Managerial Judges: The Long View

BY ROBERT M. DOW JR.

In a landmark law review article published four decades ago, Professor Judith Resnik expressed skepticism about the rise of "managerial judging."[1] Professor Resnik contrasted the emerging model of active judicial case management, with its emphasis on efficiency and settlement promotion, with the "classical view" of judges approaching cases with "disinterest and disengagement."[2] Fast forward 40 years and it appears that, at least in certain kinds of complex litigation, there is no substitute for managerial judges. And over roughly that same period, all stakeholders have struggled to equip lawyers and judges with better tools for performing their roles in increasingly complicated litigation, never quite satisfied with the results of their prior work.

As Professor Resnik recognized, one of the litigation pressure points driving the impetus for judicial involvement is "the creation of pretrial discovery rights."[3] In an adversarial system, disputes over the scope of discovery and the use of judges as arbiters of these disputes were inevitable. So, too, was dissatisfaction with the ability of the rules to cope with the explosion of available information and the evolution of complex civil litigation. Professor Brooke Coleman has carefully tracked rule-makers' attempts to manage this discontent, accurately observing that for several decades "the Civil Rules Committee has been occupied with how to fix civil discovery."[4]

Despite amendments to the Federal Rules of Civil Procedure that took effect in 1983, 1993, 2000, and 2006, the view persisted among judges, lawyers, and academics "that the civil justice system was still in a crisis, and that discovery was a major cause of this discord."[5] In 2010, the Civil Rules Advisory Committee convened a conference at Duke University School of Law to consider the available empirical research and begin a discussion about further rules amendments.

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Around the same time, a group of experienced lawyers from both sides of the "v.," working closely with the Institute for the Advancement of the American Legal System (IAALS), developed a pattern discovery protocol for use in adverse action employment discrimination cases.[6] This pilot program began in late 2011 and ultimately involved more than 50 federal district judges handling almost 500 cases across ten districts.[7] While the study found no statistically significant difference in case-processing times between the pilot cases and comparison cases, it appears that pilot cases were more likely to settle.[8] These protocols remain in use in some districts.[9]

The larger project emerging from the 2010 Duke Conference culminated in the 2015 amendments to Rules 26 and 37. The centerpiece of these amendments elevated "proportionality" to a more prominent place in Rule 26.[10] Though controversial at the time, the rule change does not seem to have radically altered then-existing practices. Rather, the amendment gives greater emphasis to a long-available tool for judges to impose initial limits on the scope of discovery, including the practice of sampling, subject to revision based on the needs of the litigation.

The Civil Rules Committee since has initiated amendments to Rule 23 (adopted in 2018) and Rule 30(b)(6) (adopted in 2020), and, recently, the Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g) have gone into effect (as of Dec. 1, 2022). Each of these rule changes has carried forward the motivation of its post-2010 precursors, encouraging early and active judicial case management. In a similar vein, a less heralded 2015 amendment to Rule 1 has stressed that the core obligation to "secure the just, speedy, and inexpensive" determination of federal litigation is shared by "the court and the parties."[11]

And the work continues: Between 2017 and 2020, two districts — the District of Arizona and the Northern District of Illinois — participated in the Mandatory Initial Discovery Pilot Project (MIDP), which required parties to disclose at the outset of the litigation "both favorable and unfavorable information that is relevant to their claims or defenses regardless of whether they intend to use the information in their cases."[12] The Federal Judicial Center has made exhaustive efforts to survey participating lawyers and judges on the results of this pilot. Its final report indicates mixed overall reviews, but notably finds that "pilot ▸

ways to cooperate on procedural aspects of a case").

71 Nicholas M. Pace & Laura Zakaras, RAND Corp., Where The Money Goes: Understanding Litigation Expenditures for Producing Electronic Discovery (2012).

72 The Advisory Committee Note to the 2015 Amendments to Federal Rule of Civil Procedure 26 includes a perceptive comment going to the core of the problem of overbroad and contentious discovery: "A party requesting discovery . . . may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party." Notes of Advisory Committee on Rules, 2015 Amendment to Rule 26. The Advisory Committee's answer to the "black box" problem is a meaningful discussion between counsel followed by a discussion with the court: "Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in pretrial conferences with the court." Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment.

73 A case management order should direct the parties to the topics to be discussed and include required discussion of documents and information that can be voluntarily exchanged.

74 CCJ Call to Action, *supra* note 7, at 27 ("[A]n in-person case management conference can play a critical role in reducing cost and delay by affording the judge and parties the opportunity to have an in-depth discussion regarding the issues and case needs").

75 Rosenthal, *supra* note 12, at 227, 242–43.

76 *See* Cal. R. Ct. 3.400-3.403 regarding definition and selection of complex cases. *See also* Los Angeles County Court Rules, Rule 3.3(k) (selection of complex cases). *See generally* CCJ Call to Action, *supra* note 7, at 23, Recommendation 5.

77 A complex case should be stayed as soon as it is identified so that the court may control the timing of motions and discovery and work with the parties to direct effort to reducing uncertainty on core factual and legal issues. Unwinding broad discovery issued without consultation with opposing counsel and the court is highly likely to waste time.

78 An off-the-record conference in an informal setting can be helpful to encourage candid discussion if this can be done consistent with the goal of perceived fairness.

79 *See* Rosenthal, *supra* note 12.

80 Cal. Civ. Proc. Code § 166.1 was enacted at the urging of the California Judicial Council, which acted at the suggestion of judges assigned to Complex Civil Litigation Program Courts. Section 166.1 allows a trial judge to indicate in an interlocutory order "a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation."

81 *See* Hamblin & Hannaford-Agor, *supra* note 49 for an example of a thorough analysis of the impact of case management reform on case outcomes, as compared to a control group of cases, considering such measurables as disposition time, amount of case activity, and lawyer satisfaction.

82 *See* Nat'l Ctr. for State Cts., National Open Court Data Standards, https://www.ncsc.org/consulting-and-research/areas-of-expertise/data/national-open-court-data-standards-nods (last visited Jan. 23, 2023).

cases had shorter disposition times than non-pilot cases, controlling for case type, district, and the effects of the coronavirus pandemic," and that the pilot was rated "most positively in terms of providing the parties with information earlier in the case."[13] Like the employment-litigation pilot referenced above, the MIDP offers an opportunity to use local experimentation as a vehicle for assessing what may work on a larger scale. In addition, at its October 2022 meeting, the Civil Rules Committee advanced to the Standing Committee a recommendation that potential amendments to Rules 16 and 26 concerning privilege logs be approved for publication and public comment. In June 2023, the Civil Rules Committee also will ask the Standing Committee to approve for publication a proposed Rule 16.1 to address issues relating to multidistrict litigation.

Through all of these changes, debate over the proper role of the judge continues. Two generations of lawyers, judges, and rule-makers have taken turns reworking practice and procedure to meet the latest perceived challenge of ever-evolving dockets, including but not limited to changes in pleading standards, privilege logs, e-discovery and proportionality, the rise and relative fall of class actions, and the explosion of multi-district litigation. In this volume, Judges Kuhl and Highberger have brought their decades of experience managing complex cases in the nation's single-largest unified court system to bear in a significant contribution to the discussion.[14] The judicial role in the largest case agglomerations in both state and federal court is too substantial to be described by any other term than "managerial." Yet those who wish to resist that designation can fairly point out that the traditional roles of judges to ensure a fair process for all litigants, including the availability of trial by jury, and to produce deliberate and well-reasoned rulings remain and must be accommodated within the realm of case management.

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1 Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).

2 *Id.* at 445.

3 *Id.* at 378.

4 Brooke D. Coleman, Am. Const. Soc'y, Federal Civil Rulemaking, Discovery Reform, and the Promise of Pilot Projects 2 (2018) https://www.acslaw.org/wp-content/uploads/2018/07/Pilot-Projects.pdf.

5 *Id.* at 7.

6 Emery G. Lee III & Jason A. Cantone, *Pilot Project on Discovery Protocols for Employment Cases Alleging Adverse Action*, 100 Judicature 1, 6 (2016).

7 *Id.*

8 *Id.*

9 *See, e.g.*, D. Or. R. 26.7.

10 Fed. R. Civ. P. 26(b)(1).

11 Fed. R. Civ. P. 1.

12 *Mandatory Initial Discovery Pilot Project Model Standing Order*, Fed. Jud. Ctr. (Nov. 15, 2021), https://www.fjc.gov/content/320224/midpp-standing-order.

13 Emery G. Lee Iii & Jason A. Cantone, Mandatory Initial Discovery Pilot (MIDP) Final Report Prepared for the Judicial Conference Advisory Committee on Civil Rules 3 (2022).

14 Carolyn B. Kuhl & William F. Highberger, *Toward Fairer, Quicker, Cheaper Litigation: A Unified Theory of Civil Case Management*, 107 Judicature 1 (2023).