proportionality.[39] The Sedona Conference has adopted a set of principles on the conduct of ESI discovery, which can be helpful to a judge handling a complex case.[40]

The "fence" must be a flexible one which may bulge and narrow at various points, and may change over the course of the discovery period. Obviously, the judge needs to schedule frequent conferences concerning the scope of discovery, problems that are arising among the parties in either seeking or providing discovery, and any unanticipated and/or excessive costs. Some lawyers are noted for exaggerating their own performance while minimizing their failures,

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[39]Courts can and do expand the scope of ESI discovery as the case progresses. See, e.g., Bellinger v. Astrue, 2009 WL 2496476, at *3 (E.D.N.Y. Aug. 14, 2009); Kilpatrick v. Breg, Inc., 2009 WL 1764829, at *5 (S.D. Fla. Jun. 22, 2009); Ross v. Abercrombie & Fitch Co., 2008 WL 4758678, at *1 (S.D. Ohio Oct. 27, 2008); Treppel v. Biovail Corp., 249 F.R.D. 111, 117 (S.D.N.Y. 2008); Consolid. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 347-48 (M.D. La. 2006); In re Worldcom, Inc. Sec., No. 02-3288, 2004 WL 768573, at *1 (S.D.N.Y. 2004).

Similarly, courts limit or narrow the scope of ESI discovery. See, e.g., Donaldson v. Pillsbury Co., 554 F.2d 827, 828 (8th Cir. 1977); Dunkin' Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc., 2009 WL 1750348, at *4 (E.D.N.Y. Jun. 19, 2009); Simon Prop. Group, Inc. v. Taubman Ctrs., Inc., 2009 WL 205250, at *5 (E.D. Mich. Jan. 24, 2008); Best Buy Stores, L.P. v. Developers Diversified Realty Corp., DDR GLH, LLC, 247 F.R.D. 567, 571-72 (D. Minn. 2007); Hagemeyer N.Am. Inc. v. Gateway Scis. Corp., 222 F.R.D. 594, 599-601 (E.D. Wis. 2004).

In addition, taking into account the burdensome nature of ESI and the relevance to the case at hand, courts frequently decline requests for additional ESI discovery. See, e.g., United States v. Gonzalez, 2009 WL 1543798, at *1 (D. Mass. May 26, 2009); Hubbard v. Potter, 247 F.R.D. 27, 31 (D.D.C. 2008); Yount v. Pleasant Valley Sch. Dist., 2008 WL 2857912 (M.D. Pa. Jul. 21, 2008); White v. The Graceland Coll. Ctr. for Prof. Dev. & Lifelong Learning, Inc., 586 F. Supp. 2d 1250, 1261-62 (D. Kan. 2008); Sims v. Lakeside School, 2007 WL 3254455, at *1 (W.D. Wash. Nov. 1, 2007); Palgut v. City of Colo. Springs, 2007 WL 4277564 (D. Colo. 2007); Motorola, Inc. v. United States, 462 F. Supp. 2d 1367, 1779 (Ct. Int'l Trade 2006); Dangerfield v. Merrill Lynch, 2006 WL 335357, at *2 (S.D.N.Y. Feb. 15, 2006).

[40]See generally **The Sedona Conference, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production** (2004).

and it can be difficult for a judge, whether in court, in chambers, or on the phone with counsel, to ascertain the situation and whether a lawyer's contentions are truth, hype, or a bit of both. In some cases, an evidentiary hearing or the appointment of a special discovery master will be necessary.

But central to the active case management model of discovery is that discovery need not be perfect for a trial to be fair. Most Rule 34 requests start out with the word "all." Although every lawyer wants to find the proverbial "smoking gun," we must ask ourselves, as discovery becomes more expensive, whether requiring a party to produce "all" documents on a particular topic, although meant literally, must be pursued literally.

Discovery is a relative, rather than absolute, concept: reject the routine request for "all documents," encourage sampling techniques, define specific categories of documents subject to discovery, and require specific reasons for expanding that list. The judge frequently reviews what is within and outside the bounds of the "discovery fence."

e. Making Objections Temporary

Evenhandedness is important. Objections are often routine, verbose, and overbroad, just as many discovery requests. A judge can order in a specific case, and the Rules Committee should consider, limiting the durability of objections to discovery requests under Rules 33, 34, and 36. Some parties serve objections routinely and maintain them throughout the discovery process, preferencing every response as "subject to objections." As long as an objection remains, the party propounding the discovery can never be really sure that the responding party has fully complied. This tactic delays discovery and may obfuscate the search for facts. Unless the parties have specifically agreed on the scope of an interrogatory, document request, or request

for admission, objections not specifically sustained by the court in a certain time frame should be deemed overruled; the discovery shall be provided as if an objection had never been made.

f. Apply the "Brady" Rule[41] in Civil Cases

Judges might transport the "Brady" rule from criminal to civil cases—imposing an ethical requirement on lawyers and a behavioral requirement on parties to disclose any "smoking guns" or other materially unfavorable evidence, whether or not requested by the opposing party. This is not a novel idea. In 1982, the late Judge Marvin Frankel authored an article which proposed two principles to guide lawyers in litigation:[42]

> (1) Counsel should be under a duty in civil litigation to disclose all material evidence favorable to the other side.
>
> (2) This requirement should not be obstructed or limited by either the professional rule protecting client confidences or the attorney-client privilege.

The second proposal was widely discussed in the law journals, but the first proposal was largely ignored until Judge William Schwarzer, former Director of the Federal Judicial Center, expanded on Judge Frankel's suggestions as follows:

> What has been learned from experience and what is likely to be learned from the inquiry suggested above is that the existing discovery rules require reexamination. One approach might be to restructure the existing discovery rules by shifting the emphasis from discovery—the process—to disclosure—the objective. There is after all no intrinsic value in depositions, interrogatories, or

[41] Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), which have been universally followed by trial courts in criminal cases and prosecutors offices, require prosecutors to divulge exculpatory evidence in their possession, including evidence for impeachment relating to the prosecution witnesses.

[42] Hon. Marvin Frankel, The Search for Truth Continued: More Disclosure, Less Privilege, 54 **U. Colo. L. Rev.** 51 (1982). See generally United States v. [redacted] Plaintiffs, 209 F.R.D. 475 (D. Utah 2001). The Court declined to extend Brady to a civil case, but engaged in a fair analysis of prior cases where courts arguably did apply Brady to civil cases.

> requests for production. Yet it is the inquiry process with which the rules now deal rather than its objective, the disclosing of information. This approach could be implemented by a rule requiring prompt disclosure of all material documents and information by all parties at the commencement of every action, permitting supplemental traditional discovery for good cause only.[43]

The mandatory disclosure rules, adopted in 1990, are only a slight shadow of these broad proposals. Most lawyers, in advising their clients, live up to their ethical obligations, but the rules as drafted give too much emphasis to the phrasing of discovery requests, which puts a premium on drafting and provides an excuse for evasion. A search for facts must be at the heart of the reason for discovery. We may not want a "Brady" rule as a specific rule of civil procedure; instead, the concept can be an effective and evolving discovery sanction by a trial judge where the responding party is taking an unduly narrow focus of discovery.

CONCLUSION

The circumstantial evidence is overwhelming that aggressive emphasis on settlement, and the threat or actuality of expensive discovery, are leading causes of the decline in trials. Exchange of information among the parties, accomplished since 1938 through the ever expanding civil procedural rules, has many positive results – one of which is to facilitate settlements. However, exacerbated by the advent of ESI in recent years, the cost of discovery is exceeding its value. More trials and fewer settlements may result from limiting discovery, but the judicial system will be stronger.

The framers of the Constitution understood and guaranteed the value of a jury trial in civil cases, and its utility survives today, even in shrunken form. Civil jury trials set us apart from the

[43]Hon. William W. Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 **U. Pitt. L. Rev.** 703, 721 (1989).

rest of the world, yet we have witnessed the culture of settlement overshadowing the values of trials.