FROM RULES OF PROCEDURE TO HOW LAWYERS LITIGATE: 'TWIXT THE CUP AND THE LIP

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There's many a slip 'twixt cup and lip

– Old English Proverb

INTRODUCTION

The 1938 Federal Rules of Civil Procedure brought a new era to civil litigation in the United States. The rules replaced formalistic pleading with notice pleading; replaced extremely limited discovery with rules that "went farther than any single system anywhere";[1] and replaced varying rules with a single set of rules that would apply in every federal trial court and to every kind of civil case in the country. After seventy years, one would think that what the rules mean and how they apply would have achieved both clarity and stability. However, we are still debating such fundamental questions as how to unpack the notice-pleading standard of Rule 8[2] and the extent to which special rules should apply to different kinds of cases or different districts as an exception to transsubstantivity or national uniformity.

Many of the ongoing debates are about discovery. The 2007 and 2009 Supreme Court decisions on the sufficiency of pleading were based, in part, on a concern that discovery is so expensive and burdensome that pleadings must be found sufficient before discovery is allowed to begin.[3] Many of the relatively recent additions to local rules are driven

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1. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 726 (1998).

2. *See, e.g.*, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1947–54 (2009) (analyzing the level of specificity in pleadings required to avoid dismissal); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–70 (2007) (same).

3. *See Twombly*, 550 U.S. at 559 ("Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim." (alteration in original) (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005))); *see also Iqbal*, 129 S. Ct. at 1953 (noting that "the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process," and that the "rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity" because "[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery'" (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring))).

by pressure to address electronic discovery problems.[4] Other additions are driven by a belief that certain kinds of cases, such as patent disputes, require a special set of rules.[5] Since their inception in 1938, the rules of discovery have been revised with what some view as distressing frequency. And yet the rulemakers continue to hear that the rules are inadequate to control discovery costs and burdens.

The expressions of discontent over discovery are well known. Discovery, it is said, is overused by aggressive plaintiffs and is met with obstruction by reluctant defendants.[6] The adversarial nature of lawyers and litigants and the incentives of the hourly fee are said to combine to encourage attempts to discover "any and all" potential evidence and attempts to resist any discovery.[7] It is said that the use or even the threat of broad discovery discourages potential plaintiffs from filing cases and, when cases are filed, encourages settlements, often on terms that do not reflect the strength or weakness of the merits of the claim or defense.[8] It is also said that discovery diminishes the willingness to try cases and helps explain the continued decline in trials.[9]

Many of the criticisms leveled against discovery today sound similar to those raised in the debates in the 1930s over the broad discovery provisions in the newly proposed civil rules. The drafting and adoption of the Federal Rules of Civil Procedure were accompanied by expres-

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4. *See, e.g.*, E. & W.D. ARK. CT. R. 26.1(4)(e) (requiring the report filed under FED. R. CIV. P. 26(f) to "contain the parties' views and proposals regarding" certain matters, including "problems which the parties anticipate may arise in connection with electronic or computer-based discovery"); D. COLO. CT. R. app. f (providing instructions for preparation of a scheduling order, which should contain a report of preconference discovery and meeting under FED. R. CIV. P. 26(f) that includes: a "[s]tatement as to whether the parties anticipate that their claims or defenses will involve extensive electronically stored information, or that a substantial amount of disclosure or discovery will involve information or records maintained in electronic form"; in cases involving such electronic discovery, an indication of "what steps [the parties] have taken or will take to (i) preserve electronically stored information; (ii) facilitate discovery of electronically stored information; (iii) limit associated discovery costs and delay; and (iv) avoid discovery disputes relating to electronic discovery"; and a description of "any agreements the parties have reached for asserting claims of privilege or of protection as trial-preparation materials after production of computer-generated records"); S.D. GA. CT. R. 26(f) Report (stating that a report under FED. R. CIV. P. 26(f) should include, if the case involves electronic discovery, a statement as to "whether the parties have reached an agreement regarding the preservation, disclosure, or discovery of electronically stored information" and an identification of "any issues regarding electronically stored information as to which the parties have been unable to reach an agreement"; and, if the case involves privilege or work-product claims, a statement as to "whether the parties have reached an agreement regarding the procedures for asserting claims of privilege or protection after production of either electronic or other discovery material"); N.D. OHIO CT. R. 16.3(b)(2)(F) (referencing a default standard for conducting electronic discovery if the parties have not agreed).

5. *See, e.g.*, N.D. CAL. PATENT L.R. 1-1 ("Patent Local Rules"); N.D. ILL. L.R. 3.4 ("Notice of Claims Involving Patents or Trademarks"); S.D. TEX. P.R. 1-1 ("Rules of Practice for Patent Cases in the Southern District of Texas"); E.D. TEX. P.R. 1-1 app. m ("Rules of Practice for Patent Cases").

6. *See* Subrin, *supra* note 1, at 706.

7. *Id.*

8. *Id.* at 706–07.

9. *Id.* at 707.

sions of deep concern over the liberal discovery they provided.[10] In 2009, the 1930s debates over discovery rules sound both modern and familiar. William DeWitt Mitchell, then-Chairman of the Judicial Conference's Advisory Committee on Civil Rules, worried in the 1930s that, "[w]e are going to have an outburst against this discovery business unless we can hedge it about with some appearance of safety against fishing expeditions."[11] Another Committee member, Robert G. Dodge, emphasized that, "[i]n some way the courts must have control . . . and power to check abuses."[12] The demands for meaningful limits and controls on discovery have been loud and vigorous for decades.[13] These demands have received renewed force with the advent of electronic discovery.[14]

The discovery rules have been revised more frequently than any other section. The frequency of changes—in 1946, 1970, 1983, 1991, 1993, 2000, and 2006—in part reflects the extent to which changes in technology, commerce, and business have impacted the practice of law and the laudable commitment of rulemakers to keep the rules abreast

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10. *Id.* at 706–07 ("A discovery-skeptic both in the 1930s and today might share the concerns expressed during the Advisory Committee drafting process or in the debates about the Federal Rules: that expanded discovery provisions, combined with the adversarial nature of lawyers and their clients and the natural desire of attorneys to earn a good living, would result in extreme attempts to resist disclosure and to discover every shred of potential evidence; that the actual utilization of discovery or even the threat thereof would dramatically influence what cases are brought and how they are settled in ways that may not reflect the true merits of a lawsuit or potential lawsuit; that expansive discovery provisions would require courts to spend significant time ruling on discovery motions; and that expanded discovery would diminish the use and importance of trial in open court.").

11. *Id.* at 722 (internal quotation marks omitted) (quoting Proceedings of the Meeting of the Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States (Feb. 22, 1935), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-206-59 (Cong. Info. Serv.)).

12. *Id.* at 721 (internal quotation marks omitted) (quoting Proceedings of the Meeting of the Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States (Feb. 22, 1935), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS Nos. CI-209-59 to -60 (Cong. Info. Serv.)).

13. *See, e.g.*, Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 752–53 (1998) (describing rising opposition to broad discovery); Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 BYU L. REV. 579, 579 (1981) (noting that "[r]ecent years have witnessed a torrent of criticism of the practice of pretrial discovery in federal litigation," and noting one commentator's concern that "'[u]nnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy.'" (quoting William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978))).

14. *See, e.g.*, Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206, 206 (2001) ("[T]here is an urgent need to treat the discovery of electronic records differently from traditional documents, and amendments to the Federal Rules are necessary to help impose order in an area of the law that is both unpredictable and increasingly subject to abuse."); Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, LAW & CONTEMP. PROBS. Spring/Summer 2001, at 253, 259–60 (discussing rising concerns about electronic discovery); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 589–92, 628 (2001) (arguing that the costs and burdens of electronic discovery are "substantially greater" than the costs and burdens involved in traditional discovery, and concluding that "a system of discovery control that fails to take account of the special needs and unique impact of the computer age is destined to fail").

with fundamental changes in practice. The frequent changes also, in part, reflect the continued complaints about discovery and the ongoing efforts to locate reasonable limits on the broad discovery that the rules allow. There continues to be a demand for rule changes that will better control discovery costs and burdens and reduce the attendant delays. That deserves to be the subject of unremitting study. The Rules Committees have the task of monitoring the rules to ensure that they are working properly, and that responsibility has been met with diligent commitment.[15] At the same time, many suggestions that the rules should be amended to provide for "X" are appropriately met by pointing out that the rules already, in fact, provide for "X."

There appears to be a gap between the cup of the rules and the lip of judges, lawyers, and litigants applying them. The inevitable lag between the proposal of new rules or rule changes and their adoption is part of the reason and itself counsels against overly frequent amendments. But if the existing rules are not used, and those rules are believed to be well designed, then it is appropriate to ask why and how to best address that gap.

Professor Steven Gensler recently wrote that it is not necessary to look for a new rule to state the goal of civil procedure reform.[16] Rule 1 already states that goal in elegant terms: "to secure the just, speedy, and inexpensive determination of every action and proceeding."[17] Professor Gensler is surely right. Nor is it necessary to look for a new rule to state the defining criteria of proper discovery, consistent with Rule 1. Since 1983, Rule 26 has spelled out the proportionality limits on all types of discovery. Many of the rule changes before and after 1983 can be described as giving judges tools to control toward proportionality.

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15. *See, e.g.*, 28 U.S.C. § 2072(a) (2006) (giving the Supreme Court the "power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals"); *id.* § 2073 (authorizing the Judicial Conference to prescribe procedures for consideration of proposed rules, establish committees to assist with the rulemaking process, and establish a standing committee to review proposals of other committees and to make recommendations to the Judicial Conference); U.S. Courts, Federal Rulemaking, http://www.uscourts.gov/rules/procedurejc.htm (last visited Jan. 4, 2010) ("Each Advisory Committee shall carry on 'a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use' in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. . . . The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.").

16. Steven S. Gensler, *Justness! Speed! Inexpense!: An Introduction to* The Revolution of 1938 Revisited: The Role and Future of the Federal Rules, 61 OKLA. L. REV. 257, 273 (2008) (observing that "[t]o the extent the Federal Rules of Civil Procedure have a rallying cry, it is found in Rule 1 and it is this: 'Justness! Speed! Inexpense!'"; and noting that "[i]f there is agreement among our contributors [to the symposium], it may be that the future of federal rulemaking depends not on finding new ideals but on fidelity to the ones we have").

17. FED. R. CIV. P. 1.

The theme of this symposium issue is to identify a single change that should—and could—be made to improve civil litigation. Is there a single rule or procedure that can be changed to achieve the proportionality in discovery that is essential to just, speedy, and inexpensive case resolution? No. Have the Federal Rules been changed to try to do so? Yes, repeatedly. Is there a theme to the rule changes that offers guidance? Yes, and it is a familiar one. Many of the changes to the discovery rules were designed to increase judicial supervision over pretrial work, particularly discovery.

At the same time, the rulemakers have recognized that many cases do not require close judicial supervision or the added burdens that such supervision can impose, such as detailed discovery plans. Rule changes have attempted to facilitate the district judge's active involvement in the cases that need it, when such involvement is likely to be most effective, and to allow the attorneys and parties otherwise to manage the cases. Yet the gap from the cup of these rules to the lip of the judges tasked with providing such supervision, and the lawyers and parties tasked with invoking it, seems to remain. The gap limits the rules' effectiveness and may push toward other changes that may be less desirable or have more far-reaching consequences. Reminding ourselves of the potential benefits available under the existing rules can provide the help that many are looking to obtain from new or different rules. As every frugal shopper knows, before spending money on new clothes, it is always a good idea to review what is already in the closet.

Many studies and surveys analyzing the civil litigation system have concluded that the critical element in bridging the gap between the rules and their application is making the district judge more accessible to the lawyers, more involved in the details of discovery in cases that need such involvement, and more *present* in the cases that require such supervision.[18] This conclusion is consistent with the last half-century of rule

18. *See, e.g.*, THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 44 (1997), http://www.fjc.gov/public/pdf.nsf/lookup/discovry.pdf/$File/discovry.pdf [hereinafter WILLGING ET AL., SURVEY]; Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 584 (1998) ("The change most likely to reduce discovery expenses, in the view of [our sample of] attorneys, is to increase the availability of judges to resolve discovery disputes. . . . The related concept of increasing court management of discovery also ranked high as a means for reducing discovery expenses . . . ."); *see also* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 458 (1991) (noting that a "study of trial judges and lawyers involved in complex cases found that both believed the system would benefit from 'greater judicial involvement in the framing and control of discovery, including resolution of discovery disputes.'" (quoting GORDON BERMANT ET AL., PROTRACTED CIVIL TRIALS: VIEWS FROM THE BENCH AND THE BAR 56 (1981))); Rosenberg & King, *supra* note 13, at 589 (noting that a 1978 Federal Judicial Center report on discovery practices found that "effective control of discovery depends upon judicial management" (citing PAUL CONNOLLY ET AL., FED. JUDICIAL CTR., JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY 77 (1978))); David S. Yoo, Comment, *Rule 33(a)'s Interrogatory Limitation: By Party or by Side?*, 75 U. CHI. L. REV. 911, 924 n.76, 928, (2008) (noting that "studies have demonstrated a high correlation between judicial in-

amendments. The question, then, is how to increase the use of the rules that are already on the books, especially those that were designed to facilitate the judges' involvement where and when it is needed.

This Article suggests ways to improve the effective application of the *existing* rules. Specifically, the Article suggests ways to incorporate the optional components of Rule 16 into routine discovery and case management. Part I provides a brief history of the rules of discovery from adoption of the rules in 1938 to the "highwater mark" of party-managed discovery in 1970. Part II examines the trend from 1970 to 2006 toward court-supervised discovery. Part III examines the mandatory and discretionary procedures outlined in Rule 16 and makes two suggestions for judges to consider as part of case management.

I. A BRIEF HISTORICAL BACKGROUND OF DISCOVERY

Professors Stephen Subrin and Richard Marcus aptly describe one of the results of the 1938 Federal Rules as a "discovery revolution."[19] Before 1938, American discovery opportunities were "spotty and incomplete."[20] The words "fishing expedition"—as negative a term then as it is now—were part of the litigation vocabulary.[21] When the rules became effective in 1938, they provided broader discovery rights than any state or federal jurisdiction.[22] The rules were adopted despite the concern of

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volvement and efficient litigation," and referencing a report that "summariz[ed] the results of a study of more than 10,000 cases that determined that early judicial management of litigation significantly reduced the duration of litigation" (citing JAMES S. KAKALIK ET AL., RAND, JUST, SPEEDY, AND INEXPENSIVE?: AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 6, 13–15 (1996))).

The 1997 Federal Judicial Center study found:

> To reduce discovery expenses, the highest percentage of attorneys would look to increased availability of judges to rule on discovery disputes and/or increased court management of discovery (63%) and controls on attorney conduct through sanctions and/or a civility code (62%). While substantial numbers would also find certain rule changes helpful—for example, the 44% who said a uniform national rule requiring initial disclosure would reduce expenses and the 35% who said narrowing the scope of discovery would be helpful—changes in judge and attorney behavior clearly outweigh changes in the rules.

WILLGING ET AL., SURVEY, *supra*, at 45–46. The study concluded that "[w]hen pressed to select the single most promising approach to reducing discovery problems, then, the choice that clearly outstrips others is increased judicial case management." *Id.* at 47.

19. Marcus, *supra* note 14, at 255–56; Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 158–60 (1999); Subrin, *supra* note 1, at 734, 736.

20. Marcus, *supra* note 19, at 159.

21. *See id.*

22. Subrin, *supra* note 1, at 719. Professor Subrin quotes Professor Edson R. Sunderland, who wrote the drafts of the summary judgment and discovery sections of what became the Federal Rules of Civil Procedure. Professor Sunderland told the Advisory Committee that "he did not have precedent for the combination of liberalized discovery that he had drafted." *Id.* He admitted that he was "going further than any single jurisdiction's discovery provisions." *Id.* He explained:

> There is no very well settled system which will embrace the various objects that I have sought to attain . . . . [O]ne Rule would be supported by experience in one State or jurisdiction, and another by experience in another State or jurisdiction. You cannot find justification for all of these anywhere. It is strictly an eclectic provision which I have brought in here. . . . It was an entirely new subject matter. Now I might say that I made very little

some members of the Advisory Committee about such liberal discovery, including overreaching depositions.

The discovery permitted under the 1938 rules was further broadened in 1946 by amendments that "went a long way toward completing the discovery revolution."[23] Under those amendments, all discovery was subject to a "scope of discovery" provision within Rule 26. The main change was the addition of the statement that "[i]t is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."[24] Other amendments reduced court control over interrogatories under Rule 33, broadened requests for production under Rule 34, and made it clear that an objection to one or more specific requests for admission was not a basis for refusing to respond to the remaining requests.[25] The limits on discovery were a judicial protective order under Rule 26 and motions to terminate or limit discovery—limits that depended on the lawyers asking for specific protection.

The 1970 amendments reached what Professor Richard Marcus termed the "highwater mark" of party-managed discovery.[26] Rule 34 was amended to remove the requirement that made document discovery available only by a motion based on a "good cause" showing. This requirement was removed, according to the Advisory Committee Notes, in part because it was so little used.[27] The 1970 amendments also removed the necessity of seeking judicial permission to take a deposition in most instances,[28] and allowed interrogatories and requests for admission to seek matters of opinion.[29] The 1970 amendments expressly made the frequency of use of discovery methods unlimited unless otherwise ordered, and allowed discovery to occur in any order.[30] Since 1970, courts have seen a series of amendments designed to achieve what Professor Marcus calls "discovery containment."[31] These amendments moved the line separating party-managed from court-supervised discovery.

> use [sic] the Equity Rules or Federal statutes, because they have only in the very slightest degree provided for what I tried to do . . . .

Id. (alterations in original) (internal quotation marks omitted) (quoting Proceedings of Advisory Committee on Uniform Rules of Civil Procedure for the District Court of the United States (Nov. 17, 1935), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-113-92 (Cong. Info. Serv.)).

23. *Id.* at 736.

24. FED. R. CIV. P. 26(b) (1946 amendment), *reprinted in* 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26 app. 02 (3d. ed. 2009).

25. Subrin, *supra* note 1, at 737–38.

26. Marcus, *supra* note 13, at 748.

27. *See* FED. R. CIV. P. 34(b)(3) advisory committee's notes to 1970 amendment.

28. *Id.* 30(a) (1970 amendment), *reprinted in* 7 MOORE ET AL., *supra* note 24, § 30 app. 03.

29. *Id.* 33(a) (1970 amendment), *reprinted in* 7 MOORE ET AL., *supra* note 24, § 33 app. 03; *id.* 36(a) advisory committee's notes to 1970 amendment.

30. *Id.* 26(a) (1970 amendment), *reprinted in* 6 MOORE ET AL., *supra* note 24, § 26 app. 05; *id.* 26(d) advisory committee's notes to 1970 amendment.

31. *See generally* Marcus, *supra* note 13.

II. MOVING THE LINE

The first set of amendments designed to provide greater judicial control over discovery was enacted in 1983. Rule 16 was originally entitled "Pre-Trial Procedure; Formulating Issues."[32] It permitted a federal judge to require attorneys to attend a pretrial conference to consider matters such as simplifying issues, pleading amendments, admissions, limiting the number of experts, and referring issues to a master, with a pretrial order entered to reflect the results.[33] Rule 16 was significantly expanded in 1983, and again in 1993 and 2006. The 1983 amendments were intended to "extend[] the scope of the rule to cover the entirety of the pretrial process, including discovery and motions, and provid[e] judges with greater flexibility to tailor Rule 16 activities to the needs of a specific case."[34] As amended, the rule authorizes pretrial conferences and lists their objectives, requires an early scheduling order that mandates deadlines for certain items and allows them for others, and provides a lengthy list of subjects that can be considered and acted on at any pretrial conference.[35] The rule also authorizes a final pretrial conference, addresses pretrial orders, and authorizes sanctions for failing to obey scheduling orders or participate in good faith in scheduling or pretrial conferences.[36] In 2006, the amendments added authority to include provisions relating to e-discovery in a scheduling order.[37]

Also in 1983, Rule 26 was amended to state the criterion for tailoring the pretrial work to the needs of the particular case: proportionality. Rule 26(b) introduced the proportionality limitations applicable to all discovery under the Civil Rules.[38] Rule 26(b)(2)(C) now states:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
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> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

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32. FED. R. CIV. P. 16 (1938 adoption), *reprinted in* 3 MOORE ET AL., *supra* note 24, § 16 app. 01.

33. *Id.*

34. Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit and Bar*, 139 F.R.D. 525, 527 (1992).

35. FED. R. CIV. P. 16(a)–(c) (1983 amendment), *reprinted in* 3 MOORE ET AL., *supra* note 24, § 16 app. 03; *id.* 16(c) (1993 amendment), *reprinted in* 3 MOORE ET AL., *supra* note 24, § 16 app. 05.

36. *Id.* 16(d)–(f) (1983 amendment), *reprinted in* 3 MOORE ET AL., *supra* note 24, § 16 app. 03.

37. *Id.* 16(b) (2006 amendment), *reprinted in* 3 MOORE ET AL., *supra* note 24, § 16 app. 06.

38. *See id.* 26(b) (1983 amendment), *reprinted in* 6 MOORE ET AL., *supra* note 24, § 26 app. 07.

> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[39]

Professor Arthur Miller, the reporter who drafted this rule amendment, described it as a "180-degree shift" in the approach to discovery.[40] The combination of discovery conferences and the direction to curtail disproportionate discovery required judges to undertake some managerial action in most cases and encouraged judicial involvement even when not required. But, in 1994, commentators noted that this amendment "seems to have created only a ripple in the caselaw, although some courts now acknowledge that it is clearer than it was before that they should take responsibility for the amount of discovery in cases they manage."[41]

What accounted for the ineffectiveness? Perhaps it is that the broad discovery provisions embraced in the rules had been in place for forty-five years.[42] The expectation of broad discovery and the habits of party-management proved resistant to the encouragement of judicial control provided by the 1983 changes to Rule 16 and Rule 26.

In 1993, 2000, and 2006, additional amendments sought to make the tools provided in 1983 more effective. In 1993, Rule 16 was amended to allow judges to consider at pretrial conferences "the control and scheduling of discovery," as well as disclosures under Rule 26 and Rules 29 to 37.[43] Rule 26(d) continued to allow judges to control the sequence of discovery, and the 1993 amendments imposed a moratorium on formal discovery until "the parties ha[d] met and conferred as required" under Rule 26(f).[44] Rule 26(f) required the parties to meet and confer to prepare the discovery plan.[45] In 2000, a rule amendment twenty years in the making (because it was viewed as so controversial) narrowed the scope of discovery in Rule 26(b)(1) from "relevant to the subject matter involved in the pending action" to "relevant to the claim or defense of any party."[46] For good cause shown, the court could order discovery of any matter relevant to the subject matter.[47] This explicitly divided discovery

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39. *Id.* 26(b)(2)(C).

40. ARTHUR R. MILLER, FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 33 (1984).

41. 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2008.1, at 121 (2d ed. 1994).

42. Marcus, *supra* note 19, at 163.

43. FED. R. CIV. P. 16(c) (1993 amendment), *reprinted in* 3 MOORE ET AL., *supra* note 24, § 16 app. 05.

44. *Id.* 26(d) (1993 amendment), *reprinted in* 6 MOORE ET AL., *supra* note 24, § 26 app. 09.

45. *Id.* 26(f) (1993 amendment), *reprinted in* 6 MOORE ET AL., *supra* note 24, § 26 app. 09.

46. *Id.* 26(b)(1) (2000 amendment), *reprinted in* 6 MOORE ET AL., *supra* note 24, § 26 app. 10.

47. The full text of Rule 26(b)(1) now provides:

into two tiers: party-managed discovery regarding "any matter, not privileged, that is relevant to the claim or defense of any party"; and broader court-ordered and supervised discovery of "any matter relevant to the subject matter involved in the action."[48] The same rule was amended to clarify that only relevant information can be discovered—not all information that might lead to the discovery of admissible evidence—and to invoke the proportionality limits.[49] Although the debate over the change in the scope of discovery was passionate, it too was perceived as having little effect on practice. One explanation was that any effect was swamped by the changes that e-discovery brought.

In 2006, rule amendments to give judges additional tools to manage the distinctive aspects of e-discovery were enacted. These amendments further defined a discovery regime bifurcated between party-managed disclosure and discovery, and court-supervised discovery. The amendments encourage parties to ask the court to take an earlier, more detailed, and more frequent role in managing discovery. The amended rules require parties to include electronically stored information in initial disclosures,[50] in the mandated early discovery-planning conference of counsel,[51] and in the report to the court.[52] The court is permitted, but not required, to include electronically stored information in the scheduling order as well. [53] The amendments to Rule 16 and Rule 26(f) require the parties to discuss general e-discovery matters at the meet-and-confer conference and to discuss three issues in particular that, if deferred or ignored, often produce disputes: the form of production, data preservation, and privilege waiver.[54] The amendments were designed to require parties to discuss these issues early in the case and to seek early judicial involvement if agreements cannot be reached. These changes were intended to get the judge involved early in the cases that need such supervision—early enough to make the involvement most helpful.

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

48. *Id.*

49. *See id.* 26(b)(1) (2000 amendment), *reprinted in* 6 MOORE ET AL., *supra* note 24, § 26 app. 10.

50. *Id.* 26(a)(1)(A)(ii).

51. *Id.* 26(f).

52. *Id.* app. form 35 (2006 amendment) (providing a form for reporting the results of the planning meeting required by Rule 26(f), including the handling of discovery of electronically stored information); *see also id.* app. form 52 (replacing form 35 effective Dec. 1, 2010).

53. *Id.* 16(b)(3)(B)(iii).

54. *See id.* 26(f)(2), (f)(3)(C)–(D).

Another part of the e-discovery amendment package, Rule 26(b)(2)(B), clarified the obligation of a responding party to produce electronically stored information that is not reasonably accessible because of undue costs and burden.[55] The amendment to Rule 26(b)(2)(B) applied the two-tier structure between party-managed and court-supervised discovery. A party must provide discovery of the first tier—relevant, reasonably accessible, electronically stored information—without a court order. Information identified as "not reasonably accessible" is in the second tier, subject to discovery if the requesting party can show good cause for a court to order production. If a party seeks production of electronically stored information that has been identified as not reasonably accessible, and the parties cannot agree on a solution, the issue is to be brought to the court by a motion to compel or motion for protective order. If good cause is shown, the court may order discovery and may impose terms and conditions. In deciding whether to compel production, and what terms or conditions should apply, the court is to consider the proportionality limits of Rule 26(b)(2), including whether the cost of the discovery is worth the likely benefits. The terms and conditions may include requiring the requesting party to absorb some or all of the costs of production, making explicit a judicial tool for controlling and limiting discovery in order to encourage its use.

Another set of amendments to Rule 16 and Rule 26(b) addressed privilege waiver in an attempt to offer relief from the costs and burdens of reviewing discovery materials for privilege. The Rule 26 amendment requires the parties to discuss at their meet-and-confer conference whether they can agree on procedures for asserting privilege claims after production without risk of waiver and, if so, to request the court to include the agreement in a court order.[56] The Rule 16 amendment permits the court to "include [in the scheduling order] any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced."[57] The amendments also set out in Rule 26(b)(5)(B) a procedure to apply if the parties cannot agree on postproduction privilege assertion, allowing the parties to seek court involvement and preserve the status quo until the court can decide the disputed privilege or work-product questions.[58]

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55. Rule 26(b)(2)(B) provides:
> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

56. *Id.* 26(f)(3)(D).

57. *Id.* 16(b)(3)(B)(iv).

58. *See id.* 26(b)(5)(B).

Since the enactment of Rule 26(b)(5)(B), another rule change further encourages early judicial involvement to make discovery less burdensome and expensive. Under Rule 502 of the Federal Rules of Evidence, effective September 2008, if a federal court enters an order stating that disclosure of attorney-client privileged or work-product protected information in discovery does not waive the privilege or protection, the order is binding not only on the parties but also on third parties and other courts.[59] This rule provides more predictable and reliable protection against privilege waiver and provides an additional incentive for parties to seek—and for courts to provide—early involvement to set the terms and limits governing discovery.

The 2006 rule amendments continued the trends toward requiring the parties and their lawyers to raise problems early, to try to reach agreement, and to facilitate judicial involvement and supervision when needed. The amendments, and more importantly, the features of electronic discovery that made the amendments necessary in the first place, highlighted the importance of judicial involvement in managing discovery.

Since 1983, the Federal Rules have provided a wealth of opportunities for judges, on their own or on a party's motion, to supervise discovery in order to control toward proportionality. The changes to Rule 16 in particular make clear the number of tools and the extent of the authority the rules now provide. Yet complaints of judicial disengagement persist and abound. Such disengagement is widely viewed as resulting in disproportionate discovery, with the unjustified costs and delays that it brings. These concerns have led many to call for more amendments to the discovery and related rules. This Article proposes an alternative to this approach. If the use of the *existing* tools can be invigorated, perhaps the gap from the rules cup to the practice lip can be bridged, and the pressure for frequent additional rule changes reduced.

III. RULE 16 AND THE MANAGERIAL JUDGE

Rule 16 provides, in the words of Professor Thomas Rowe, "more managerial arrows than can fit in an ordinary quiver."[60] A rereading of Rule 16 confirms its potential for effective judicial supervision of discovery. Rule 16 begins by identifying the purposes for "one or more pretrial conferences" in any action. The first three purposes focus on pretrial management, and read like the wish list of many civil justice reform advocates: "expediting disposition," "establishing early and continuing control," and "discouraging wasteful pretrial activities."[61] The court must

59. *See* FED. R. EVID. 502(d).

60. Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—And the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 196 (2007).

61. FED. R. CIV. P. 16(a)(1)–(3).

enter a scheduling order in every case, by a specified date, after receiving the parties' Rule 26(f) report or after conferring with the lawyers and unrepresented parties at a scheduling conference or by other means.[62] The order must contain limits on the time to add parties, amend pleadings, complete discovery, and file motions.[63] The scheduling order is capable of accomplishing much more. The order may also modify the "extent of discovery" and provide specifically for disclosure or discovery of electronically stored information, recognizing that e-discovery may require more detailed planning and management than paper discovery to handle issues such as preservation and the form of discovery.[64] Rule 16 also encourages the court to "consider and take appropriate action" on sixteen nonexclusive enumerated matters.[65] They again read like the "X" in the frequent statement, "The Rules should be amended to allow judges to do 'X.'" The "matters for consideration" include the following:

> (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;
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> (B) amending the pleadings if necessary or desirable;
>
> (C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;
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> . . . .
>
> (E) determining the appropriateness and timing of summary adjudication under Rule 56;
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> (F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;
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> . . . .
>
> (L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
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> . . . .
>
> (P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.[66]

As amended, Rule 16 was "explicitly intended to encourage active judicial management of the case development process and of trial in most

62. *Id.* 16(b).
63. *Id.* 16(b)(3)(A).
64. *See id.* 16(b)(3)(B).
65. *Id.* 16(c)(2).
66. *Id.*

civil actions."[67] Judge Charles Richey, a trial judge and federal rules scholar, summarized the intended effect of the 1983 amendments to Rule 16:

> [T]hese Amendments replaced the historical model of the passive judge—the judge who acts only when compelled, and who does not get involved in the administration of a lawsuit—with a model of a managerial, more active judge, who is involved with every aspect of a lawsuit from start to finish.[68]

In articles written in 1989 and 1992, Judge Richey reviewed the potential and actual applications of Rule 16's provisions and concluded that it "is the most powerful tool in a trial judge's case management arsenal."[69]

Has this combination of rules designed to move toward increased judicial supervision over controlled discovery, as opposed to party management of very broad discovery, worked? Empirical studies are underway to try and give a reliable answer to this question. Anecdotal evidence suggests that lawyers view the amount of judicial involvement as inadequate. But the wealth of rule-based opportunities for lawyers to invoke judicial supervision, and for judges to provide it, does not suggest that additional rules are the only, or the best, answer. The remainder of this Article outlines how the courts might apply an existing rule—Rule 16—to improve its effectiveness.

Rule 16 requires judges to enter an order that sets four deadlines: to join parties, to amend pleadings, to complete discovery, and to file motions.[70] But Rule 16 *allows* judges to do far more. The rule quite properly recognizes that flexibility is paramount. Judges do their work in very different ways. Cases are different. Many cases involve little discovery. Many cases that do involve discovery require little judicial supervision over that discovery.[71] The rule invites lawyers and judges to use a number of tools to control cases, but does not require their use in any case.

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67. 3 MOORE ET AL., *supra* note 24, § 16.02.

68. Richey, *supra* note 34, at 527.

69. *Id.* at 528; *see also* Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599, 600 (1989).

70. FED. R. CIV. P. 16(b)(3)(A).

71. *See* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 9, 13 (2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf (noting that "[i]nformal exchange of documents was reported by a majority of respondents," and that more than 20 percent of those responding to the survey reported that a judicial officer took no action in discovery other than holding a conference to plan discovery); WILLGING ET AL., SURVEY, *supra* note 18, at 13 (discussing informal exchanges of information); *cf. id.* at 21 ("[T]he data suggest that problems in discovery may not differ so much by which form of discovery is used as they do by the nature of the case. Where a lot of money is at stake, where the issues involve personal injury or matters of principle, where the relationships are contentious and the issues complex, here we see more discovery and more problems with discovery.").

The point of Rule 16 is for the judge, working with the lawyers and litigants, to tailor a discovery and case-management plan that works for the particular case, limiting the use, timing, and extent of discovery in relation to pleading amendments and motions, to control discovery toward proportionality. The challenge is to invigorate and encourage the appropriate use of the Rule 16 tools to provide for such tailored discovery management, without impairing the discretion and flexibility that are essential.

A. The Rule 16 Conference

One suggestion for invigorating the use of Rule 16 is to hold an in-court hearing (or, at a minimum, a telephone hearing) with lawyers (and non-prisoner unrepresented parties) before entering a Rule 16 order. Many lawyers limit the proposed discovery plans submitted to the court to the minimum required—a list of deadlines. Many judges, asked to do no more, have a "paper hearing" and limit the Rule 16 order to the "Required Contents"—the deadlines for adding parties, amending pleadings, completing discovery, and filing motions—with dates for a joint pretrial order and docket call or trial. The rule allows this minimalist approach. But again, the rule permits much more. In a critical number of cases, such a minimalist approach does not capture the benefits available under Rule 16.

How can this be changed? This suggestion is not new but is perhaps underused: If the district judge required the lawyers to be present for the Rule 16 conferences and engaged in a genuine exchange about the case, the judge could learn critical information about the needs of that case and, when appropriate, craft a tailored order providing detailed management. The judge could learn whether the meet-and-confer conference was a meaningful exchange, or merely a perfunctory discussion about deadlines. The judge could also learn whether threshold legal issues had to be resolved, and could put into place a discovery, motion, and briefing schedule when appropriate. The judge could discuss with the lawyers what arrangements they had made for preservation of electronically stored information and management of e-discovery to focus on the key players and the most likely sources of important information. The judge could ask the lawyers whether they planned to submit a Rule 502 order to protect against privilege waiver. The judge could explore whether it was appropriate to stage discovery in relation to motions that could narrow the issues and therefore reduce the amount and expense of discovery required. The judge could determine whether, if such information was not then available, it was appropriate to schedule one or more later conferences to add to or modify the scheduling order.

Finally, a tailored discovery plan could be put into place, offering greater control—and greater benefit—than the bare-bones scheduling order that customarily results from the Rule 16 "paper hearing." Judges

usually cannot determine whether more than the bare-bones order is needed, or what a more detailed order should say, without actually talking to the lawyers. By making such a discussion the default practice in cases that involve discovery—rather than the exception—judges could better tailor the order consistent with the proportionality limits of Rule 26(b).

B. The Premotion Conference

The second suggestion also is not new; it is already used by many courts. The suggestion is that judges follow a procedure of holding a premotion conference in discovery disputes. Under such a procedure, the parties would seek a premotion conference after they have conferred with each other and before filing any motion to compel discovery, to quash discovery, or to seek protection from discovery. The judge might ask from each party a brief description of the issues, but would not allow the parties to file the motions, briefs, and submissions that frequently accompany discovery disputes.

At the conference, the parties and the court could identify the issues that could be resolved in an informal fashion, and do so. Issues that require more detailed development, including the filing of motions and briefs, could be identified and a schedule set to address them. This procedure reduces the delays in resolving discovery disputes, delays that can increase costs, disrupt the case, and even reduce parties' willingness to seek judicial relief. This procedure allows the judge to supervise discovery without the time lag introduced by the motion, response, reply, and decision process. This procedure is consistent with the rules designed to facilitate judicial involvement in the cases that need it, and allows for early resolution of discovery disputes.

Neither of these procedures is suggested as a rule. That would be inconsistent with the flexibility that Rule 16 embodies. But many judges already use these or similar procedures and have found them to be a helpful way of using the many tools that Rule 16 provides to identify, early in the case, opportunities for effective control of discovery.

Many have warned against embracing the model of the "managerial judge."[72] But the procedures discussed above—and their recognition of

72. *See, e.g.*, E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 314 (1986) (noting that opponents of managerial judging "argue that litigants are being forced, directly or indirectly, to abandon positions on the merits," that "judges are making discretionary procedural decisions early on that effectively close off lines of substantive inquiry without benefit of full development and consideration of the merits of the parties' positions," and that "the 'managerial' decisions of these judges are largely immune from appellate review"); Grace M. Giesel, *Enforcement of Settlement Contracts: The Problem of the Attorney Agent*, 12 GEO. J. LEGAL ETHICS 543, 548 n.23 (1999) (noting that some commentators have "question[ed] the wisdom of judicial involvement" in settlements (citing Stephen Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 58–78 (1992); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 491–

Rule 16's potential to control discovery toward proportionality—do not raise the danger of an aggressive managerial judicial role such that they distort or detract from the essential disinterestedness of the judge in our adversarial system. To the contrary, by focusing on the district judge's involvement in discovery when it is appropriate and useful, these procedures increase the judge's ability to decide—fairly, accurately, and efficiently—the disputed issues that the adversaries present for resolution. These procedures also allow a judge to learn about the case before the parties ask for a decision on dispositive motions. In short, these procedures allow judges to control discovery in order to allow the parties to try cases, not in order to push parties to settlement. These practices would invigorate the use of the existing Rule 16 tools and make them more effective to work toward proportionality, without adding a new rule or amending an existing rule.

CONCLUSION: FROM CUP TO LIP

Two things are clear. The first is that the application of the rules must be monitored to ensure that they are working well, and that the tools they provide are both adequate and effective. The second is that the rules themselves cannot solve all the problems. The incentives and habits lawyers and judges developed under the regime of party-controlled, very broad discovery, in a world of paper rather than computers, are not easily changed. The rules have to be general enough to deal with all the different kinds of cases that come into federal courts, to accommodate the inevitable changes in technology, and to accommodate the different demands on, and styles of, individual judges. And many problems affecting discovery, such as when the duty to preserve evidence arises and the extent of its application, begin before cases are actually filed, which is when the rules apply.

The rules of civil procedure are, at best, only one part of what must be a multi-front and multi-faceted approach to controlling discovery toward proportionality. If the empirical studies show that judges are not

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514 (1985); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378–80 (1982); Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 752–65 (1989))); Resnik, *supra*, at 425–26, 430 (expressing concern that "[t]ransforming the judge from adjudicator to manager substantially expands the opportunities for judges to use—or abuse—their power"; that managerial judging "undermine[s] traditional constraints on the use of [a judge's] power," such as the need to provide written justification for decisions and the availability of appellate review; that "no explicit norms or standards guide judges in their decisions about what to demand of litigants"; and that "[h]aving supervised case preparation and pressed for settlement, judges can hardly be considered untainted if they are ultimately asked to find the facts and adjudicate the merits of a dispute"); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 360 (1996) ("Without further revisiting the debate on managerial judging, it should be sufficient to note that there are dangers of mistake, favoritism, or lax administration of justice when judges become managers, settlement impresarios, or active participants in the dispute rather than reasonably detached umpires of adjudication.").

sufficiently involved in the cases that require supervision to control toward proportionality, the procedures suggested in this Article deserve to be considered as protocols or guidelines for more general application, to help narrow the gap from the cup of the rules to the lip of practice.