

Managing Summary Judgment

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Twenty-five years ago, during a four-month span in late spring of 1986, the Supreme Court issued three decisions interpreting and applying Rule 56.¹ Judges, lawyers, and—perhaps especially—academics still debate the impact that “Trilogy” of cases had on summary-judgment practice. Conventional wisdom long held that the Trilogy caused a fundamental shift in pretrial practice by leading lawyers to be more aggressive in seeking summary judgment and by leading judges to be more willing to grant it.² Recent empirical work by the Federal Judicial Center (“FJC”) challenges those beliefs. According to the FJC’s data, the greatest increase in federal-court summary-judgment filings occurred in the ten years *preceding* the Trilogy, not after.³ And the FJC study found no statistically significant change in how often motions were granted.⁴

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** United States District Judge, Southern District of Texas. We thank the Seattle University School of Law and the *Loyola University Chicago Law Journal* for their excellent work hosting and publishing this Colloquium respectively. These are our personal views, not the views of any of the rulemaking committees on which we have served.

1. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

2. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984 (2003); Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 103 (2002) (“Since 1986, when the Court decided the trilogy, lower federal courts appear much more willing to grant summary judgment.”); see also Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1935 (1998) (“Its flame lit by [the trilogy], and fueled by the overloaded dockets of the last two decades, summary judgment has spread swiftly through the underbrush of undesirable cases.”); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 73–74 (1990) (“[The trilogy] brought into the battle against excess litigation a weapon held largely in reserve by the federal courts since the promulgation of the Federal Rules in 1938.”). Some even drew a link between the Trilogy and the “vanishing” civil jury trial. See Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1333 (2005) (discussing the expansion of summary judgment and its role in reducing the number of federal civil trials).

3. See Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 882 (2007) (noting that the increase prior to the 1986 trilogy was “unexpected by many legal commentators”); *id.* at 890 (“Statistically

We probably will never understand exactly what role the Trilogy played in shaping summary judgment as we know it today. What is unquestionably clear, however, is that the Trilogy continues to hold a central place in modern summary-judgment jurisprudence and practice.⁵ Who among us cannot recite (or at least paraphrase) Justice Rehnquist's famous line: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'"⁶ In a single pithy sentence, the Court simultaneously assured judges already open to summary judgment that their decisions would not be unduly second-guessed and burnished summary judgment's image among those judges who had been less receptive.⁷ For our purposes, whether the Trilogy actually caused a fundamental change in summary-judgment practice or was simply Justice Rehnquist preaching to already converted judges is beside the point. It is no exaggeration to say that one cannot understand modern summary-judgment practice without understanding the Trilogy and the message it sent to courts and litigants about the role of summary judgment in our civil pretrial system.⁸

That being said, if we were asked to identify the dominant phenomenon in the federal pretrial landscape during the twenty-five years since the Trilogy, it would not be the change in attitudes about summary judgment. It would be the rise of active judicial case management.⁹ The Trilogy itself came just three years after the landmark 1983 amendments to Rules 16 and 26 that formally embraced active judicial case management as the civil justice system's best hope

significant increases in summary judgment motions over time took place almost exclusively between 1975 and 1986, prior to the trilogy.").

4. *Id.* at 886–89 (controlling for differences across courts and types of cases).

5. To the extent case citations are a measure of impact, as of 2006 the Trilogy cases were cited more frequently than any other federal-court cases. See Adam M. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 87 (2006) ("Anderson and Celotex [had] over 72,000 citations by federal and state courts.").

6. *Celotex*, 477 U.S. at 327.

7. See WILLIAM W. SCHWARZER, ALAN HIRSCH & DAVID J. BARRANS, FED. JUDICIAL CTR., *THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS 3–7* (1991) (discussing developments from 1938 to 1986 that caused or manifested judicial reluctance to fully embrace Rule 56).

8. See Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 99 (1988) ("[T]he Court's rhetoric in these three cases changed the tone of judicial perspective on Rule 56, creating a climate more conducive to more frequent use and granting of the motion.").

9. See Steven S. Gensler, *Judicial Case Management: Caught In the Crossfire*, 60 DUKE L.J. 669, 674–88 (2010) (chronicling the rise of judicial case management in the federal courts).

for controlling pretrial expense and delay.¹⁰ Since 1986, several rounds of amendments have expanded the federal scheme's commitment to, and reliance on, active judicial case management.¹¹ The Trilogy was born into a pretrial system struggling to adapt to this new way of thinking about the respective roles of judges and litigants.

As we see it—from our vantage points on the bench and in the academy, and as former participants in the civil rulemaking process—active judicial case management is defined by two essential features. One is custom tailoring the pretrial process and the trial itself to what makes sense for the particular case. The second is communication between the parties and the court. These two features work in tandem.¹² Rule 16 and its enthusiastic endorsement of case management are based on recognizing that no one-size-fits-all model can efficiently and fairly apply to every case.¹³ It is the judges who are responsible, using the parties' suggestions and information, for custom tailoring the pretrial process to the needs of each case.¹⁴ To carry out that task, Rules 16 and 26 give judges a “full quiver” of case-management tools.¹⁵ In using

10. See ARTHUR R. MILLER, FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 21, 33 (1984) (explaining how revised Rules 16 and 26 became tools for judicial case management).

11. See Gensler, *supra* note 9, at 679–83 (discussing case-management-oriented amendments since 1986); Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 235–38 (2010) (discussing discovery amendments from 1993 to present and noting intersection with judicial case management).

12. See generally COMM. ON COURT ADMIN. & CASE MGMT., JUDICIAL CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 14–16 (2d ed. 2010) [hereinafter CIVIL LITIGATION MANAGEMENT MANUAL] (emphasizing relation between communication with the parties and tailoring the case-management plan to the needs of the case); WILLIAM W. SCHWARZER & ALAN HIRSCH, FED. JUDICIAL CTR., THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE FOR JUDGES 3–5 (2d ed. 2006) (same).

13. See Gensler, *supra* note 9, at 719 (explaining how case management responds to the need for judges to custom-fit the general rules to the needs of their cases); Rosenthal, *supra* note 11, at 240 (“[Rule 16] quite properly recognizes that flexibility is paramount. Judges do their work in very different ways. Cases are different.”).

14. See Rosenthal, *supra* note 11, at 241 (“The point of Rule 16 is for the judge, working with the lawyers and the litigants, to tailor a discovery and case-management plan that works for the particular case.”); Gensler, *supra* note 9, at 697 (“Judges individually tailor the pretrial process in each case, sometimes by guiding the parties to make better choices, sometimes by working with the parties to help them agree on the size and scope of the pretrial activities, and sometimes by resolving disputes and imposing limits when the parties cannot agree or when the parties both engage in unreasonable behaviors.”).

15. See 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) (noting that Rule 16 gives district judges “more managerial arrows than can fit in an ordinary quiver”).

those tools, judges can look to the overriding objective of Rule 1¹⁶ and the core principles identified in the Rules—like proportionality in discovery¹⁷—for guidance. But there are few bright-line or hard-and-fast rules when it comes to case management. It is an inherently discretionary process. To effectively tailor discovery and pretrial-motions practice to what is appropriate for the case in question, the judge needs information from the parties. Only a sufficient amount of good and reliable information from the parties will accurately identify the real and important issues in the case and the best ways to investigate and resolve them. Communication between the court and the parties is the fuel that makes the case-management engine run.

Given the year when the Trilogy was born and the era in which it grew up, one might expect modern summary-judgment practice to reflect a high level of custom tailoring and communication. But the opposite seems true. Summary-judgment practice has become routinized and prescribed. It has become a one-dance-fits-all minuet of motions and briefs and responses, followed in due course by a written opinion, usually without any other communication on the topic between the judge and the lawyers. The lawyers and judges don't talk about the summary-judgment motions that might be made. And they don't talk about the motions that have been made. As a result, the judge has no opportunity to tailor the work leading up to the summary-judgment motion, or the work needed to resolve it, to what makes sense for the case. It is the antithesis of the active judicial case-management model. In many ways, summary-judgment practice seems to have missed the case-management revolution.

We think summary-judgment practice would be greatly improved if it embraced and incorporated the core case-management values of communication and custom-tailoring. We have three specific suggestions. First, we urge courts to incorporate anticipated summary-judgment motions into their early case planning, particularly into discovery planning. Thoughtfully deployed, summary judgment can avoid needless *pretrial* as well as needless trial time, work, and expense. Second, we urge courts to consider holding pre-motion conferences with the parties—preferably in person but at least by telephone or videoconference—before summary-judgment motions are made or briefed. A discussion with the parties before any motion is

16. FED. R. CIV. P. 1. The words of Rule 1 have attained a nearly iconic status: the Civil Rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” *Id.*

17. FED. R. CIV. P. 26(b)(2)(C).

made—which usually only takes a short time—can greatly reduce the largest expense and effort of modern summary judgment: the cost of making, briefing, and responding to motions. A discussion between the judge and the parties can avoid the filing of futile motions, can identify issues that can be resolved without a motion and full briefing, can identify issues that can be presented and resolved with only limited briefing, and can focus the arguments and proofs that do require full briefing for proper presentation. Exhaustively prepared summary-judgment motions that address every possible issue consume enormous resources¹⁸—both from the parties and the court—and much of it is simply a waste of time, effort, and money. Third, we urge courts to consider hearing oral argument on their summary-judgment motions. Just as holding a pre-motion conference allows the judge to tailor the motion process to the needs of the case before briefs are written and supporting materials assembled, holding oral argument allows the judge to tailor the resolution process to what works best for resolving that particular motion. One-size-fits-all works no better for the judges who must decide motions than it does for the parties who make them.

The main emphasis of this Article is how increased communication can improve the efficiency of the summary-judgment process. Better, more frequent, and more detailed communication between judges and parties can help reduce unnecessary cost and delay for the parties and unnecessary work for the judges. We take this as our point of emphasis for two reasons.

First, it responds directly to some of the most pointed and loudest criticisms of our federal civil justice system we hear—that excessive and disproportionate cost is driving people out of the court system or causing them to enter into settlements based on cost-avoidance rather than on the strengths or weaknesses of the merits.¹⁹ That’s not to say that we adopt those criticisms in full. Indeed, we worry that some of

18. See Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 232 (2011) (“Enormous resources go into the preparation of summary judgment motions.”).

19. See, e.g., AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009) [hereinafter ACTL/IAALS FINAL REPORT] (“Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.”); ABA SECTION OF LITIG. MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 2 (2009) [hereinafter ABA SURVEY] (citing survey results that 82% of respondents reported they had turned away cases due to cost and that 83% of respondents believe cost forces cases to settle contrary to the merits).

those criticisms, and some of the responses, are characterized by overstatement. But insofar as summary-judgment practice has become a part of the problem—or is failing to be part of the solution—we owe it to the users of the system to make helpful changes when they are possible.²⁰

Second, the Supreme Court itself has lauded the efficiency and cost-savings benefits of summary judgment.²¹ In *Celotex* in particular, the Supreme Court positioned summary judgment as a bulwark against unnecessary delay and expense.²² After declaring summary judgment to be not only not disfavored but in fact integral to the system, Justice Rehnquist explained that summary judgment avoids “unwarranted consumption of public and private resources” by avoiding trials.²³ Some have questioned whether that is true, arguing that trial adjudication would be less expensive.²⁴

We think the standard “summary judgment versus trial” comparison is incomplete. First, it too often falls into the trap of thinking of

20. See EMERY G. LEE III & THOMAS WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS—REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 6, 8 (2010) (finding that, all other things being equal, summary judgment increased litigation costs by 24% for plaintiffs and 22% for defendants); ABA SURVEY, *supra* note 19, at 114 (reporting that 62% of plaintiffs agreed with the statement that “[s]ummary judgment practice increases cost and delay without proportionate benefit”). Not surprisingly, plaintiff-side attorneys and defense-side attorneys disagree about the value of summary judgment and whether the procedure is being used appropriately. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 10 (2010) (reporting contrasting views on value); THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 29 (2010) [hereinafter WILLGING & LEE, IN THEIR WORDS] (“[P]laintiff and defendant attorneys disagreed sharply about whether summary judgment is used appropriately.”).

21. See Issacharoff & Loewenstein, *supra* note 2, at 100 (“The premise of the summary judgment trilogy is that a broader use of summary judgment should help alleviate the burdens on the federal courts by allowing pretrial disposition of meritless claims.”).

22. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (noting that summary judgment is a key component of the Federal Rules that helps to ensure “the just, speedy and inexpensive determination of every action”).

23. *Id.*; see also Martin Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 769 (1974) (“The primary function of summary judgment is to intercept factually deficient claims and defenses in advance of trial.”).

24. See John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 533 (2007) (“[S]ummary judgment is more expensive than trial.”); D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 876 (2006) (attempting to frame an efficiency formula and questioning whether conditions exist in which summary judgment would be efficient under that formula); Stempel, *supra* note 8, at 171 (“[O]ne can argue that the use of summary judgment may exact a higher total cost to the system than it saves the system and its participants.”).

summary judgment solely as a post-discovery mechanism whose benefits are limited to avoiding a certain number of trials.²⁵ But when judges and lawyers talk about summary judgment early in the case, and incorporate summary-judgment planning into the case-management process, the benefits include avoiding unnecessary discovery and other pretrial work. Second, we think current summary-judgment practices are making the process far more costly and burdensome than it needs to be. With just a short conversation between the judge and the parties, many motions that prophylactically raise and then exhaustively brief every possible issue can be avoided or significantly streamlined. If better communication between judges and lawyers can increase the benefits of summary judgment while also reducing the cost and effort needed to achieve those benefits, that has obvious implications for the efficiency equation.

By focusing on cost and efficiency, we do not mean to be dismissive of other concerns that have been raised about summary judgment since the Trilogy. Rule 56 has been challenged as unconstitutional.²⁶ It has been said that judges have been abusing the procedure by resolving fact disputes under the guise of making legal rulings.²⁷ It has been argued that judges have been systematically misapplying the rule because their “cognitive illiberalism” makes them inherently bias prone when determining what a “reasonable jury” might conclude based on a “cold” paper (or video) record.²⁸ And it has been argued that certain categories of cases (particularly civil rights claims brought by women) are especially at risk of being adversely affected by modern summary-judgment practices.²⁹ These are all important topics. If the procedure was unconstitutional, or if judges were applying it in a way that systematically deprived litigants of jury rights or discriminated against identifiable categories of litigants, cost savings or efficiency gains

25. See, e.g., Rave, *supra* note 24, at 886–87 (discussing summary judgment as a case disposal tool).

26. See Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 144–45 (2007) (arguing that summary judgment violates historical English common law jury trial procedures and is therefore unconstitutional according to the Seventh Amendment).

27. See Miller, *supra* note 2, at 1064–71 (discussing cases in which the judge assumed the role of fact finder).

28. See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 895–901 (2009) (discussing *Scott v. Harris* as an example of “cognitive illiberalism”).

29. See Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 734 (2008) (“My thesis is not that the dangers of summary judgment arise only in cases of women plaintiffs, but that they are particularly acute in these cases and that we can learn a great deal about the dangers of summary judgment in general by examining them.”).

would not overcome those harms. But those arguments are beyond the scope of this Article. Whether you like it or not, summary judgment is an accepted part of the federal pretrial process. The Supreme Court has given no indication that it thinks summary judgment is unconstitutional or that it is not capable of fair administration.³⁰ Recognizing that, our focus is on working toward a more effective and efficient administration of summary-judgment motions.

We also do not intend to suggest that cost reduction is the only value at stake. Though there is no consensus on all the core values a procedural system should advance, most commentators agree that the core procedural values include decisional accuracy, process transparency, and participation, in addition to efficiency.³¹ We think our suggestions enhance each of these core procedural values. Compared to current practice, our suggested practices are more transparent, more participatory, and, we think, more likely to yield accurate summary-judgment findings and conclusions. Though our emphasis in this Article will be on the cost and burden issues as described above, we will also try to highlight how our proposals further these other procedural values as well.

This Article proceeds in three parts. Part I discusses how judges can better integrate summary judgment into the larger case-management picture to aid in narrowing and focusing the case before and during discovery, not just for trial. Part II discusses how judges can better manage the summary-judgment process itself, principally by engaging in a direct dialogue with the parties in pre-motion conferences and oral argument. Broadly speaking, Part I discusses ways that judges can maximize the benefits available from summary judgment, while Part II discusses ways that judges can minimize the costs and burdens of seeking those benefits. Part III concludes.

I. TALKING ABOUT SUMMARY JUDGMENT AT THE START OF THE CASE

Rule 56 would make any lawyer's—and any judge's—list of most influential pretrial rules. It's not just that summary judgment stands as

30. See Edward Brunet, *Summary Judgment Is Constitutional*, 93 IOWA L. REV. 1625, 1642–48 (2008) (canvassing Supreme Court decisions in comparable contexts like motions for directed verdict).

31. See Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 593–94 (2001) (listing six basic procedural values); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 305–06 (2004) (listing principles of procedural justice anchored around accuracy, cost, and participation); see also Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 302 (2010) (proposing new text for Rule 1 based on procedural values including accuracy, efficiency, and participation).

the gateway to trial, though that is an important role.³² Rather, the very existence of the summary-judgment mechanism affects the way lawyers conduct discovery and prepare their cases long before any motions are made. Most lawyers start *thinking* about summary judgment from the moment they start working on their cases. They think about the motions they might make and about the motions the other side might make. Those thoughts shape discovery requests and responses. For the most part, however, the parties do not *talk* about summary judgment—with each other or with the judge—during the pretrial process. Far too often, the communication between the judge and the lawyers about summary judgment is limited to picking a dispositive motion deadline (and, not infrequently, ruling on requests that it be extended).

We think summary judgment should be discussed early in the case as part of the Rule 16 case-planning and case-management process. Properly and strategically used, summary judgment can be an important tool for setting pretrial priorities and for identifying issues that offer the best chance of expeditiously resolving or narrowing the case. For that to happen, however, judges and parties must start *talking* with each other about the role that summary judgment might play in the particular case. If judges and parties wait until discovery is over before talking about summary judgment, it will be too late to consider how planning the discovery in light of the anticipated motions might have helped to avoid needless discovery work and expense.³³ A small amount of time spent talking about summary judgment early in the case usually pays handsome dividends later in the form of a more focused and efficient pretrial process.

Our discussion of summary-judgment planning proceeds as follows. Subpart A begins by setting the stage. In most cases, judges and lawyers are not *seriously* talking about summary judgment at the case-planning stage, and we think that is a major missed opportunity. Subpart B turns to how planning for likely summary-judgment motions early in the case can help to narrow the issues and focus discovery—two primary goals of active judicial case management. Subpart C examines the role that summary-judgment motion planning can play in

32. See EDWARD J. BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 1:1, at 2–3 (3d ed. 2006) (describing gatekeeping function).

33. See *id.* § 1:1, at 10 (“Because much of the prohibitive expense and potential abuse flow from a burdensome discovery process, rather than from the actual trial, traditional use of the summary judgment device does not provide an answer to this problem.”). This treatise also acknowledges a strategic dilemma for lawyers. It first explains the strategic advantages to waiting until discovery has closed to move for summary judgment. *Id.* § 10:8, at 430. But as the authors of that treatise later admit, “such a strategy precludes the beneficial use of summary judgment as a means to avoid expensive discovery.” *Id.*

helping parties reach informed settlements earlier in the pretrial process than otherwise would be possible. Subpart D locates summary-judgment planning within the existing Civil Rules scheme, demonstrating that the Rules already facilitate—and even encourage—incorporating summary-judgment planning into the case-planning process. Finally, subpart E addresses the lingering misconception that summary judgment is simply a “post discovery” tool limited to avoiding trial expense. It concludes that summary judgment can yield comparable benefits during the pretrial process and that the path forward is for judges and parties to start talking about summary judgment early in the case.

A. Summary Judgment and Silence: The Missed Opportunity

Summary judgment directly affects a significant percentage of civil cases in federal court. Empirical studies tell us that, overall, summary judgment is sought in somewhere between 15% and 20% of cases.³⁴ Within that population, 88% of the motions seek to resolve the entire case while 12% are motions for partial summary judgment.³⁵ The filing rate is higher in some districts than in others.³⁶ It also varies by case type. For example, summary-judgment motions are more common in civil rights cases and employment discrimination cases.³⁷ If you focus on cases that survive into discovery, the summary-judgment motion filing rate may in fact be significantly higher than 20%. Lawyers reported summary-judgment *rulings* (not just filings) in roughly 26% of their cases that had discovery activity, and in over 60% of their cases that were long-pending or survived to trial.³⁸ All of the data point to the conclusion that summary judgment has a direct impact on a substantial part of the civil docket.

But summary judgment impacts cases long before any motions are filed, and even when they never come. Lawyers often start *thinking* about summary judgment as soon as they start working on a case, and

34. See Cecil et al., *supra* note 3, at 882 fig.1; JOE CECIL & GEORGE CORT, FED. JUDICIAL CTR., REPORT ON SUMMARY JUDGMENT PRACTICE ACROSS DISTRICTS WITH VARIATIONS IN LOCAL RULES 11 tbl.11 (2008).

35. See CECIL & CORT, *supra* note 34, at 7 tbl.2.

36. See Cecil et al., *supra* note 3, at 883 (ranging from low teens to the high twenties); CECIL & CORT, *supra* note 34, at 3 (“As in previous research, we found great variation in summary judgment practice across individual districts.”).

37. See Cecil et al., *supra* note 3, at 884 fig.3; CECIL & CORT, *supra* note 34, at 11 tbl.11.

38. 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 14 & n.6 (2009) (“Rulings on summary judgment motions were much more common in the cases terminated by trial.”).

the prospect of summary judgment influences how they conduct discovery.³⁹ For defendants, the prospect of making a summary-judgment motion often means taking discovery not to gather essential information for trial but to create the foundation for a *Celotex*-type “no evidence” motion. For plaintiffs, the prospect of having to oppose a summary-judgment motion often means expanding discovery far beyond gathering essential materials for trial. The looming threat of having to respond to a “no evidence” motion—which could be based on any element of the plaintiff’s case—can lead plaintiffs to assemble proofs on even the most peripheral matters and reduce them to admissible form in case they are needed later.⁴⁰ Judge Brock D. Hornby astutely summed it up this way:

To seek or resist summary judgment, lawyers must discover—in advance—all the evidence needed for trial and more, including expert opinions. . . . At summary judgment, lawyers cannot rely on what they expect witnesses will testify or on hope that brilliant cross-examination will persuade a judge and a jury. Instead, they must have information in documents, deposition transcripts, interrogatory answers, admissions, or affidavits.⁴¹

The cost implications are as large as they are obvious. As Judge Diane P. Wood has explained, “[A]s it became ever more urgent to amass, and then use, more supporting materials either to oppose or support summary judgment, both costs and delays kept growing.”⁴² This is no secret to the Bar, of course. During the public comment period for the 2010 amendments to Rule 56, the Civil Rules Advisory Committee consistently heard from lawyers that modern summary-judgment practice was driving them to demand discovery that they would not be pursuing otherwise. In a recent lawyer survey, nearly half of the respondents stated their belief that discovery is used *more* to develop evidence for summary judgment than to prepare for trial.⁴³

Given the major impact that summary judgment has on the pretrial process, one might expect it to be a major topic of discussion at the case-planning stage. Our best sense, however, is that it is not. In many cases, the summary judgment discussion—if there is one at all—is limited to a brief exchange in which the judge and the parties talk about

39. See Wood, *supra* note 18, at 241, 243.

40. See *id.* at 240 (stating that after the Trilogy litigants “quickly learned that they had to redouble their investment in discovery so they could present enough material to avert an untimely demise of their cases”).

41. D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 274 (2010).

42. Wood, *supra* note 18, at 241.

43. See ABA SURVEY, *supra* note 19, at 71 fig.6.11.

the deadlines (including one for filing dispositive motions) that must be set under Rule 16. Too often there is no serious discussion about what motions might be filed. Too often there is no serious discussion about the sequence or timing of any contemplated motions. And too often there is no serious discussion about the relationship between those motions and discovery. As a result, in too many cases the court and the parties give no serious thought to, and have no meaningful conversation about, the role that summary judgment might play in helping to shape or guide the scope or timing of discovery.

We think that is a missed opportunity. Summary judgment should be a central part of the Rule 16 discussion of the case in general and of discovery management in particular. If a “live” (either in person or by telephone or videoconferencing) Rule 16 conference is held, the judge can ask the parties whether an early summary-judgment motion might narrow the issues or even resolve the case entirely.⁴⁴ If so, then it might make sense to focus discovery on the issues that would be raised in that motion and to defer distinct discovery that might no longer be needed as a result. The Rule 16 conference is also the right time for the court and parties to start talking about motions that might be made later in the pretrial process. That conversation can identify whether the discovery needed for an early motion is distinct from the discovery needed for any later motion and whether it makes sense to separate that work. It also can help the parties identify the most important issues and then focus discovery on the critical proof and the best means of obtaining it.

These discussions usually take only minutes. If the lawyers have already thought about the likely motions and what discovery will be needed for them—and especially if they have already talked to each other about these matters as Rule 26(f) requires—it does not take much time for them to tell the judge. In a conference devoted to the judge working with the lawyers to figure out what pretrial work and schedule makes sense for that case, it does not take long to discuss how to tailor the timing and sequencing of summary-judgment motions and related discovery. Amendments to the Federal Rules since the Trilogy have paved the way for—indeed, have anticipated—those kinds of discussions. Lawyers take their cues from the judges before whom they appear. If the lawyers know that the *judge* will raise these issues at the

44. See ACTL/IAALS FINAL REPORT, *supra* note 19, at 22–23 (urging that parties and courts talk about potential dispositive motions at the Rule 16 conference and then “give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution”); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASEFLOW MANAGEMENT GUIDELINES 17 (2009) [hereinafter CIVIL CASEFLOW MANAGEMENT GUIDELINES] (“Judges should discuss potential dispositive motions at the initial pretrial conference.”).

Rule 16 conference and will be focused on a tailored case-management plan, the lawyers will be prepared.

Before developing these points further, we think it important to clarify that we are not advocating increased usage of summary judgment. Nothing we suggest would alter the standards governing summary judgment. Our concerns here are with timing and sequence. Some motions are better made earlier in the suit than later. Some motions should be made before other motions or before certain discovery. Those are topics the parties should address at the early case-planning stage.⁴⁵ We have no reason to believe that doing so will lead to more motions, largely because we have no reason to believe that the types of motions suitable for early attention are not currently being brought. Rather, motions that could be dealt with earlier are just brought later and rolled into an omnibus motion that addresses everything. In fact, if we are correct, openly discussing how summary judgment fits into the pretrial process will decrease the overall amount of summary-judgment activity because it will eliminate many of the end-of-suit motions that are currently being filed.

B. Using Summary-Judgment Planning to Narrow the Issues and Focus Discovery

The strategic use of summary judgment can advance the overarching goal of active case management by helping to focus the case on what matters the most, which in turn streamlines the pretrial process and avoids needless pretrial work and expense. Thinking of summary judgment as a means of avoiding needless *pretrial* expense departs from the traditional notion expressed in *Celotex* that summary judgment is a way of avoiding needless *trial* expense. But they are not exclusive. Properly deployed, summary judgment can do both.

Active case management can be seen as performing two functions. The first is to make sure that the pretrial activities remain within the boundaries set by the claims and defenses that have been pleaded. The scope of discovery, for example, is presumptively tied to the claims and defenses asserted.⁴⁶ Active case management can keep discovery from straying beyond those borders. But there is much more to case management than border control. It will be the rare case in which *everything* that could be done will need to be done, or *should* be done, to resolve the case or prepare for trial. The second function of active

45. See SCHWARZER ET AL., *supra* note 7, at 74–75 (emphasizing the need to discuss motion timing to ensure that motions are filed neither too soon nor too late).

46. See FED. R. CIV. P. 26(b)(1).

case management is to establish priorities within the boundaries set by the claims and defenses.⁴⁷ Common sense tells us to begin with the work most likely to yield the greatest benefits for the least effort.⁴⁸ The Rule 26 requirement that courts limit discovery to what is proportional to the needs of the case is but one way—though a critical way—in which judges help the parties to set priorities and focus their efforts on the most productive tasks first.⁴⁹

The strategic use and scheduling of summary judgment can be an important part of setting priorities in the case. The clearest example is when there is an issue that stands out as potentially case-dispositive. That issue might be an affirmative defense, a threshold issue for the plaintiff, or a discrete and separable element of the plaintiff's case. An obvious and recurring example is a qualified immunity defense that could end the case entirely.⁵⁰ As a matter of common sense, the judge and the parties should talk about whether it makes sense to focus on potentially dispositive issues first given their potential to make other issues in the case moot.⁵¹ And as part of that conversation, the judge and the parties should discuss whether discovery can be initially limited to the issues to be raised by an early motion or whether it is more efficient to conduct discovery more broadly even at the early stage.

47. In its simplest form, case management influences priority-setting indirectly by prompting the parties to set their own priorities. For example, discovery deadlines and limits (e.g., no more than ten depositions) do not directly set priorities, but they force the parties to set their own priorities or risk running out of discovery options before they obtain the most important materials. See FED. R. CIV. P. 16(b) advisory committee's note (1983) ("Litigants are forced to establish discovery priorities and thus to do the most important work first.").

48. See generally CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 12, at 37–39 (discussing setting of discovery priorities and limits); SCHWARZER & HIRSCH, *supra* note 12, at 10 (same).

49. See FED. R. CIV. P. 26(b)(2)(C). While proportionality issues can come up during the discovery process via motions to compel or motions for protective order, judges do not need to wait until problems arise before getting involved. At the scheduling stage, courts can prioritize discovery by ordering that it be conducted in phases or that certain sources be examined first. See FED. R. CIV. P. 16(c)(2)(F).

50. See *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.").

51. See Rosenthal, *supra* note 11, at 241 (urging courts to have "live" Rule 16 case-management conferences and identifying as one of the benefits that "[t]he 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"); William W. Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213, 221 (1987) ("The proper approach is to define issues that may be susceptible to disposition by motion as early as possible and then to conduct the discovery necessary to make the record. Both sides should target their discovery to that end, although their respective discovery targets may not necessarily be the same.").

The judge and the parties should also discuss whether the strategic use of targeted early summary-judgment motions can help narrow the scope of pretrial work. For example, although motions for partial summary judgment are by their nature not case-dispositive, they certainly can narrow the scope of the case, eliminate the need for discovery on specific issues, and focus the parties' efforts going forward. To return to the qualified immunity example, a motion for partial summary judgment that resolved some or all of the claims against one or more individual defendants would substantially narrow and focus the rest of the case even if other claims remained against those defendants or other defendants. An early partial summary judgment resolving certain claims can also eliminate the need for discovery into issues that are moot as a result.

In many cases, the discussion will lead to the conclusion that early summary-judgment motions would not be appropriate or feasible. At times some discovery is needed before the parties can be precise about what issues are appropriate for early summary-judgment motions. And sometimes there is no way to carve out key issues and address them separately. But that information is itself valuable. First, it may avoid an ill-advised early motion that would simply have led the other side to seek a Rule 56(d) continuance and led the judge to deny the motion or defer consideration pending the needed discovery.⁵² Second, if the judge knows what motions are likely to be filed later in the case, the judge can use that information to establish a proportional discovery plan because the parties will have identified, at least provisionally, some of the key disputed proof issues and the legal contexts in which they will be raised.

While the need to set pretrial priorities is not new, the advent of electronic discovery makes it even more important for judges to help parties establish discovery priorities. Unchecked and unmanaged, electronic discovery can quickly exceed all boundaries of proportionality. The judge should require the parties to focus on identifying what electronically stored information ("ESI") is likely to be important to the contested issues in the case and where that information can most easily be obtained. If summary judgment motions are expected, the judge and the parties should discuss the best timing for those motions and develop a discovery plan designed to focus discovery

52. See FED. R. CIV. P. 56(d) (formerly Rule 56(f)). For a discussion of practice under Rule 56(d), see 1 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 968-71 (2011); 11 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE §§ 56.100-.104 (3d ed. 2011).

on the right issues at the right time. If the parties cannot agree on how to do that, the dispute will be identified early and can be resolved before discovery, and therefore all progress in the case, grinds to a halt. Recent work by the Northern District of Illinois and The Sedona Conference, among others, provides valuable guidance for linking early, detailed planning for what summary judgment motions will be filed, and when, to the discovery—especially electronic discovery—that will be required.⁵³

We are far from the first commentators to link summary judgment and case management. Indeed, the idea of using summary judgment to narrow the issues and focus discovery traces back to the earliest days of the case-management movement. A brief summary of the history serves as a good reminder of the benefits that summary-judgment planning yields.

The federal courts first began looking into case management as a way of dealing with what were then called “protracted” cases. That study led to the publication of the Handbook of Recommended Procedures for the Trial of Protracted Cases (the “Handbook”).⁵⁴ It was a trailblazing work that proclaimed the need for active case management by a judge specifically assigned to the case.⁵⁵ The Handbook recommended that discovery “be confined to the genuine issues necessary to a decision of the case” and noted that discussions at an early pretrial conference could, together with targeted summary-judgment motions, help to identify the “necessary” issues.⁵⁶ Nine years later, the newly created Federal Judicial Center published the Manual for Complex and Multidistrict Litigation (“MCML”), which built upon but superseded the Handbook.⁵⁷ As the following passage illustrates, the MCML even more clearly embraced the idea of using early dispositive motions to focus discovery:

53. See SEVENTH CIR. ELEC. DISCOVERY COMM., PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION § 2.01(a) (2010), available at http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf (emphasizing need for lawyers to plan for discovery to achieve proportionality and discussing tactic of conducting discovery in phases); THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, at ii (2007) (emphasizing importance of early communication to ensure proportionality).

54. JUDICIAL CONFERENCE STUDY GRP. ON PROTRACTED LITIG., HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES 23–24 (1960) [hereinafter HANDBOOK FOR PROTRACTED CASES].

55. *Id.* at 27.

56. *See id.* at 38 & n.43.

57. See MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION 6 (1970) (discussing the contributions of numerous federal judges who volunteered “to process masses of multidistrict litigation”).

In some complex cases it becomes apparent at the preliminary pretrial conference or shortly thereafter that the determination of a legal question will expedite the disposition of the case. This is particularly the case where the nature and scope of discovery and further pretrial proceedings would be substantially affected by the determination of the preliminary legal question When desirable to expedite the cause, the court should provide an efficient method including discovery if desirable, and a time schedule for submission and determination of such preliminary legal questions.⁵⁸

Over the last several decades, the FJC has updated and revised the MCML several times. The most current version is the Manual for Complex Litigation (Fourth) (“MCL 4th”).⁵⁹ The MCL 4th continues the tradition of prompting judges to think about how and when to utilize summary judgment to achieve overall case management goals. In a section specifically addressed to summary judgment, the MCL 4th advises as follows: “To avoid pretrial activities that may be unnecessary if the summary-judgment motion is granted, the schedule should call for the filing of the motion as early in the litigation as possible.”⁶⁰

From its origins in complex cases, the case-management movement went mainstream in the early 1980s as judges increasingly recognized that the practices used to manage complex cases could be applied across the docket.⁶¹ The idea of integrating summary-judgment planning with discovery planning started to appear in case-management guides written for “ordinary” cases. In part, this expansion reflected the recognition that “ordinary” cases can be every bit as contentious as “complex” cases. It also reflected the reality that excessive and obstructionist discovery knows no case-category boundaries.

58. *Id.* § 1.8, at 26–27.

59. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) xvii (2004) [hereinafter MCL 4th] (“The fourth edition of the *Manual* is adapted to new conditions and demands of federal litigation.”).

60. *Id.* § 11.34, at 47. In discussing how summary-judgment motions avoid unnecessary pretrial activities, the MCL 4th explained that “[s]ummary judgment may eliminate the need for further proceedings or at least reduce the scope of discovery or trial. Even if denied, the parties’ formulations of their positions may help clarify and define issues and the scope of further discovery.” *Id.* § 11.34, at 46.

61. *See* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308–09 (1986) (describing the development of managerial judging); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 790–91 (1993) (same). Some people predicted this development from the start. Judge Alfred P. Murrah, the driving force behind the Handbook, presciently concluded his Foreword with the following comment: “This Handbook has been designed for use in protracted cases, but is not limited to use therein. One cannot escape the clear application of the principles enunciated herein to the average case as well as to the protracted case.” HANDBOOK FOR PROTRACTED CASES, *supra* note 54, at 7.

In 1991, the FJC published a pamphlet titled “The Elements of Case Management.” One of the authors was Judge William Schwarzer, then the Director of the FJC and an early evangelist for active judicial case management. Judge Schwarzer viewed the initial pretrial conference as a “moment of truth” for the case, when the court and the parties could identify the “pivotal issues” and then design a pretrial plan around them.⁶² He recognized that discovery management and summary-judgment management were complementary pieces of the puzzle:

Careful definition of issues at the outset may also disclose issues susceptible to resolution by summary or partial summary judgment. *Discussion* can reveal some threshold legal issues that may not have appeared clearly to the lawyers or perhaps was swept under the rug by one of them.⁶³

Importantly, Judge Schwarzer also recognized the value of planning for the dispositive motions that would be filed later. He explained that “[t]he conference not only lays the groundwork for motions, it also serves to identify the discovery needed before motions can be made, thereby avoiding premature motions and building the foundation for proper ones.”⁶⁴ All of these passages appear verbatim in the “pocket guide” Second Edition published in 2006.⁶⁵

The suggestion that judges discuss summary judgment at the initial pretrial conference was also featured prominently in a monograph on summary judgment that Judge Schwarzer co-wrote for the FJC.⁶⁶ The connection is most clearly made in this passage:

Rule 16 and pretrial conferences can help accomplish numerous goals germane to the effective use of summary judgment motions. First, they may clarify which issues are suited for a summary judgment motion and what factual basis will be needed to decide the motion. This, in turn, will enable the parties to conduct discovery with more precision and economy (and give the court a better basis for ensuring that this is done). Indeed, the parties can agree on various cooperative measures that will make discovery quicker and less expensive. Moreover, this process will sometimes clarify that there are genuine factual disputes and thus save the parties and the court the time and expense of preparing and considering summary judgment motions. In other cases it may hasten the recognition that summary judgment *should* be

62. WILLIAM W. SCHWARZER & ALAN HIRSCH, FED. JUDICIAL CTR., THE ELEMENTS OF CASE MANAGEMENT 4 (1991).

63. *Id.* at 6 (emphasis added).

64. *Id.* at 7.

65. See SCHWARZER & HIRSCH, *supra* note 12, at 6.

66. See SCHWARZER ET AL., *supra* note 7, at 73–74.

sought and thus prevent superfluous discovery and other pretrial activity.⁶⁷

Finally, the United States Judicial Conference itself has lauded the benefits of integrating summary-judgment management into case management. The Judicial Conference's Court Administration and Case Management Committee published the first edition of its "Civil Litigation Management Manual" ("CLMM") in 2001.⁶⁸ The CLMM advised judges to use the initial case-management conference as a forum for identifying and narrowing the issues.⁶⁹ In that vein, it suggested that judges engage the parties to determine whether any issues might be resolved by partial summary judgment and then put discovery targeted at those issues on an expedited track.⁷⁰ The CLMM emphasized the importance of scheduling the filing of summary judgment motions "for the appropriate time in the litigation."⁷¹ Acknowledging an inherent tension that cannot be resolved by any generally applicable rule, but instead requires an informed case-specific determination, the CLMM states: "Summary judgment motions should be filed at the optimum time. Motions filed prematurely can be a waste of time and effort, yet motions deferred until shortly before trial can result in much avoidable litigation effort."⁷² A second edition of the CLMM, published in 2010, reiterates these suggestions.⁷³ The Benchbook used by federal-court trial judges⁷⁴ is currently being revised to include, for the first time, a chapter on pretrial case management, which also will highlight how judges can coordinate motions management and discovery management to avoid unnecessary pretrial work and expense.

C. Summary-Judgment Planning and Settlement

So far, we have focused on how the strategic use of targeted summary judgment can avoid pretrial work and expense by eliminating issues early and narrowing discovery. But it also can affect settlement, particularly timing. The timing of settlement directly and obviously

67. *Id.* at 73 n.309.

68. *See* COMM. ON COURT ADMIN. & CASE MGMT., JUDICIAL CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL, at iii (2001).

69. *Id.* at 21.

70. *Id.* at 22.

71. *Id.* at 48.

72. *Id.*

73. *See* CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 12, at 27, 57.

74. *See* FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES (5th ed. 2007). The Sixth Edition is expected to be completed sometime in 2012.

affects pretrial work, cost, and delay. The sooner a case settles, the more litigation expense is avoided.

It is probably true that nothing avoids more litigation expense than settlement. Like a summary judgment grant, a settlement before trial avoids the cost of a trial. It is a well-known statistic that fewer than 2% of federal civil cases filed terminate in a trial.⁷⁵ What happens to the other 98%? One careful study suggests that about 67% of filed federal civil cases end in a settlement.⁷⁶ So settlement avoids roughly two-thirds of all potential civil trials.

While the number of cases that settle is important to avoiding litigation expense, so too is the timing of those settlements. A settlement after all discovery is done (fact and expert) and after a full round of fully briefed summary-judgment motions is resolved will save the cost of trial, but only after all the costs of pretrial work have been incurred. We break no new ground in pointing out that the earlier a case settles, the greater the savings to the court and the parties.⁷⁷ That is a major reason why courts often direct parties to take part in activities designed to foster early settlements, like early settlement conferences, early mediation, and Early Neutral Evaluation.⁷⁸

75. See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1958 fig.3 (2009). In 2010, the trial rate dropped to one percent. See ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, at tbl.C-4 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/C04Dec10.pdf>.

76. See Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 115 (2009) (describing data from 2001–02 civil cases in the Eastern District of Pennsylvania and the Northern District of Georgia). It is important to emphasize that this is an aggregate figure. The settlement rate varied between districts and varied dramatically across case categories. See *id.* at 131–33. This study also emphasizes that the settlement rate one identifies depends significantly on which case outcomes are deemed to be settlements (the numerator) and whether one includes in the rate calculation cases that were “resolved” in that court but that had no definitive outcome (the denominator). See *id.* at 129–31. Professor Kevin Clermont has also identified a settlement rate of about 67%, subject to the same caveats about coding and definitions. See Clermont, *supra* note 75, at 1954–55.

77. See FED. R. CIV. P. 16 advisory committee’s note (1983) (“Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible.”); see also CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 12, at 90 (noting that one of the optimal points in a lawsuit to raise the possibility of settlement is early in the suit when “no discovery has yet occurred and the cost savings are significant”).

78. See WAYNE D. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 141 (1988) (“Consider initiating settlement conferences early in the life of the case. Early in the case, money that otherwise would be spent on discovery, motions, and pretrial can be available for the settlement fund.”); Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 18 (Donna Stienstra & Susan M.

The literature exploring the dynamics of settlement is vast, and it has identified many factors that influence settlement.⁷⁹ One factor everyone agrees is important is information. Parties bargain in the shadow of expected legal outcomes.⁸⁰ Outcome assessments require information, and one of the most important pieces of information a party can obtain is whether any particular claim or defense will survive for trial.⁸¹ The sooner the parties have that information, the sooner they can use it to make more informed predictions about likely trial outcomes.⁸²

Summary-judgment rulings that do not dispose of a case in its entirety can facilitate an early settlement in many ways. The elimination of part of a case by granting a motion for partial summary judgment can have an enormous impact on crystallizing the trial value of a case. But so too can the denial of an early summary-judgment motion.⁸³ If nothing else, the denial of the motion provides the parties with new information—in this instance, that the judge believes the claim or defense warrants a trial—that parties find very important in the

Yates eds., 2004) (discussing relationship between timing and avoiding discovery and other pretrial expenses); ROBERT J. NIEMIC, DONNA STIENSTRA & RANDALL E. RAVITZ, FED. JUDICIAL CTR., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 13–15 (2001) (noting that initial view that referral should wait until discovery is over has now given way to the view that in many cases early referral is better to avoid pretrial expense and position entrenchment); ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 8 (“[W]hereas in the past many considered ADR appropriate only for trial-ready cases, now ADR is more often integrated into a court or judge’s overall case management practices and is considered much earlier in the case.”).

79. See Stewart J. Schwab & Michael Heise, *Splitting Logs: An Empirical Perspective on Employment Discrimination Settlements*, 96 CORNELL L. REV. 931, 936–38 (2011) (providing a compact literature review of the factors that influence settlement decisions). For additional discussion of the economic determinants of settlement, see Daniel P. Kessler & Daniel L. Rubinfeld, *Empirical Study of the Civil Justice System*, in 1 HANDBOOK OF LAW AND ECONOMICS 343, 381–83 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

80. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 9 (1984) (discussing process of estimating case outcomes); Schwab & Heise, *supra* note 79, at 937 (noting that disparate settlement theories “share common conceptual ground insofar as litigants’ assessments of their legal exposure inform their bargaining positions”).

81. See Schneider, *supra* note 29, at 716 (“[W]hen summary judgment is denied, lawyers and judges report that defendants immediately offer to settle, often with far more generous offers than they might have otherwise considered.”).

82. See Schwab & Heise, *supra* note 79, at 938 (“To the extent that the disposal of an important motion (or motions) during the pretrial stage reduces the uncertainty surrounding a trial’s outcome, ambiguity aversion theory might account for an increase in settlement activity after a court decides a critical motion.”); Eisenberg & Lanvers, *supra* note 76, at 113–14 (noting that pretrial motion practice also provides litigants with information that informs settlement decisions).

83. See CIVIL CASEFLOW MANAGEMENT GUIDELINES, *supra* note 44, at 16 (“[C]ases often proceed toward a quick settlement after a dispositive motion is denied.”); WILLGING & LEE, IN THEIR WORDS, *supra* note 20, at 32–33 (noting that summary judgment often serves as a catalyst for settlement, but sometimes as an obstacle because of sunk costs).

pricing of claims.⁸⁴ In addition, the summary-judgment process itself tends to organize the issues and the proof in ways that enhance the parties' abilities to assess the strengths and weaknesses of their cases.⁸⁵ According to one recent study, the filing of substantive motions (like summary-judgment motions) has a "propelling effect" of accelerating settlement timing, a finding the study attributes to the fact that both the making of the motion and the court's ruling "unlock[] information that the parties and the court otherwise would not share with each other."⁸⁶ This theory may help to explain the finding that 57% of summary-judgment motions are never ruled on.⁸⁷ Sometimes this is because the case proceeds to trial without any ruling. But that figure also captures cases the parties settle while the motion is pending, perhaps because the motion draws out the real issues and the available proof in a way that allows the parties to refine their case valuations, and perhaps to avoid the risk of the valuation change that will result from whatever the court decides.

By discussing how the strategic use of *early* summary-judgment motions can facilitate settlement, we are not taking a pro-settlement position. (We are not taking an anti-settlement position either.⁸⁸) The issue is not whether parties will seek summary judgment. Nor is it whether the parties' settlement positions will be influenced by the court's rulings. It is simply an issue of timing. It is inevitable that the parties will learn which of the claims and defenses that have been asserted will survive for trial. To the extent some of that information can be made available earlier in the litigation, it can accelerate the

84. See Rave, *supra* note 24, at 894–95.

85. See Edward Brunet, *Six Summary Judgment Safeguards*, 43 AKRON L. REV. 1165, 1167 (2010) (arguing that the summary-judgment process increases the chances of settlement); Hornby, *supra* note 41, at 276 n.9 ("Summary judgment preparation also provides thorough information to both sides that may prompt settlement even when summary judgment is denied."); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 44 (2003) ("[E]ven in the course of explaining why a trial is necessary, a decision denying summary judgment (or granting partial summary judgment) can put nonissues to one side and induce the parties to address only those aspects of the case that present a genuine issue of material fact.").

86. Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement* 25 (Jan. 13, 2012) (unpublished manuscript) (on file with authors).

87. CECIL & CORT, *supra* note 34, at 8 tbl.3; see also Cecil et al., *supra* note 3, at 862 n.57 (discussing possible reasons for absence of a ruling on the motion).

88. See Clermont, *supra* note 75, at 1951–53 (discussing the critical need settlement fills for parties and the system). For more on the costs and benefits of settlement, see Symposium, *Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117, 1118 (2009).

settlement process to a point where the parties may be able to avoid some of the discovery expense.⁸⁹

It is more difficult to garner empirical support for the proposition that the terms on which cases settle is improved by well-planned and well-timed summary-judgment motions, but our intuition leads us to that conclusion. Parties need information to accurately value the strengths and weaknesses of their claims. But most parties are sensitive to the cost of obtaining that information. As the cost of the pretrial process rises, so too does the probability the terms of the settlement will be affected by the desire to avoid pretrial expense. A more focused and less expensive pretrial process should reduce the impact of litigation expense as a factor—a distorting factor—in the pricing of claims.

D. Summary-Judgment Planning Under the Civil Rules

We now turn to how the current structure of the Federal Rules of Civil Procedure accommodates—we might even say encourages—early summary-judgment planning. Rulemaking activity in the years following the Trilogy sent a clear message that summary-judgment practice should be integrated into active case management in order to narrow the issues in the case during the run of pretrial activity. Amendments to Rule 16 specifically added summary-judgment planning to the list of potential agenda items for case-management discussions among counsel, conferences with the court, and court orders. But equally instructive are recent amendments to Rule 56 that culminate a longstanding vision for a restructured Rule 56 that would more obviously and directly facilitate using summary judgment as a case-management tool.

In 1983, Rule 16 was transformed from a rule principally governing trial preparation to one principally governing pretrial case management.⁹⁰ The 1983 version of Rule 16 alerted parties and judges to the idea of using the pretrial conference process to streamline the issues and discovery,⁹¹ but it made no specific reference to summary

89. See WILLGING & LEE, IN THEIR WORDS, *supra* note 20, at 29 (“Because discovery generally precedes summary judgment, in most cases interviewees say they have already invested most of the cost of litigating the case before a motion for summary judgment is filed.”).

90. See FED. R. CIV. P. 16(a) advisory committee’s note (1983) (“The amended rule makes scheduling and case management an express goal of pretrial procedure. This is done in Rule 16(a) by shifting the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery.”). See generally Gensler, *supra* note 9, at 676–79 (discussing impact of the 1983 amendments).

91. FED. R. CIV. P. 16(c)(1), (4) (1983).

judgment.⁹² That changed with the 1993 version, which included a new subsection directing courts and parties to consider “the appropriateness and timing of summary adjudication under Rule 56.”⁹³ The Committee Note explained that the reference to summary judgment was added “in recognition that use of Rule 56 to avoid or reduce the scope of trial is a topic that can, and often should, be considered at a pretrial conference.”⁹⁴ More to our point, the Committee Note hinted at using the scheduling conference to identify claims and issues that would be susceptible to early motions, saying: “Often, however, the potential use of Rule 56 is a matter that arises from discussions during a conference. The court may then call for motions to be filed.”⁹⁵

The post-Trilogy rulemaking activity on Rule 56 makes the linkage between summary-judgment management and case management even more clear. The trail begins in the late 1980s, when the Advisory Committee began considering amendments to Rule 56.⁹⁶ After one false start,⁹⁷ the Advisory Committee proposed an amendment that would have overhauled Rule 56. In large part it was an attempt to codify the Trilogy in new rule text.⁹⁸ But it was also clearly directed at emphasizing the use of summary judgment as a comprehensive case-management tool. Mechanically, it did that by explicitly authorizing claim-specific and even issue-specific motions⁹⁹ and by authorizing the court to initiate summary judgment through a “show cause” mechanism.¹⁰⁰ Thematically, the Advisory Committee made explicit

92. The only mention of summary judgment was in the Committee Note discussing the court’s power under Rule 16(c)(1) to eliminate frivolous claims and defenses, which emphasized that the court need not await a formal summary-judgment motion before taking that step. FED. R. CIV. P. 16(c) advisory committee’s note (1983).

93. FED. R. CIV. P. 16(c)(5) (1993).

94. FED. R. CIV. P. 16(c) advisory committee’s note (1993).

95. *Id.*

96. *See* ADVISORY COMMITTEE ON CIVIL RULES, MINUTES, APRIL 27–29, 1989, at 50–51 (1989) (discussing review of draft).

97. The Advisory Committee published an initial amendment proposal in 1989 but, in light of the comments received, elected to rework the proposal rather than present it to the Standing Committee for approval. *See* REPORT OF THE CIVIL RULES ADVISORY COMMITTEE TO THE STANDING COMMITTEE, JUNE 19, 1990, at 1 (1990) [hereinafter JUNE 1990 CIVIL RULES REPORT] (“[T]he amendments to Rules 30 and 56, have been temporarily withdrawn pending further reconsideration.”).

98. *See* REPORT OF THE CIVIL RULES ADVISORY COMMITTEE TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MAY 1, 1992, at 124 (1992), available at <http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Reports/CV5-1992.pdf> (explaining that the revisions would have restated the summary-judgment standard as it “has been developed through case law”).

99. *Id.* at 119 (proposed FED. R. CIV. P. 56(a)).

100. *Id.* at 124 (proposed FED. R. CIV. P. 56(g)).

the interrelationship between summary adjudication and controlling pretrial costs. The very first sentence of the proposed accompanying Committee Note read, “This revision is intended to enhance the utility of summary judgment procedure as a means to avoid *the time and expense of discovery*, preparation for trial, and trial itself as to matters that . . . can have but one outcome.”¹⁰¹ A later passage in the proposed Committee Note was even more direct: “A primary benefit of summary adjudication is elimination of ultimately wasteful discovery and other preparation for trial.”¹⁰² Moreover, the proposed Committee Note linked this function with Rule 16 and active case management, identifying the scheduling conference as an opportune moment “to focus early discovery on potentially dispositive motions” and clarifying that judges might invoke the new “show cause” provision in light of the discussion of the merits at the conference.¹⁰³

The proposed amendment was voted down, but for reasons related to the statement of the standard for summary judgment, not because of any philosophical opposition to linking summary judgment with case management.¹⁰⁴ It bears noting that the 1993 amendments to Rule 16 described above—which were enacted—were part of the same package of proposed amendments. Viewed in that light, there can be little doubt that the rulemakers envisioned a much more robust interplay between early case management and summary judgment targeted at narrowing the case early enough to avoid needless discovery.

That vision was realized in the 2010 amendments to Rule 56. Like the 1992 proposal, the 2010 version of Rule 56 specifically authorizes “partial summary judgment” in the form of both claim-specific and issue-specific motions.¹⁰⁵ The 2010 version also explicitly authorizes judges to raise the prospect of summary judgment *sua sponte*.¹⁰⁶ The Committee Note to the 2010 amendments does not expressly link Rule 56 and Rule 16.¹⁰⁷ But as participants in the rulemaking process that led to the 2010 amendment to Rule 56, we can confirm that this linkage was very much in mind. In particular, the explicit recognition of issue-

101. *Id.* (proposed FED. R. CIV. P. 56 advisory committee’s note) (emphasis added).

102. *Id.* at 126 (proposed FED. R. CIV. P. 56 advisory committee’s note).

103. *Id.* at 129 (proposed FED. R. CIV. P. 56 advisory committee’s note).

104. See Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1152 (2010) (discussing history of the failed 1992 summary judgment amendments).

105. FED. R. CIV. P. 56(a).

106. FED. R. CIV. P. 56(f)(3).

107. That linkage is made in the Committee Note accompanying the 2009 amendments creating new default timing provisions for summary-judgment motions. See FED. R. CIV. P. 56 advisory committee’s notes (2009) (discussing how courts and parties may adjust the timing of summary-judgment motions to the needs of the case).

specific motions and sua sponte consideration were intended to enhance the utility of Rule 56 as a means for narrowing the scope of the case earlier in the pretrial process in order to focus discovery.

The Supreme Court has acknowledged the benefits of case management generally and of summary-judgment management specifically. In 1989, the Court stated that “[o]ne of the most significant insights that skilled trial judges have gained in recent years is the wisdom and necessity for early judicial intervention in the management of litigation.”¹⁰⁸ Early statements focused on the need for judges to manage discovery to minimize cost and burden.¹⁰⁹ Later, the court expanded the discussion to bring in summary judgment and explain the value of an integrated case management approach that manages discovery and summary judgment together:

The trial judge can therefore manage the discovery process to facilitate prompt and efficient resolution of the lawsuit; as the evidence is gathered, the defendant-official may move for partial summary judgment on objective issues that are potentially dispositive and are more amenable to summary disposition than disputes about the official’s intent, which frequently turn on credibility assessments. Of course, the judge should give priority to discovery concerning the issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible.¹¹⁰

Now more than ever, it is important to remember that the Supreme Court once spoke favorably about the ability of judges to control discovery through active case management. In two recent pleadings cases, *Twombly* and *Iqbal*, the majority opinions took an unexpectedly skeptical stance.¹¹¹ Perhaps the Court now embraces the view that case management is doomed to fail because judges lack the information they need to mark the boundaries of the case and to set priorities.¹¹² But it is

108. *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989).

109. *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 546 (1987) (“Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests.”).

110. *Crawford-El v. Britton*, 523 U.S. 574, 599 (1998).

111. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (rejecting argument that “careful-case-management” controls discovery sufficient to allow relaxed pleadings requirements); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“[T]he success of judicial supervision in checking discovery abuse has been on the modest side.”).

112. *See Frank Easterbrook, Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989) (asserting the view that judges cannot manage discovery because they lack the information to distinguish between “good” discovery and “bad” discovery); *see also* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 899–900 (2009) (“The *Twombly* Court’s skepticism is in fact well justified. . . . Judges face information and other

equally plausible (no pun intended) that this skepticism reflects a sense that trial judges too often have failed to use the active case-management tools and practices that the Court once praised. This second explanation is far less pessimistic and, in our view, much more realistic in light of the Court's prior statements.

E. Getting Judges and Parties to Talk About Summary Judgment

As the preceding sections detail, the idea of incorporating summary judgment into a comprehensive case-management strategy is firmly established in all aspects of the case-management movement. It was a part of the case management vision that emerged from early thinking about how to deal with complex cases. It has been a fixture of the institutional judiciary's publications on case management. It has been incorporated into the applicable Federal Rules. And it has been favorably discussed by the Supreme Court. With all of that support, we might expect that early summary-judgment management would, by now, be a ubiquitous part of federal civil pretrial practice. But that has not happened, at least as far as we can tell.¹¹³ Why not? And what, if anything, can be done to change that?

The first obstacle to the process we have been describing is that its success depends initially on the success of the active judicial case-management movement overall. Though it is not impossible, we very much doubt that there are many judges who eschew early active case management generally but then specifically engage in active summary-judgment planning. So a crucial predicate to our proposal is to determine the extent to which federal judges generally implement the active case-management model. That is itself a complicated question.

First, it is a small but critical detail to point out that Rule 16 never *requires* a judge to hold a case-management conference of any kind. What Rule 16 requires is that the judge issue a scheduling order setting deadlines for joining parties, amending the pleadings, completing discovery, and filing motions.¹¹⁴ The judge must get input from the parties but can forego any kind of "live" conference (whether conducted

constraints that impair their ability to manage optimally . . ."); Redish, *supra* note 31, at 603–04 (arguing that proportionality limits are impractical because the trial court is not in a good position to assess whether the desired information is worth the cost). We do not share this view. See Gensler, *supra* note 9, at 692–93; Rosenthal, *supra* note 11, at 240–41.

113. We must begin with an acknowledgment. We do not have empirical data specifically addressing the extent to which judges are engaging in summary-judgment planning as part of the case-management process. To our knowledge, no empirical study has ever sought to gather that precise data. As discussed herein, however, all of the information we do have points toward the conclusion that most judges are not engaging in active summary-judgment management.

114. FED. R. CIV. P. 16(b)(1), (3)(A).

in person or by telephone or videoconference) and instead rely on the parties' Rule 26(f) report or other submissions.¹¹⁵ Moreover, even if the court holds a live conference, Rule 16 does not dictate what is discussed. Rule 16 creates a vast authority for judges to actively manage if they choose to, but it requires very little.¹¹⁶ Judges have near plenary autonomy to determine how much or how little active case management to do in any case. As Professor Richard Marcus noted when the Civil Rules were first amended in 1983 to add case management to the pretrial process, the success of the case-management model ultimately "depends on wide acceptance of the tenor, not just the letter, of the proposed amendments."¹¹⁷

The available evidence indicates that case-management practices continue to vary widely among federal judges. We are not aware of any existing empirical data on how often federal judges hold "active" early case-management conferences.¹¹⁸ Some data is available on what may be seen as proxy issues. In one recent survey of federal-court discovery practices, for example, lawyers reported that the judge held a conference to discuss a discovery plan in fewer than half of the cases involved in that study.¹¹⁹ That data is consistent with (but does not specifically confirm) our own experience that many judges do not have a conference to engage the parties at an early stage. Instead, many judges rely on the papers then on file and limit the Rule 16 order to setting the required deadlines and perhaps a deadline for filing the joint pretrial order and dates for holding docket call or trial.¹²⁰ In short, in many cases, the

115. FED. R. CIV. P. 16(b)(1).

116. See Rosenthal, *supra* note 11, at 238–41 (discussing what Rule 16 requires versus what Rule 16 allows). See generally GENSLER, *supra* note 52, at 312 ("Rule 16 is deliberately crafted to empower rather than dictate. It identifies various goals that can be achieved by active case management and sets forth a comprehensive list of subjects that might profitably be addressed through case management. But whether to pursue these case management techniques in any particular case, and how aggressively to do so, is left to the individual judge.").

117. Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 370 (1983).

118. That will have changed by the time this Article is published. In January 2012, the Federal Judicial Center conducted a closed-case survey asking lawyers about the case-management practices they encountered in the early stages of those cases. The survey is titled "Early Stages of Litigation Survey." The Federal Judicial Center's report is expected to be available sometime later this spring. Unofficially, the early returns are fully consistent with our assessment of current practice.

119. See LEE & WILLGING, *supra* note 38, at 13 fig.4. It should be noted that the case population in that study was limited to cases where discovery was expected to occur, excluding cases that closed before 60 days and cases in categories where discovery is not likely (e.g., social security appeals). *Id.* at 77. In other words, lawyers in half of the cases where discovery was expected were still reporting that the judge did not hold a conference to discuss a discovery plan.

120. See Rosenthal, *supra* note 11, at 241.

reason the judge and the parties are not talking about summary-judgment planning early in the case is because the judge and the parties are not talking at all.¹²¹

That being said, we think the problem goes beyond whether or not the judge engages in active case management. We suspect that even among the judges who do more actively manage their cases, including holding some kind of “live” Rule 16 conference, many do not include active summary-judgment planning in that process.¹²² Part of the problem is that summary judgment has been typecast. The idea that summary judgment is a post-discovery mechanism used to determine whether any of the claims can survive for trial is deeply ingrained. It is the role described by the Supreme Court in what is arguably its most famous summary-judgment decision, *Celotex*.¹²³ It is also the role featured in the 1963 Committee Note to Rule 56, which states that “[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.”¹²⁴ We do not think these statements were intended to confine summary judgment to the post-discovery realm. We are certain that neither the Court nor the Advisory Committee intended to send the message that there is a “summary judgment stage” of litigation that only falls between discovery and trial. But taken in isolation, it is easy to see how statements like those might create just that impression. In short, part of the problem may simply be that the campaign to demonstrate how summary judgment can avoid unnecessary trials may have been *too* effective, and in the process obscured, and possibly undercut, how summary judgment can be used to plan the pretrial work as well.

It may also be that, for some judges, the type of summary-judgment planning we have described is simply a bridge too far. Active case management is not a monolithic enterprise. The range of activities that are a part of active case management extends from setting pretrial deadlines to addressing complicated electronic discovery issues.¹²⁵ Individual judges will have their own views about what types of

121. For a thorough—and we hope compelling—discussion of why federal judges *should* be embracing the active-judicial-case-management model, see Steven S. Gensler & Lee H. Rosenthal, *Sixteen Reasons Why* (unpublished manuscript) (on file with authors).

122. Here too, we are not aware of any empirical data on this point, and the January 2012 Early Stages of Litigation Survey, *supra* note 118, does not address it.

123. See *supra* notes 22–23 and accompanying text.

124. FED. R. CIV. P. 56 advisory committee’s note (1963).

125. See FED. R. CIV. P. 16(b) (scheduling of basic deadlines); FED. R. CIV. P. 16(c) (discussing other matters that can be raised at pretrial conferences).

activities they are comfortable getting involved with.¹²⁶ It may be that some judges who engage in some forms of active case management view active summary-judgment planning as straying too far from the traditional judicial role of only resolving motions as conceived and brought by the parties.¹²⁷

Lawyers may also feel like they are getting mixed signals about whether early summary judgment motions are welcome or advisable. Some districts, for example, have local rules limiting parties to filing a single summary-judgment motion absent leave of court.¹²⁸ The primary purposes of this type of rule, as we understand it, are to prevent end-runs around page limits, to reduce the risk that wealthy litigants will use multiple motion rounds to impose expense on their less-wealthy opponents, and to avoid unnecessary burdens on the judge. Those are unquestionably legitimate goals. But the practical effect of “omnibus motion” rules is to push summary-judgment motions towards the post-discovery period when the would-be movant will be in a position to make the most comprehensive motion possible. It is true that a party could make an early, targeted motion and then seek leave to file a later motion on other matters, but the far less risky path is to forego the early, targeted motion and include those grounds in the omnibus motion later. In districts with no such rule, lawyers nonetheless may be reluctant, for a variety of reasons, to take the initiative in filing an early summary-judgment motion and seeking to limit discovery to that necessary for the issues raised in the motion when the judge has not indicated any interest in pursuing that path.

It should be clear at this point that with summary-judgment motions, as with most things, timing is critical.¹²⁹ The last thing judges want to do is to encourage premature summary-judgment motions. Rule 56(d) provides a mechanism to address a motion that is prematurely filed,¹³⁰

126. See SCHWARZER & HIRSCH, *supra* note 12, at 1 (“Case management means different things to different people, and there is no single correct method.”).

127. See Molot, *supra* note 85, at 44–45 (hypothesizing that summary-judgment practice is a less controversial form of case management because the judge is generally in a reactive posture, relying on the parties to file motions).

128. See, e.g., W.D. OKLA. L. CV. R. 56.1 (“Absent leave of Court, a party may file only one motion under Fed. R. Civ. P. 56.”); N.D. TEX. L. CV. R. 56.2(b) (“Unless otherwise directed by the presiding judge, or permitted by law, a party may file no more than one motion for summary judgment.”).

129. See CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 12, at 56 (stating that many motions should not be filed until after discovery is closed but also stating that some motions cannot be deferred “if they are to serve to forestall needless expense and trial preparation”).

130. FED. R. CIV. P. 56(d) (allowing judges to defer, deny, or take other appropriate action with respect to a premature summary-judgment motion).

but it is not a perfect remedy and adds a layer of delay and expense. Far better if the motion had not been brought prematurely in the first place. But we also don't want to discourage parties from bringing motions earlier in the case when they might advance the resolution of the action or help reduce the cost and burdens of the pretrial activities to follow. In the big picture, too late is just as bad as too soon.

The solution lies in our core principles of case management—communication and custom case-tailoring. There is no one-size-fits-all answer to when a summary-judgment motion should be filed. There is no rule any committee can write that will usefully distinguish in advance between premature motions and motions filed too late to avoid unnecessary work and expense. That determination is best made—indeed, can only be made—on a motion-by-motion and case-by-case basis, informed by a meaningful dialogue between the court and the parties. If courts and parties talked openly about summary judgment at the Rule 16 conference, it would go a long way towards solving *both* timing problems: it would help to avoid premature motions while at the same time identifying issues that are good candidates for early motions.¹³¹

II. TALKING ABOUT SUMMARY JUDGMENT AT “MOTION TIME”

In Part I, we explored how early communication between judges and parties about summary judgment can increase the opportunities for avoiding unnecessary discovery and motion costs. Put another way, early summary-judgment communications can increase the benefits of summary judgment. In Part II, we turn to the role of communication in containing the costs and burdens of summary judgment.

We think prevailing summary-judgment practice needlessly increases the cost and burden of summary judgment. First, the prevailing practice is for parties to make and respond to summary-judgment motions with full briefs and extensive submissions that consume large amounts of the parties' and then the court's time and resources. Some motions warrant that expenditure, but many do not. Second, the prevailing practice is for judges to resolve summary-judgment motions by issuing written decisions on the papers, without oral argument. That too is a high-cost process that makes sense in some cases but not in others.

131. See SCHWARZER ET AL., *supra* note 7, at 73–74 (discussing the role of Rule 16 conferences in identifying potential summary-judgment motions, determining timing, and coordinating discovery); Schwarzer, *supra* note 51, at 221 (discussing motion timing benefits of early discussion).

We encourage courts to consider two practices that might help them to avoid many of these costs. First, courts could consider holding premotion conferences (either in person or by telephone or videoconference), during which the would-be moving party identifies what motion will be made and the basis for it, and the would-be responding party outlines the likely response. The judge and the parties then can make an early assessment of whether the motion raises a real matter for summary judgment and, if so, what the focal issues are. The purpose is not to seek leave to file a motion—Rule 56 provides leave—but to allow the judge and the parties to discuss what the motion and response will involve. Judges with experience holding premotion conferences report that futile or unnecessary motions often can be avoided and the motions that are filed are streamlined and focused. Second, courts could give greater consideration to setting summary-judgment motions that are filed for oral argument. The premotion conference can be viewed as a kind of oral-argument preview of a proposed motion, creating an opportunity to reduce the cost and work of determining whether there are genuinely disputed facts and whether judgment is appropriately granted as a matter of law. Oral argument after motions and briefs are filed can do even more to improve the judge's understanding of the parties' arguments and proof. It also creates flexibility in the presentation of issues. When parties must rely solely on their briefs, they feel the need to prophylactically raise and respond to every possible issue, even though most won't matter to the outcome of the motion. Finally, judges who hear oral argument give themselves the opportunity to rule from the bench, issuing written decisions on an as-needed basis, which also can greatly reduce the time and work involved.

These practices are simply an extension of our main thesis—that the summary-judgment process could be greatly improved by embracing the core case-management values of communication and custom tailoring. If the judge and the parties talk about potential motions before they are made, they can custom tailor the motions process by avoiding motions that reveal themselves to be unwarranted, by quickly resolving motions that have clear answers, and by focusing the formal presentation of motions that warrant a fuller examination. If the judge and the parties continue the conversation by holding oral argument on the motion, they can custom tailor the resolution process by streamlining and improving the presentation of the evidence and arguments and by affording the court an opportunity to make an oral ruling.

A. Premotion Conferences

Judge Brock Hornby recently lamented (quipped?) that summary judgment is anything but summary.¹³² As Judge Hornby noted, “The term ‘summary judgment’ suggests a judicial process that is simple, abbreviated, and inexpensive.”¹³³ Few people we know would use those terms to describe the federal summary-judgment process as it typically exists. Instead of being quick, simple, or cheap, the summary-judgment process is more likely to be slow, complicated, and expensive.¹³⁴ At its worst, it is an elaborate and costly exercise in waste and overkill. No wonder Judge Hornby concluded that summary judgment should be renamed “motion for judgment without trial,” in the interests of truth-in-labeling and reducing false hopes.¹³⁵

Why is summary judgment so *unsummary*-like? In part, it is because sound and informed legal analysis is hard work that requires effort and care. Ultimately, a summary-judgment analysis requires the judge to make a legal decision—the sufficiency of a claim or defense for trial—in a context where a mistake can result not just in an error but the deprivation of a constitutionally protected right. By its nature, summary judgment is not a process that could ever be made to be carefree and easy, and it would trivialize the stakes involved to indulge in that type of fantasy. That being said, the standard approach to motions and briefing makes the process much harder and costlier than it needs to be.

The absence of any conversation and the exclusive reliance on paper submissions practically guarantee overkill. Parties seek summary judgment by filing written motions accompanied by written briefs, which themselves are accompanied by written supporting materials. This “full briefing” model leads to the parties doing unnecessary work in two ways. First, the briefs invariably address matters that will end up having no bearing on the outcome of the motion. Second, the parties invariably go to great lengths to support or oppose assertions of fact that will have no bearing on the outcome of the motion or that could have been adequately supported or opposed without nearly as much fuss.

Probably the greatest inefficiency caused by fully briefing all summary-judgment motions is that the parties almost always end up addressing issues that the court will not reach and that will play no role in the outcome. In saying that, our purpose is not to criticize the

132. Hornby, *supra* note 41, at 273.

133. *Id.*

134. *Id.*

135. *Id.* at 284.

lawyers. To a certain extent, they don't have much choice.¹³⁶ The party making the motion is flying blind in two respects. The party does not know what issues the court will eventually think matter. And the party must guess at—but can never know exactly—what the opposing party's response will be. Under these circumstances, the natural tendency is to expand the scope of the motion and brief to include issues that *might* bear on the outcome.¹³⁷ Responding parties face their own similar uncertainties and thus have their own incentive to raise peripheral or less important issues protectively.

Some factors do constrain the scope of the briefs. Rule 11 applies to summary-judgment papers.¹³⁸ Page limits exist in substantial part to force lawyers to prioritize and prune. And lawyers are taught as early as first-year moot court that weaker arguments are better omitted lest they dilute the impact of, or distract the court's attention from, stronger arguments. These constraints surely play some role in keeping motions and briefs from growing completely wild. But the first constraint—Rule 11—culls only the unsupportable arguments; it does nothing to identify the dispositive issues, let alone ensure that the briefs stick to them. The second and third constraints could lead parties to identify the most relevant issues, but they share a common and inherent limitation—they require the parties to speculate and predict. Faced with a choice between spending time and money addressing issues that might not matter and risking not having raised the issue that would have been critical, we cannot be surprised when lawyers more often opt for the former over the latter. For most lawyers, the risk is too much for the reward.

A second problem with the full-briefing model is inefficiency and overkill in the presentation of supporting and opposing proofs. This is another area where uncertainty leads to excess. In advance, a party that makes an assertion of fact does not know if the opposing party will accept it or contest it. How much time and money go into supporting facts that are never contested? In addition, parties making and opposing assertions of fact commonly go overboard in listing their support. In at

136. We are not suggesting that lawyers bear no responsibility for the cost of the summary-judgment process. As others have recognized, the fact that lawyers usually bill by the hour may also explain, at least in part, why lawyers so often "overdo it" with their summary-judgment papers. See Hornby, *supra* note 41, at 282; Wood, *supra* note 18, at 250 ("Discovery and summary judgment are the engines of a lot of billing.").

137. As Judge Hornby put it, "'everything-but-the-kitchen-sink' sometimes seems the rule-of-thumb." Hornby, *supra* note 41, at 282.

138. FED. R. CIV. P. 11. See generally GENSLER, *supra* note 52, at 982 ("The summary judgment motion—and any briefs or other papers submitted in support of or in opposition to the motion—are subject to the requirements of Rule 11.").

least some cases, this is because the party does not want to risk coming up short in the eyes of the court. As Mr. Micawber might put it, a little too much support is happiness, but coming up just short would be disaster.¹³⁹ Finally, putting proofs in writing can be a time-consuming and difficult process even under the best of circumstances. Things that can be made perfectly clear when spoken may prove to be very difficult to capture fully on the page.¹⁴⁰ The best solution may lie in finding better words, but the easier fix is often to just add more of them.

The situation we describe is not a pretty one. It is also the antithesis of what summary judgment would look like if we applied our core principles of case management. First, there is no communication between the judge and the parties. Lawyers file omnibus motions and take a blunderbuss approach to briefing because, having never talked about the likely grounds for a proposed motion with the judge or the opposing party, they lack any solid guidance for taking a more focused approach. Second, the lawyers follow a prescribed briefing scheme for all of the issues raised in the motion, response, or reply.¹⁴¹ No effort is made to custom tailor the motion and briefing process to fit the needs of the case. These points are related. The reason that the parties approach each round of motions the same way is that they never talk about the would-be motion and expected response, either among themselves or with the judge, to determine whether the motion really needs to be made, which issues are genuinely contested, which issues appear to be dispositive, and how those issues could most efficiently be presented to the court. And by not having a conversation about what the motion and briefing process actually *needs* to cover in that case, they also, necessarily, do not have a conversation about the things that simply *don't need* to be briefed or addressed at all.

Premotion conferences with the parties before summary-judgment motions are filed could provide a solution to many of these problems.¹⁴²

139. "Annual income twenty pounds, annual expenditure nineteen nineteen six, result happiness. Annual income twenty pounds, annual expenditure twenty pounds ought and six, result misery." CHARLES DICKENS, DAVID COPPERFIELD 185 (Random House, Modern Library 1940) (1849).

140. See PAUL R.J. CONNOLLY & PATRICIA LOMBARD, FED. JUDICIAL CTR., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS 57 n.61 (1980) (noting that fact issues often are easier to explain orally than in written briefs).

141. By prescribed, we mean that it is set by that district's local rules or by an individual judge's requirements. The prescribed method, of course, varies by district and judge.

142. Here too, we are not the first commentators to make this suggestion. See CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 12, at 54–58 (discussing prefiling conference mechanism and potential benefits); MCL 4th, *supra* note 59, § 11.34, at 46 ("To avoid the filing of unproductive motions, the court may require a prefiling conference to ascertain whether issues are appropriate for summary judgment, whether there are disputed issues of fact, and whether the

The purpose of the procedure is to have an exchange of information that will allow the court to tailor the motion process to the needs of the case. Though the details of the procedure can vary, the basic idea is that, before a party may file a summary-judgment motion, the party must ask for an informal conference during which the judge and the parties will talk about the would-be motion and anticipated response. The judge can (but need not) ask the moving party to submit a short (typically no more than two or three pages) letter outlining the scope and grounds of the intended motion. A short response may be allowed (but is not essential), to be filed within a few days of receiving the moving party's letter. The purpose of these submissions is to set a basic agenda for the conference. They are not surrogates for briefs. One of the primary purposes of the premotion conference is to see if briefs are actually needed, and if so on what issues. The conference itself is held shortly after the request is made, typically within a week or two. It is on the record and can occur either with the lawyers attending in person (our preference) or by telephone or videoconference.

Many motions will be avoided or greatly narrowed as a result of the premotion conference. The discussion may identify some claims, defenses, or issues for which a grant of summary judgment would be so clearly warranted that a motion is no longer needed to resolve it. For example, in many employment adverse action cases, the plaintiff will include a state law claim for intentional infliction of emotional distress. In most states, the elements of that claim are quite demanding and difficult to satisfy. If the discussion reveals that the plaintiff cannot meet those demands, the plaintiff may agree to withdraw the claim without the need for full briefing. Alternatively, the discussion may reveal that a particular claim, defense, or issue cannot be resolved without weighing facts or assessing credibility. The defendant may then choose not to make that motion. In a different vein, every judge has heard about lawyers who file summary motions for inappropriate reasons, such as to "educate the judge."¹⁴³ A premotion conference will reveal those motions (which are almost never valid) for what they are and likely avoid the need for any further work by the parties or the court.

motion, even if granted, would expedite the termination of the litigation."); Hornby, *supra* note 41, at 284 ("[J]udges could require conferences, after discovery is complete, to discuss where cases stand before summary judgment motions can be filed.").

143. MOORE ET AL., *supra* note 52, § 56.08[7] ("Summary judgment motions pursued as a means to 'educate the court' when there is no realistic chance of success on the motion are problematic and, if sufficiently weak, may violate Rule 11.").

The premotion conference discussion can also focus and streamline the briefing process for the motions that do get made. Most of the time, there are no more than a handful of pivotal issues. During the premotion conference the judge can get the parties to identify which parts or aspects of the claims or defenses are being contested—and which ones are not—and then ask the parties to direct their briefs to the disputed issues. The result is a much shorter and much more focused brief. Moreover, having participated in the premotion conference, the judge is in a much better position to resolve the motions that are briefed for the simple reason that the judge now has a feeling for the context and the background of the motion.

The time spent holding the premotion conference is well worth it. The conferences typically do not last long. Most conferences last between twenty and thirty minutes, though they can be shorter or longer depending on the circumstances. This short investment of the judge's and the parties' time can pay off in a significant saving of time and effort. Some motions are avoided entirely. Many motions are greatly narrowed. The motions that are made are more targeted and more focused, and usually shorter. The parties have avoided the costly process of filing motions, responses, and replies "in the dark." The court has avoided the work of slogging through the thick stack that results.¹⁴⁴ The case continues to progress. Everyone benefits.

We are convinced that judges who follow a premotion conference procedure will find that they spend much less time resolving summary-judgment motions than they currently do. The premotion conference mechanism has already proved to be an effective way of dealing with discovery disputes.¹⁴⁵ Many judges have told us that most of the disputes are resolved during the conference, either because the parties work through the problem during the discussion or because the judge is able to rule on the spot. Full briefing is reserved for those motions that need it, and the briefs are invariably shorter and more focused as a result of the discussion. There is no reason why similar benefits cannot be attained in the summary-judgment context. Our former colleague on

144. See Hornby, *supra* note 41, at 275 (describing work required of judges and their law clerks to analyze fully-briefed and supported summary-judgment motions).

145. See S.D.N.Y. L. CV. R. 37.2 ("No motion under Rules 26 through 37 inclusive of the Federal Rules of Civil Procedure shall be heard unless counsel for the moving party has first requested an informal conference with the Court by letter and such request has either been denied or the discovery dispute has not been resolved as a consequence of such a conference."). Judge Rosenthal requires premotion conferences for discovery disputes in her standing procedures for civil cases. See Procedure 5.C.1, available at <http://www.txs.uscourts.gov/district/judges/lhr/lhr.pdf> ("The party wishing to make any discovery motion must arrange for a conference with the court before the preparation and submission of motion papers.").

the Civil Rules Advisory Committee, Judge John G. Koeltl, has required promotion conferences for summary-judgment motions for many years.¹⁴⁶ He is an ardent advocate and has told us many times that the conferences repeatedly result in motions being avoided entirely or being greatly narrowed and focused. The Southern District of New York recently included a promotion conference requirement in its pilot project on managing complex civil cases.¹⁴⁷

A promotion conference requirement can be adopted on a district-wide basis by local rule or by an individual judge through a standing order or a case-specific order. Districts and individual judges unquestionably have authority to create a similar mechanism for summary-judgment motions. Rule 56 leaves it to districts and judges to establish their own practices for how motions are made and briefed.¹⁴⁸ Rule 16 explicitly states that a court may hold a pretrial conference for the purpose of “determining the appropriateness and timing of summary adjudication under Rule 56.”¹⁴⁹

Importantly, we are not suggesting a procedure by which parties must obtain *permission* to file a summary judgment motion.¹⁵⁰ Rule 56 provides for summary-judgment motions and it does not require permission from the court before it can be used. The purpose of the promotion conference is solely to provide an opportunity for the judge and the parties to talk about possible motions before they are filed, to try to identify and, if possible, reach agreement on the subjects the motion will address and what issues and evidence will be the focus. Judges with experience in using the procedure report that the conference does not lead them to order the parties to file certain motions or to not file others. There is no need to do so. The discussion itself provides the lawyers with the guidance they need.

146. See Individual Practices of Judge John G. Koeltl § 2.A. (Oct. 2011), available at http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=385 (describing promotion conferences that are required before making a motion to dismiss or a motion for summary judgment); see also Cecil et al., *supra* note 3, at 897 (noting Judge Koeltl’s practice).

147. See REPORT OF THE JUDICIAL IMPROVEMENTS COMMITTEE: PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES 8 (2011), available at http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf (“Pre-motion conferences should be held for all motions except motions for reconsideration, motions for a new trial, and motions *in limine*.”).

148. See FED. R. CIV. P. 56 advisory committee’s note (2010) (emphasizing that the new provisions of subdivision (c) regarding ways to support an assertion of fact do not prescribe motion or briefing practices, which are left to the district or individual judge to determine).

149. FED. R. CIV. P. 16(c)(2)(E).

150. See Wood, *supra* note 18, at 250 (describing a procedure in which parties must seek permission to file a summary-judgment motion).

Looking back, summary-judgment practice in the twenty-five years since the Trilogy has been dominated by efforts to contain it and improve it with more and better rules. The briefing schemes that have proliferated in the local rules across the country are one manifestation.¹⁵¹ But the answer will not be found in more rules or more one-size-fits-all schemes because the problem has never been one of there being too few rules or too little structure.¹⁵² The problem is that there is too little communication. No standardized scheme, however brilliantly designed it might be, can tailor the motion and briefing process as well as the judge and the parties can simply by talking it through before the motion is made and briefed. If we want to reduce the cost and burdens of the summary-judgment process and the amount of time it takes, the best thing we can do is to get judges and lawyers talking about the process before the work is performed and those costs are incurred.

B. Oral Argument

Our final recommendation is that judges consider more often holding oral argument on summary-judgment motions. Our reasons underlying this recommendation once again turn to the core principles of active judicial case management. First, we think oral argument presents an opportunity for the judge and the parties to communicate in a way that written arguments cannot fully duplicate. Second, we think holding oral argument allows the court to custom tailor the argument process—and the resolution process—to the particular needs of the case.

Lawyers frequently bemoan the lack of oral argument in district courts.¹⁵³ As summary-judgment motions have seemingly increased in use and importance, the frequency of oral argument on those motions

151. See MOORE ET AL., *supra* note 52, § 56.70[5] (discussing range of motion and briefing practices under local rules). Another manifestation is the Civil Rules Advisory Committee's recent effort to enshrine the so-called point-counterpoint motion and briefing scheme into Rule 56. See Wood, *supra* note 18, at 245–48 (discussing point-counterpoint proposal and the reasons for its eventual abandonment).

152. See Hornby, *supra* note 41, at 283 (“Constant efforts to simplify, through local rules and procedures, perversely drive up legal expense . . .”).

153. See Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 255 (2009) (“[A]t a recent hearing of the Judicial Conference's Civil Rules Advisory Committee on proposals to amend Rule 56 . . . a chief complaint of practitioners—plaintiffs' and defendants' lawyers alike—was that district court judges rarely, if ever, provide an opportunity for oral argument on summary judgment motions.”); Michael A. McGlone, *The Silence of Oral Argument*, 58 FED. LAW. 4, 4 (2011) (“There was a time, in the federal system, when in-person motion practice with oral argument was very active. Unfortunately, such now seems to be, in many of the federal districts, a distant, albeit fond, memory of the past.”).

has seemingly declined.¹⁵⁴ Lawyers complain that they do not see the trial judge between a Rule 16 conference—which may itself be done on the basis of a report that sets out proposed dates for a scheduling order and has no live interaction between judge and parties—and the trial itself, which is often avoided by settlement. As Judge Patrick E. Higginbotham recently put it, “The faces of the United States district courts are fading.”¹⁵⁵ Holding an in-person or some form of “live” Rule 16 or pre-motion conference reduces this sense that the judge is isolated and inaccessible.¹⁵⁶ Holding oral argument on summary judgment motions not only reduces this sense of the invisible judge, it can also make the trial judge faster and better at ruling on the motions.

Judge Mark R. Kravitz, a district judge after 20 years as an appellate advocate, has written persuasively about the benefits of oral argument on substantive motions.¹⁵⁷ Oral argument is responsive in ways that a written brief cannot be. Counsel may not cover in the brief what the judge thinks is important.¹⁵⁸ Counsel may have confused the judge in ways that oral argument alone can clarify. The parties’ briefs may be “two ships passing in the night, neither ever coming to grips with the other side’s key points.”¹⁵⁹

Oral argument at the district court is free from the harsh time constraints of the appeals court. The judge can devote as much time as she wants, asking questions and probing the answers. Argument is a chance for the judge to try ideas or approaches out on the lawyers and understand the flaws before enshrining them in an opinion. Argument is a chance for the judge to test her own understanding of the case and

154. A recent study found that on average 30% of summary-judgment motions received some type of hearing or oral argument, though the range was from 3% to 73% depending on the district. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 51 (2009) (surveying eight federal districts).

155. Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 745 (2010).

156. See Hornby, *supra* note 41, at 284–85 (noting that holding oral argument takes the summary-judgment process “out of the back room,” puts a “human face” on it, and demonstrates to the parties and the public that the court takes the process seriously); Kravitz, *supra* note 153, at 263 (“Part of the reason that the English legal system has clung to oral argument is the English belief that justice must be seen in order to be done.”); see also E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 219–20 (1988) (discussing the value litigants place on having a meaningful opportunity to state their case to a neutral decisionmaker).

157. See Kravitz, *supra* note 153, at 263–64.

158. *Id.* at 262; see also William H. Rehnquist, *Oral Advocacy: A Disappearing Act*, 35 MERCER L. REV. 1015, 1021 (1984) (“Counsel can play a significant role in responding to the concerns of the judges, concerns that counsel won’t always be able to anticipate in preparing their briefs.”).

159. See Kravitz, *supra* note 153, at 262.

get answers to questions that were not covered, or not covered adequately, in the briefs. Argument may result in concessions that reduce the need for judges to decide or address certain issues, even if they were covered in the briefs.¹⁶⁰

Because it is interactive, and because it allows the judge to probe and question and the parties to respond and explain, oral argument can “provide judges with a measure of confidence in their decision making that cannot be provided by written briefs alone.”¹⁶¹ At times, oral argument will clarify and confirm the parties’ positions and the merits to a point that lets the court rule from the bench,¹⁶² saving the effort and time that otherwise would be needed to prepare a written opinion.¹⁶³ At other times, the oral argument will reveal that further research or further analysis is needed on critical points before a decision can be made. Either way, the judge usually will have a better understanding of the case and the important, contested issues afterwards, and that allows the decision to be reached faster and the opinion to issue sooner regardless of the form it takes.¹⁶⁴

The prospect of oral argument can also improve the briefing process, especially when it is paired with a premotion conference. As discussed above, the premotion conference can be used to weed out issues that do not need briefing and focus the briefs on the key issues. Lawyers will feel much more comfortable omitting side issues or issues that might be conditionally important if they know that they will have a chance to raise or respond to them at oral argument should they prove to be more important than first thought.¹⁶⁵ The prospect of oral argument can also lead lawyers to be more reasonable and forthright in their briefs. As Judge Kravitz explained:

When arguing in a written brief with one’s opponent, all the incentives are to be unreasonable, and that is especially true if counsel knows there will not be any argument, and therefore, counsel will not have to

160. *See id.* at 270 (“Oral argument, therefore, allows me to clarify issues, obtain concessions, gain perspective, and even eliminate issues that I might otherwise have to discuss in a written opinion.”).

161. *Id.* at 267.

162. *See id.* at 269 (noting the practice of writing out thoughts in advance before delivering a decision orally, and generally waiting a week or so to deliver the opinion).

163. *See* CONNOLLY & LOMBARD, *supra* note 140, at 57 (noting the correlation between the frequency of written opinions and the length of disposition time); STEVEN FLANDERS, FED. JUDICIAL CTR., CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 31 (1977) (analyzing whether routine oral argument speeds disposition time and finding qualified support that it does).

164. *See* Kravitz, *supra* note 153, at 269–70 (“I find oral argument is a time saver. It makes me more efficient and effective.”).

165. *See* CONNOLLY & LOMBARD, *supra* note 140, at 57 n.61.

answer to a judge for what was written in the brief. Lawyers may feel perfectly at ease making extreme arguments in their papers that they would never make with a straight face directly to a judge. In contrast, all of the incentives on counsel are to be reasonable at argument, because there they are in a face-to-face conversation with a knowledgeable and prepared judge. That is why concessions are made at oral argument and rarely, if ever, in briefs.¹⁶⁶

The result—a more focused brief targeting identified key issues and making more reasonable arguments with less misdirection and bluster—should be an appealing prospect to any judge.

For oral argument to work well, however, the parties must understand what is expected.¹⁶⁷ Because oral argument is no longer common, the parties must understand that the judge wants argument, not a statement that the parties rest on what they have said in their briefs. It is sometimes helpful for the judge to set out specific questions or aspects that she wants the parties to address.¹⁶⁸

Oral argument on a dispositive motion can be an invaluable supplement to the briefs as well as the previous exchanges between the judge and the parties we have recommended. Oral argument allows both the parties and the judge to have more confidence that the summary-judgment motion has been properly, thoughtfully, and efficiently managed, considered, and decided.

III. CONCLUSION

“Properly used, summary judgment helps strip away the underbrush and lay bare the heart of the controversy between the parties. It can offer a fast track to a decision or at least substantially shorten the track. But proper use of the rule is the sine qua non of its utility.”

– William W. Schwarzer¹⁶⁹

166. Kravitz, *supra* note 153, at 265.

167. The oral argument proceeding itself “provides a useful opportunity for a court to communicate its standards and expectations to the bar generally. Other lawyers awaiting argument on other motions are generally in the room, and they obtain useful, informal guidance.” FLANDERS, *supra* note 163, at 31. We recently participated in a conference where the topic of oral argument on summary-judgment motions came up, and several attorneys present said that early in their careers they had learned a great deal about motions argument by attending arguments in other cases, usually in state court where motions are more frequently set for argument.

168. See CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 12, at 53 (recommending that judges who schedule oral argument on motions consider “advising counsel of the particular issues on which you want oral argument”).

169. SCHWARZER ET AL., *supra* note 7, at 8.

Twenty years ago, Judge Schwarzer recognized that summary judgment, for all of its potential benefits, must be used wisely in order to be used well. We think summary judgment is used best when judges remember to follow the core principles of active judicial case management.

First, judges and parties should communicate about summary judgment, from the first case-planning conference under Rule 16 to the time when motions are to be made and briefed and through their presentation and resolution. Talking about summary judgment early in the case allows the judge and the parties to use it at the right time for the right issues. Talking about summary judgment at a pre-motion conference can help to avoid needless motions and focus the ones that are made. Talking about summary judgment motions at oral argument can further clarify the merits and streamline the court's resolution of the motion.

Second, summary-judgment practice cannot be effective if courts and parties handle it the same way—doing the same things according to the same script—in every case. Summary judgment must be tailored to the needs of the case. The tailoring process begins at the Rule 16 stage. Using the information the court obtains from the parties after talking about summary judgment, the court can guide the parties on determining whether early motions are appropriate—which may narrow the case or lead to an early resolution—and on conducting discovery to best target and efficiently obtain the discovery that will be needed for all motions. The tailoring process can (and we think generally should) continue with a pre-motion conference between the judge and the parties to discuss the intended motion and the likely response. Using that information, the judge and the parties may be able to avoid some motions entirely and to greatly focus briefing for the ones that are made. Finally, the tailoring process can continue with oral argument. Oral argument is the apogee of custom tailoring. By definition, it can take as long as needed and cover whatever issues the judge and the parties think deserve the most attention. Afterwards, the court can choose her method of ruling (from the bench or with a written opinion) and will be in a better position to do so quickly and efficiently.

These suggestions are not the stuff of abstract jurisprudence. They are practical suggestions to improve the way lawyers, litigants, and judges approach one of the most consequential—and most costly and burdensome—aspects of civil litigation. The downsides seem few. The potential benefits seem many and large. Those who have tried these techniques report that they can be very effective and helpful in reducing costs and work, without diminishing—indeed, while enhancing—the

quality of the process and the quality of the result. This sounds to us like Rule 1. If judicial management of summary judgment gets us closer to those goals, it has done its job.