MANAGING TOWARD THE GOALS OF RULE 1

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Managing Toward the Goals of Rule 1

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ABSTRACT

Two new studies may help federal judges better achieve the objectives of Federal Rule of Civil Procedure—a "just, speedy, and inexpensive" resolution of civil cases. The first study stems from an examination of the dockets of nearly 8,000 closed federal civil cases, with the goal of identifying the areas of pretrial activity that are most closely associated with faster or slower times to disposition. The second study is a survey of nearly 1,500 Fellows of the American College of Trial Lawyers, seeking their perceptions of and experience with the pretrial process. Collectively, these studies provide valuable insight into strategies that district and magistrate judges can employ in order to steer civil cases to a fair and efficient resolution. In this article, we summarize the key findings of both studies and offer a few salient recommendations based on those results.

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I. INTRODUCTION

The importance of hands-on judicial management of civil cases was advanced at the federal level in a serious and meaningful way by the 1983 and 1993 amendments to Federal Rules of Civil Procedure 16 and 26.[3] The amendments expressly empowered federal judges to control pretrial scheduling, set limits on discovery, discourage wasteful pretrial activities, and facilitate settlement. These developments, for the most part, have been accepted—even applauded—as a positive step toward controlling cost and delay in civil cases.[4] But the actual impact of these changes on the timing and expense of civil litigation has not been the subject of extensive analysis. Although many of the stated goals of Rules 16 and 26 are susceptible to measurement—for example, the frequency of scheduling conferences, limitations on discovery, and the time between events[5]—there have been relatively few efforts to determine whether the stated goals have been met and the extent to which the rules have been used. Until now, the most thorough studies in this area were decades old.[6]

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3. FED. R. CIV. P. 16 advisory committee's note to the 1983 and 1993 amendments; FED. R. CIV. P. 26 advisory committee's note to the 1983 and 1993 amendments. Even prior to these amendments, the Federal Judicial Center had promoted active case management through reports and seminars. *See* PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978); STEVEN FLANDERS ET AL., CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (1977).

4. For a strong defense of judicial case management, see Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984). Others, however, have expressed concern that case management will open the door to unfettered judicial discretion. *See* Robert Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961 (2007); Todd Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41 (1995); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

5. *See* FED. R. CIV. P. 16; FED. R. CIV. P. 26.

6. The most complete federal studies prior to 2009 were conducted by the Federal

Fortunately, new and valuable empirical information is now available. This article considers the future of federal judicial case management through the lens of two new studies conducted by the Institute for the Advancement of the American Legal System at the University of Denver (IAALS). The first study involved a detailed review of the docket sheets of nearly 8,000 closed civil cases in eight federal district courts. The study aimed to identify factors that contributed to delay or otherwise affected civil case management.[7] The second study—separate but related—surveyed approximately 1,500 Fellows of the American College of Trial Lawyers (ACTL), an exclusive organization of highly experienced trial attorneys from both the plaintiff and defense bars.[8] The study gauged ACTL members' perceptions of the civil justice system and the pretrial process.[9] Together, these studies suggest that litigants would benefit, and efficiencies would result, from stricter and more deliberate application of existing judicial management authority.

We begin with a short explanation of each study and its methodology. From there we focus on four areas of the findings as they relate to judicial case management: (1) scheduling and extensions; (2) setting and maintaining discovery limits; (3) motion practice; and (4) local legal and judicial culture, including the relative impact of local rules.

II. BACKGROUND ON THE IAALS STUDIES

A. Civil Case Processing Study

Docket sheets are a rich source of data concerning the processing and management of civil cases. IAALS reviewed the dockets in eight

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Judicial Center in the 1970s and the RAND Institute for Civil Justice in the 1990s. *See* FLANDERS, *supra* note 4; CONNOLLY, *supra* note 3; PAUL R. CONNOLLY & PATRICIA A. LOMBARD, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS (1980); JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996).

7. IAALS, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS (2009) [hereinafter CIVIL CASE PROCESSING].

8. ACTL & IAALS, INTERIM REPORT ON THE 2008 LITIGATION SURVEY OF THE FELLOWS OF THE ACTL, 2 (Sept. 2008) (on file with the authors) [hereinafter 2008 LITIGATION SURVEY]. This report, containing both the ACTL Interim Report and the Litigation Survey results is not to be confused with the ACTL Interim Report released one month earlier in August 2008.

9. *See id.*

federal district courts of 7,689 civil cases that had closed between October 1, 2005 and September 30, 2006.[10] While some of these cases had closed within days after filing; others had been open a decade or longer before termination. By choosing a fixed date range for case closing, IAALS was able to capture cases with different lengths and different dispositions.[11]

The courts in the study were chosen to reflect diversity of size (as measured by the number of authorized district judgeships), geography, and national rankings in judicial caseload profiles based upon publicly available Federal Court Management Statistics.[12] These statistical profiles identify, among other things, the median time in months from filing to disposition for civil cases in each district, and provide each court's numerical standing among all districts in the circuit and nationwide as of September 30 of each year.[13] Working from the data as of September 30, 2006, IAALS selected courts with high, mid-range, and low rankings for median time from filing to disposition for civil cases. IAALS deliberately sought out district courts with diverse rankings in this area, including those districts with very high and very low rankings, in order to determine whether the factors that contribute to those rankings could be separated.[14] Of the eight districts selected for the study, three were considered small (one to four authorized district judgeships), three were medium (five to eight authorized district judgeships), and two were large (nine or more authorized district judgeships).[15] In each size range, at least one district court had a high national ranking with respect to median time from filing to disposition, and at least one district court had a low national ranking.[16]

The study did not include a control for unfilled judgeships during the relevant study period, nor did it directly account for each court's use (or non-use) of magistrate judges or senior judges—other than to track when individual magistrate and senior judges were assigned to cases.[17] The presence and use of magistrate and senior judges may

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10. The methodology of the study is presented here in summary form. For full details, see CIVIL CASE PROCESSING, *supra* note 7, at 2.

11. CIVIL CASE PROCESSING, *supra* note 7, at 2.

12. *Id.* at 20-22.

13. *Id.* at 21.

14. *Id.*

15. *Id.* at 20.

16. *Id.* at 21 tbl.1.

17. CIVIL CASE PROCESSING, *supra* note 7, at 20 n.46.

have contributed to some of the variation across courts observed in the study.

In all but the two largest courts, every civil case that closed within the specified date range was reviewed, except for cases that had been reopened after September 30, 2006 or cases with procedural postures that did not follow the typical structure of the Federal Rules of Civil Procedure.[18] In the two largest districts in the study—the Eastern District of Virginia and the District of Arizona—the number of closed cases was too voluminous to be included fully in the study, so a random sample of cases was taken.[19] In most districts, the clerk's office graciously provided IAALS with a list of eligible closed cases.[20]

IAALS researchers reviewed the dockets of each closed case through Public Access to Court Electronic Records (PACER), the public electronic docket retrieval system for the federal courts.[21] The public is normally charged eight cents per page to download or print dockets and individual filings through the PACER electronic interface.[22] However, IAALS obtained waivers of the PACER fees from each of the eight district courts that participated in the study.[23] For each docket, researchers identified any information relevant to the judicial management of the case or the impact of that management on the time to disposition, and logged such information in a specially designed database.[24] IAALS collected information in eight categories: (1) descriptive aspects of the case (such as case number, party names, number of attorneys filing appearances, opening and closing dates, disposition code, and progress at point of termination); (2) the district and magistrate judges assigned to the case; (3) the parties' efforts at settlement or alternative dispute resolution, to the extent those efforts were reflected on the docket; (4) each discovery motion filed (including filing date and party, ruling date, the nature of the ruling, and whether a hearing was held); (5) each dispositive motion filed

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18. *Id*. at 23 ("[W]e did not consider student loan cases, recovery for overpayment and enforcement of judgments, recovery of overpayment of veterans' benefits, forfeitures, social security cases, deportation proceedings, and . . . prisoner petitions [alleging wrongful imprisonment or inadequate prison conditions].").

19. *Id*. at 23-24.

20. *See id.* at 13.

21. *Id*. at 19.

22. *See* Admin. Office of the U.S. Courts, *PACER User Manual for ECF Courts* 5 (2007), *available at* http://pacer.psc.uscourts.gov/documents/pacermanual.pdf.

23. CIVIL CASE PROCESSING, *supra* note 7, at 20 & n.47.

24. *Id*. at 24.

(same); (6) other selected relevant motions (primarily motions seeking an extension of time); (7) scheduling orders and continuances of major case deadlines; and (8) trial.[25] Once data entry was complete, the data was cleaned and analyzed, and initial results were shared with the subject courts.[26] The analysis focused on identifying the areas of civil case processing that were most closely correlated with overall disposition time, as well as the use (and non-use) of procedural tools by both lawyers and judges to control delay in litigation.[27] The final report on the study was issued in January 2009.[28]

B. ACTL Fellows Survey

The second major IAALS study, running simultaneously with the docket study, sought the considered opinions of experienced attorneys about the benefits and drawbacks of the civil pretrial process. In concert with the American College of Trial Lawyers Task Force on Discovery (the Task Force), IAALS developed an extensive survey covering a wide range of pretrial issues. The survey was born from the realization that while there is widespread anecdotal evidence that the pretrial process has become too expensive and time-consuming in too many civil cases, now-dated empirical studies are insufficient to identify the true concerns and sources of problems faced in twenty-first century litigation.[29]

The survey consisted of thirteen sections and sought information about most stages of civil litigation.[30] It was administered electronically by an independent survey provider in the spring of 2008 to all Fellows of the ACTL who had civil trial experience, with some limited exceptions.[31] Nearly 1,500 Fellows completed the survey; a remarkable response rate of 42%.[32] Results were cross-tabulated to account for similarities or differences in responses based on (among other things) a respondent's jurisdiction of primary practice and whether a respondent represented primarily plaintiffs or defendants.

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25. *Id.* at 24-25.
26. *Id.* at 25.
27. *Id*. at 1-2.
28. *Id.* at i.
29. 2008 LITIGATION SURVEY, *supra* note 8, at 1-2.
30. *Id.* at 3.
31. *Id*. at 2 (noting that "judges, Emeritus Fellows, Honorary Fellows and Canadian Fellows" were excluded).
32. *Id.*

In addition, IAALS collected and reviewed extensive and often detailed comments offered by ACTL Fellows in response to open-ended questions in the survey.[33]

An Interim Report containing the details of the ACTL survey and the initial findings of IAALS and the Task Force was released in August 2008.[34] After an extensive period of comment and follow-up research, IAALS and the Task Force released a Final Report in March 2009, which contains a series of twenty-nine Principles for twenty-first century civil litigation, based upon the survey findings and related work by the Task Force and IAALS.[35] Some of the Principles specifically address case management; the bulk of them address recommended rule changes.

III. LESSONS FOR JUDICIAL CASE MANAGEMENT IN THE TWENTY-FIRST CENTURY

The IAALS studies suggest that judicial involvement in the management of civil cases is both desired and desirable. Indeed, attorneys responding to the ACTL survey indicated strong support for early and regular judicial involvement in civil cases. Specifically, respondents indicated that such judicial involvement results in lower costs (67% in agreement), a narrower range of issues in dispute (74% in agreement), and greater client satisfaction (71% in agreement).[36] Furthermore, in response to open-ended questions about the judicial role, most Fellows firmly advocated greater judicial involvement at the pretrial stage. According to one ACTL survey respondent, "the single most important tool for simplifying and reducing the cost of the civil discovery system is early judicial management."[37] Another respondent remarked that "[t]he judge sets the tone and pace of civil litigation, and accordingly has a central, if not the central, role in moving the case."[38] A third Fellow noted in the survey comments that "[j]udges are the key to efficient litigation . . . . Only fair and efficient

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33. *Id.* at 3.

34. *See generally id.*

35. ACTL & IAALS, FINAL REPORT (March 11, 2009), available at http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&contentID=4053.

36. 2008 LITIGATION SURVEY, *supra* note 8, at App. A-6.

37. The individual, autonomous remarks were collected during the ACTL survey, and while they are not published or apart of the official report, they are on file with the authors [hereinafter ACTL Survey Quotes].

38. *Id.*

judges can throttle out-of-control discovery when one or both parties abuse the process."[39]

Consistent with these perceptions from the bar, the IAALS docket study also suggests that greater judicial involvement in the pretrial process may lead to shorter overall disposition times, more focused discovery and motion practice, settlements based on better information, and less cluttered dockets.[40] In particular, direct judicial involvement in maintaining strict pretrial schedules, limiting discovery, and deciding motions quickly, has a measurable, positive impact both on the actual cost and time spent on a case and on the perceptions of court efficiency by the parties and their counsel.[41] We discuss the primary lessons from both studies in the sections that follow.

A. Setting and Maintaining Pretrial Schedules

Delay in civil case processing has been a legitimate concern for decades. The longer a case takes to reach resolution, the longer the parties must wait for financial and psychological closure, and the more likely that judgments will have reduced value.[42] Moreover, delay may strain limited court resources and impose additional cost to the parties.[43] In fact, respondents to the ACTL survey expressly connected delay and cost in civil litigation. Ninety-two percent of the survey respondents indicated that in their experience, "the longer a case goes on, the more it costs," and "nearly 83% of those responding agreed that continuances cost clients money."[44]

The IAALS studies suggest that much delay is preventable if the parties are held to the deadlines contemplated by the initial scheduling and case management order. More specifically, the studies show that in order to keep cases on schedule, judges should focus their attention on three areas of the pretrial process that particularly contribute to civil case delay: initial scheduling, discovery, and extensions.

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39. *Id.*
40. *Id.*
41. *Id.*
42. *See* George Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 534 (1989).
43. *See* Michael Heise, *Justice Delayed? An Empirical Study of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 814 & n.8 (2000).
44. 2008 LITIGATION SURVEY, *supra* note 8, at App. A-6.

With respect to initial scheduling, a trans-substantive, one-size-fits-all approach to pretrial scheduling may be counterproductive, since the discovery and dispositive motion needs of some case types are typically more demanding than those of other case types. Although the intricacies of differentiated case management and assigning cases to different tracks are outside the scope of this article,[45] the IAALS docket study clearly demonstrated that certain case types experience a disproportionate volume of motions disputing discovery and motions for summary judgment. For example, patent suits comprised only 4% of cases in the study but accounted for nearly 10% of the motions on disputed discovery.[46] And employment cases comprised 13% of cases in the study but accounted for more than 18% of disputed discovery motions.[47] Similarly, certain case types—among them environmental, patent, antitrust, and insurance—had a much higher than average number of summary judgment filings.[48] The findings of the docket study suggest that when developing a schedule of pretrial deadlines, it is important to account explicitly for the nature of the suit, the likelihood of complicated or disputed discovery, and the probability that one or more parties will seek summary judgment.

A related issue—and one that has been hotly debated—concerns the appropriate point at which to set a trial date. Some judges have taken the position that trial dates should be set as part of the initial scheduling order. However, others have advocated waiting until discovery is complete, or even until dispositive motions have been decided.[49] In the ACTL survey, 60% of respondents favored the early setting of a trial date, although the level of support varied by jurisdiction.[50] The docket study, however, solidly supported the early

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45. These issues have been discussed in detail elsewhere. *See, e.g.*, Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211, 215, 225-26 (1994).

46. CIVIL CASE PROCESSING, *supra* note 7, at 44.

47. *Id.*

48. *See id.* at 50, tbl.10.

49. *Compare* T.S. Ellis, III, *Judicial Management of Patent Litigation in the United States: Expedited Procedures and Their Effects*, 9 FED. CIR. B.J. 541, 542 (2000) ("First, and absolutely vital, is the early setting of a fixed and immutable trial date."), *with* MASS. CONTINUING LEGAL EDUCATION INC., THE U.S. DISTRICT COURT SPEAKS: DISTRICT OF MASSACHUSETTS 26 (2008) (noting some district and magistrate judges in Massachusetts wait until the end of discovery or after summary judgment to set a trial date).

50. 2008 LITIGATION SURVEY, *supra* note 8, at App. A-5.

setting of a trial date. The study found a correlation coefficient of about 0.7 between the overall length of a case and the elapsed time from the filing of the complaint to the setting of a trial date[51]—regardless of whether the case ever actually went to trial.[52] In other words, cases in which the trial date was set early in the litigation process tended to terminate earlier than cases in which the trial date was set later in the litigation process. The docket study could not determine precisely why this correlation was so strong relative to other factors. However, one reasonable explanation is that an early fixed trial date sends a signal to the parties that the case has a defined concluding date, encouraging more efficient discovery and motion practice. According to one ACTL survey respondent, setting an early and firm trial date "creates an inherent limitation on discovery and gives everyone a clear end point for resolution of the case."[53]

A second area in which judges may lessen case delay is ensuring the smooth and timely exchange of discovery. Fifty-six percent of the Fellows in the ACTL survey attributed the primary cause of civil case delay to the discovery process,[54] and the docket study supported this observation. In the docket study, motions on disputed discovery (such as motions to compel and motions to quash), as well as motions to extend time to file or respond to discovery requests, contributed to overall case delay, particularly when they were filed late in the discovery period.[55] Indeed, in the entire docket study, the variable most strongly correlated with overall time to disposition was the elapsed time from the initial Rule 16 conference to a party's filing of a motion for leave to conduct additional discovery not contemplated by the original case management order.[56] Put another way, where parties waited until late in the discovery period (or even after the close of

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51. The Pearson product-moment correlation coefficient is used to measure the strength of a linear relationship between two random variables. The absolute value of the coefficient ranges from zero (no linear relationship) to one (a perfect linear relationship). Here the correlation coefficient of about 0.7 was among the strongest of any random variable pairing observed in the study, indicating the strength of the relationship between the time taken to set a firm trial date and the overall time taken to resolve the case.

52. CIVIL CASE PROCESSING, *supra* note 7, at 31.

53. ACTL Survey Quotes, *supra*, note 37.

54. 2008 LITIGATION SURVEY, *supra* note 8, at App. A-5.

55. *See* CIVIL CASE PROCESSING, *supra* note 7, at 95, App. C.

56. *Id.*; *see also id.* at 32-33. The correlation coefficient r = 0.74335. The p value for was <.0001, as it was for all correlation coefficients cited in this article. The very small p value gives confidence that the correlations in this study are representative of the larger population of closed cases.

discovery) to seek leave to conduct additional discovery, longer overall case lengths tended to be observed. While preservation of original discovery deadlines and expeditious ruling on discovery motions are common-sense management techniques, the IAALS studies underscore the significant impact on overall case length that stems from failure to keep discovery within defined time limits.

The third area in which judicial management may prevent delay in civil cases relates to extensions of time and continuances of major deadlines. Twenty percent of ACTL survey respondents cited attorney requests for continuances and extensions of time as the primary cause of delay;[57] and in the docket study, motions seeking extensions of time at every stage of the pretrial process were pervasive. Across the eight districts in the study, IAALS observed nearly 40 motions to extend time to answer the complaint or counterclaims per 100 cases[58] and nearly 57 motions to extend time to respond to dispositive (and other non-discovery) motions per 100 cases.[59] In every court in the study, these motions were granted between 86% and 98% of the time.[60]

The docket study found that judges frequently move more significant deadlines as well. For every 100 cases, there were 47 motions to continue the discovery deadline, 32 motions to continue the dispositive motion deadline, 14 motions to continue the final pretrial conference, and 13 motions to continue the trial date.[61] Unlike the extension motions discussed above, which could be rationalized as not having affected the overall schedule, motions to continue major deadlines in the case almost by definition affect the overall case schedule and threaten to extend the time to disposition. Notwithstanding this fact, motions to continue major deadlines were granted in most courts more than 90% of the time.[62]

Even to seasoned court professionals, the 90% figure should appear staggering. Granting extensions and continuances have been uncontroversial in theory—most agree that extensions should be allowed only for good cause. But in practice, the 90% grant rate for extension motions sends an unmistakable signal that deadlines have

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57. 2008 LITIGATION SURVEY, *supra* note 8, at App. A-5.
58. *Id.* at 55 & 56 tbl.15.
59. *Id.* at 57 & tbl.17.
60. *Id.*
61. CIVIL CASE PROCESSING, *supra* note 7, at 61-63 & tbls.20-23.
62. *Id.*

no real meaning. When nine out of every ten requests to extend a deadline are granted, the rational conclusion is either that the deadlines were unrealistic to begin with, or that they failed to win the respect of the parties, their counsel, and the court. In either event, the information from these studies suggest a clear path by which the district or magistrate can manage cases more efficiently. Deadlines must be realistic, and they must be enforced.

B. Setting and Maintaining Discovery Limits

One purpose of Rule 26(f) and Rule 16 conferences is to discuss scheduling. An equally important purpose is to develop a joint strategy for discovery.[63] For cases that do not terminate prior to the Rule 16 conference, discovery is frequently the most time-consuming and expensive aspect of the pretrial process. Concerns about the cost and timing of discovery have pervaded for decades, but the ACTL survey sheds new light on the degree to which experienced attorneys are dissatisfied with the current system of wide-open discovery. Specifically, less than 44% of respondents believed that current discovery mechanisms work well, and nearly 71% believe that counsel use discovery as a tool to force settlement.[64] Nearly half the respondents said that discovery is abused in almost every case.[65] With respect to electronic discovery, the general concerns were even stronger; more than 75% agreed that e-discovery had contributed to a disproportionate increase in discovery costs as a share of overall litigation costs, and over 87% of respondents believed that e-discovery increases the overall cost of litigation.[66]

In the past, these concerns have been addressed in large part through rule changes—either by amending the Federal Rules of Civil Procedure to constrain discovery of certain types of information[67] or by amending the Federal Rules and local district court rules to introduce presumptive limits on certain discovery tools.[68] From time

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63. *See* FED. R. CIV. P. 16(c)(2)(F).

64. 2008 LITIGATION SURVEY, *supra* note 8, at App. A-4.

65. *Id.*

66. *Id.*

67. *See, e.g.*, FED. R. CIV. P. 26(b)(2)(B) ("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.").

68. *See, e.g.*, FED. R. CIV. P. 33(a)(1)(placing a presumptive limit of 25 interrogatories per party, including discrete subparts); D. ME. R. 16.1(b)(2) (limiting depositions to five per side in standard track cases); M.D. GA. R. 34 (limiting requests for

to time, concerns about the expense of discovery (in both time and money) have also been raised by the Supreme Court[69] or Congress.[70] From the judge's perspective, however, the most promising mechanism for controlling discovery may be the initial pretrial conference. In the ACTL survey, the four most commonly cited advantages to pretrial conferences were: (1) informing the court of the issues in the case, (2) identifying and narrowing the issues, (3) encouraging settlement, and (4) improving time management—i.e., helping the case move more quickly.[71] Federal district and magistrate judges are no doubt familiar with these benefits, but to hear these sentiments coming from some of the most experienced members of the Bar should be encouraging. To the extent that initial pretrial conferences are used to narrow the issues in dispute, the parties are less likely to engage in extraneous or unnecessary discovery.

Initial pretrial conferences under Rule 16 should function as a two-way street; while the judge learns details of the case adequate to approve a workable schedule and discovery plan, the parties are asked to justify any request for discovery or deadlines that fall outside the bounds of what might be expected for their case type. The nature of the colloquy is highly dependent on the nature of the suit. The IAALS docket study found, among other things, that certain case types are highly prone to discovery disputes while others are not. For example, very low levels of discovery disputes per 100 cases were observed in agricultural, tax, Fair Labor Standards Act, and product liability cases, while inordinately high levels of discovery disputes were observed in antitrust, Racketeer Influenced Corrupt Organizations Act (RICO), patent, fraud, and medical malpractice cases.[72] Similarly, RICO and fraud cases had a very high number of motions for leave to conduct additional discovery not contemplated by the initial case management order.[73] A court that is cognizant of these trends might adjust the amount of permissible discovery in such cases up front.

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production to ten per party); S.D. CAL. R. 36.1(a) (limiting requests for admission to twenty-five per party). Similar local rules exist in several other federal jurisdictions.

69. *See, e.g.*, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953-54 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007).

70. *See, e.g.*, Private Securities Litigation Reform Act, 15 U.S.C. § 78u–4(b)(3)(B) (2009) (staying discovery while a motion to dismiss is pending).

71. 2008 LITIGATION SURVEY, *supra* note 8, at App. A-6.

72. CIVIL CASE PROCESSING, *supra* note 7, at 97-98, App. D.

73. *Id.*

C. Motion Practice

Over 58% of the respondents to the ACTL survey indicated a belief that judges routinely fail to rule on summary judgment motions promptly.[74] Overall, there was little difference between plaintiff and defense counsel in responding to this question—53% in agreement and 60% in agreement, respectively.[75] There was, however, considerable variation based on the primary federal practice jurisdiction of the respondents. Among primary practice jurisdictions represented by at least 30 respondents (or about 2% of the total number of respondents), the percentage of Fellows agreeing that judges fail to rule promptly on summary judgment motions ranged from a low of 16% to a high of 80%.[76] This variation suggests that while all courts are perceived as being able to improve with respect to the timing of summary judgment rulings, some courts are perceived as particularly slow in this area.

This perception is supported by the docket data. The IAALS docket study found radical variations in the times to rule on summary judgment motions in the eight subject courts. The fastest court's median time from initial filing of the motion to ruling was less than 48 days; a remarkable figure, given that the process of fully briefing a typical summary judgment motion would occupy the first thirty days after filing.[77] By contrast, the slowest court's median time from filing to ruling was 191 days.[78] A similar range of ruling times was observed for Rule 12 motions: the median time from filing to ruling for all such motions in the study was 97 days.[79] However, the median time ranged from 48.5 days in the fastest court to 168 days in the slowest court.[80]

The time to rule on motions matters to lawyers. According to one ACTL survey respondent, "judges who hear and rule on pending motions promptly and fairly. . . [constitute] the biggest factor that makes one court better than another."[81]

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74. 2008 LITIGATION SURVEY, *supra* note 8, at App. A-5.
75. *Id.*
76. MATHEMATICA POLICY RESEARCH, INC., ACTL CIVIL LITIGATION SURVEY FINAL REPORT (June 27, 2008), App. D, tbl.VIII.3 (on file with authors). This unpublished report of the survey data contains extensive statistical analysis, some of which was not included in the IAALS/ACTL published reports.
77. CIVIL CASE PROCESSING, *supra* note 7, at 51 tbl.11.
78. *Id.*
79. *Id.* at 48 tbl.9.
80. *Id.*
81. ACTL Survey Quotes, *supra* note 37.

Expeditious rulings on dispositive motions also indirectly promote settlement—an important effect that is not captured in traditional case flow management statistics. The docket study found a considerable number of cases terminated shortly after the court *denied* a motion to dismiss or a motion for summary judgment.[82] In approximately 750 cases in the study, a motion for summary judgment was denied by the court in its entirety.[83] However, denial of summary judgment placed no procedural barrier on the progression of the cases toward trial; 24% of those cases still terminated within 30 days of the ruling, and nearly 40% of the cases terminated within 90 days of the ruling.[84] Similarly, where summary judgment motions were granted only in part, more than 15% of the cases nevertheless terminated within 30 days of the ruling, and nearly 34% terminated within 90 days of the ruling.[85] These figures strongly suggest that summary judgment rulings provide parties with important information about the court's perception of the strength of their cases—information that may affect settlement decisions.

The docket study also dismissed certain traditional explanations for variations in ruling times, and in doing so, it now offers guidance to judges interested in making motion practice more efficient. First, spending time to draft a formal written opinion concerning a dispositive motion need not hinder the overall average time to rule on such motions. Indeed, contrary to previous studies, the docket study found no connection between the preparation of a formal written opinion on a summary judgment motion and the overall time to disposition: the fastest court in the study as measured by overall time to disposition was also the most productive court with respect to the number of published opinions per district judge.[86] Second, the volume of dispositive motions filed with the court is not an automatic hindrance to efficient ruling times. The fastest court in the docket study with respect to Rule 12 motions—the Western District of Wisconsin—received nearly 50% more motions per 100 cases than did the slowest court in the study (which was of comparable size), yet Western Wisconsin's median time from filing to ruling was more than

82. CIVIL CASE PROCESSING, *supra* note 7, at 52.
83. *Id*.
84. *Id*.
85. *Id.*
86. *Id*.

three times faster.[87] Similarly, Western Wisconsin received almost 37 summary judgment motions per 100 cases, yet ruled on them in a median time of 53 days; this amounted to handling twice the volume of motions as another court in the study in half the average time.[88] Third, a court's average time to rule on dispositive motions need not be a function of its mix of case types. The study found that even for the same common case types (as measured by nature of suit), there is wide variation between courts in the time to rule on Rule 12 motions. For example, two courts in the study each had about 25% of their Rule 12 motions come from "Other Civil Rights" cases, yet one court ruled on those motions in a mean time of 83 days and the other court required a mean time of 161 days.[89] Similarly, while all courts in the study had between 12% and 21% of their Rule 12 motions filed in "Other Contract" cases, the mean time to rule on such motions ranged from 40 days in the fastest court to 181 days in the slowest.[90]

What, then, *does* account for the differences between court efficiency in ruling on motions? Having excluded the number of motions, volume of published opinions, and types of cases in each district, we conclude the variations stem from differences in local legal and judicial culture. Fortunately, this is an area squarely within the control of judges, and as we discuss next, one that is amenable to positive change.

D. The Importance of Local Legal and Judicial Culture

Underlying the findings of both the docket study and the ACTL survey is the impact that local legal culture has had on the time, expense, and general approach to civil litigation. Here, "local legal culture" means the "established expectations, practices, and informal rules of behavior of judges and attorneys" in a community.[91] Local legal culture need not be memorialized in formal rules; indeed, frequently it is comprised of unwritten rules of conduct and assumptions about the law and processes in a particular court or community[92]—what Lynn Lopucki has deemed elsewhere as "the law

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87. *See id*. at 48 tbl.9.
88. *See id*. at 51 tbl.11.
89. *Id.* at 48-49, 49 n.87.
90. *Id*. at 48.
91. THOMAS CHURCH, JR. ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 54 (1978).
92. *See id*. at 55.

in lawyers' heads."[93] Local legal culture may cause courts to operate more or less efficiently than a mere review of the written rules would suggest, because judges and counsel already have a shared understanding about how the process should work.

An example from the IAALS docket study illustrates this point. Local Rule 37(F) of the Eastern District of Virginia provides in part that:

> Depending on the facts of the particular case, the Court in its discretion may, upon appropriate written motion by a party, allow an extension of time in excess of the time provided by the Federal Rules of Civil Procedure, these Local Rules, or previous Court order, within which to respond or to complete discovery or to reply to discovery motions.[94]

On its face, the text of the rule suggests that: (1) the Court would be open to granting discovery extensions on a fairly regular basis; and (2) parties would seek extensions with at least the same regularity as in other districts, if not more frequently. In fact, only the first of these assumptions held true. In the IAALS study, the Eastern District of Virginia did grant discovery extensions almost 96% of the time;[95] but it was a quiet 96%, because virtually no one ever asked the court for an extension. Compared to the study-wide average of nearly 25 discovery extension motions per 100 cases, attorneys in the Eastern District of Virginia filed only 6 discovery extension motions for every 100 cases.[96]

The small number of motions may well be attributed to the culture that judges have created in that district: judges and counsel alike understand that in spite of the seemingly permissive nature of the Local Rule, in reality, motions to extend time are frowned upon and cases are expected to move expediently toward trial or an appropriate alternative resolution. As one district judge from that court stated a few years ago:

> Continuances in civil cases in the Eastern District of Virginia are as rare as hen's teeth. Remarkably, in more than 12 years on the bench, I cannot recall granting a motion for a continuance in a civil case. More significantly, I can only recall a very small number of

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93. Lynn M. Lopucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1500-01 (1996).

94. E.D. VA. R. 37(F).

95. CIVIL CASE PROCESSING, *supra* note 7, at 57 tbl.16.

96. *Id.*

such motions being made.[97]

While the statistics show that such motions are frequently granted when requested, the *perception* that extensions and continuances should not be sought is extraordinarily powerful.

The Eastern District of Virginia provides just one example of how local legal culture takes its cues from, and can be influenced by, the culture of the judges in the courthouse. When judges commit to adhering to a set schedule and appropriately limit discovery, attorneys respond in kind. As one ACTL Fellow put it, "[t]he entire process is very much dependent on the quality of the people participating in it—both judges and lawyers."[98] Indeed, the most important finding of the IAALS docket study may be that while certain variables are more closely correlated with overall disposition time than others, the courts that are fastest overall on average also tend to be the fastest at every stage of the case.[99] In other words, there is no magic bullet for making cases faster and cheaper—it requires hard work from both judges and counsel to keep a case on track and narrowly focused on the actual issues in dispute.

IV. CONCLUSION

Judicial management of individual civil actions is an art. Each case presents unique circumstances and unique needs with respect to scheduling, discovery, and ultimate disposition. The leadership of the judge assigned to the case—both in guiding the case through the pretrial process and in setting the tone for parties and their counsel—is an important element in achieving a "just, speedy, and inexpensive" result. Increasingly, however, the art of judicial management is being informed by the science of empirical studies. Collective data on thousands of cases or the joint perspectives of thousands of counsel may help inform judges who strive to balance the individual needs of each case with the realities of managing a burgeoning docket. The two studies presented in this article offer additional information to judges seeking to strike this balance. It is our hope that more studies will follow and that the art and science of case flow management will work together to benefit all users of the civil justice system.

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97. Ellis, *supra* note 46, at 542.
98. ACTL Survey Quotes, *supra* note 37.
99. CIVIL CASE PROCESSING, *supra* note 7, at 83 tbl.32.