Pre-trial Cost Reform Imperative to Preserving Endangered Jury Trial

By Patrick J. Stueve and E.E. Keenan

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Introduction

The civil jury trial is a distinguishing mark of the American judicial system,[1] a feature so important as to be enshrined in the Bill of Rights.[2] Yet there is a consensus among members of both sides of the bar:[3] the skyrocketing cost of litigating is jeopardizing this process and threatening the rights of both plaintiffs and defendants to have outcomes decided on the merits by a jury.[4]

How can we maintain a process of fair and accountable adjudication that hinges on the merits, instead of allowing the cost itself to become the judgment? Courts and lawyers have many tools at their disposal to reduce the pre-trial costs of litigation.[5] This brief article proposes ten reforms to dramatically reduce pre-trial costs, most of which can be immediately implemented either by the parties' agreement or by court order.[6] These proposals are based on the principal author's over twenty years of practice: the first ten years almost exclusively on the defense side representing Fortune 500 companies, and the last ten years almost exclusively representing plaintiffs in contingent commercial litigation cases in state and federal courts around the country and in AAA arbitrations. Many of the following steps also have been proposed or discussed in some form over the past several years by academics, jurists, or practicing lawyers:

1. Use staged discovery, focusing first on dispositive issues.

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[1] Hon. W. Royal Furgeson, Jr., *Civil Jury Trials R.I.P. Can It Actually Happen in America?*, 40 ST. MARY'S L.J. 795, 798 (2009); Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006).

[2] U.S. CONST. AMEND. VII. *See also* Furgeson, *supra* note 1, at 798, Young, *supra* note 1, at 70.

[3] ABA SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 157 (2009) (finding that 53.2% of plaintiff-side respondents, 93.2% of defense-side respondents, 92.2% of mixed-practice respondents, and 82.7% of all respondents agree that litigation costs force settlement when settlement should not occur based on the merits).

[4] For data on the decline of civil jury trials, see Am. Coll. of Trial Lawyers Ad Hoc Comm. on the Future of the Civil Trial, *The "Vanishing Trial:" The College, The Profession, The Civil Justice System*, 226 F.R.D. 414 (2005) [hereinafter ACTL, *"Vanishing Trial"*].

[5] Not only has the civil jury trial seen a decline— merits adjudication more generally has dropped. *See* Judith Resnik, *Whither and Whether Adjudication*?, 86 B.U. L. REV. 1101 (2006) (discussing decline in merits adjudication).

[6] This article focuses primarily on solutions that can be implemented quickly. Over the long term, structural incentives may need to be realigned in order to reward efficiency as the current billing method used in many cases may not lead to ideal outcomes. *See* Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 580 (1998) (reporting results of Federal Judicial Center study and finding that "when attorneys billed on an hourly basis (as opposed to a contingent fee or some other method), the time from filing to disposition was longer").

2. Require counsel to develop an early electronic discovery plan.
3. Permit only party depositions, with experts and third parties deposed only with leave.
4. Shorten the discovery timeline.
5. Set firm trial dates.
6. Establish procedures to rule on discovery disputes informally and rapidly.
7. Shorten page limits on briefs.
8. Provide nationwide subpoena power for trial.
9. Expand use of the motion to dismiss in conjunction with pre-trial conferences.
10. Narrow and simplify use of summary judgment.

1. Use Staged Discovery, Focusing First on Dispositive Issues

Over the past twenty years of my practice, the amount of discovery—particularly deposition discovery—has expanded ten fold. I attribute this in large part to the expanded use of summary judgment. Plaintiffs take many more depositions than in the past to ensure they can defeat the dreaded summary judgment motion. Defendants take many more depositions than in the past in hopes of winning summary judgment and avoiding the dreaded jury trial.[7] I also attribute it to the expanded and pervasive use of the billable hour. Because there is not a consensus among the bar regarding major reform of summary judgment[8] or the benefits of the billable hour, I focus on areas of reform which lawyers should agree will lead to meaningful pre-trial cost reductions.

A main problem is the overuse of the liberal discovery permitted in civil litigation. Often litigants demand an unreasonably broad array of information shortly after a case starts with little thought to how they ultimately intend to use the information, or its significance to the dispositive issues in the case. Frequently only a fraction of the information disclosed in discovery is ultimately used at trial. Lawyers, with the assistance of the trial court, must curtail excessive discovery through early evaluation of the critical factual and legal issues underlying the lawsuit. Particularly in complex and multi-party cases, lawyers and the courts should look at staged discovery focusing on threshold issues (like the misrepresentations in a fraud case), and later expand discovery if the early stages indicate trial-worthy questions. Staged discovery may be inefficient in less complex cases involving a single claim or a single, narrow fact pattern underlying multiple claims.

For the appropriate case, the court should meet with counsel early to determine what these issues are,[9] and then invoke its powers under Rule 26(b) to control the order in which issues will be addressed through the discovery process, with frequent review if needed to modify the discovery plan.[10] For instance, the parties may be permitted to take discovery in a price

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[7] Interestingly, my experience has been that trial courts who believe in the benefits of jury trials and like to try cases have a narrower view of the appropriateness of summary judgment and try more cases than those trial courts who either doubt the benefits of jury trials or simply do not like to try cases.

[8] ABA SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 13 (2009) (summarizing surveyed lawyers' disparate views on summary judgment).

[9] *See* FED. R. CIV. P. 16(a) ("In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as . . . expediting disposition of the action . . . ."). This article argues that the "may" should usually be treated as a "must," especially in complex cases.

[10] An interesting comparison comes from the recent British study on litigation costs, popularly known as the Lord Jackson Report, which traced several suggested and current practices to limit the scope of pretrial evidence taking. *See* RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 376 (2009), *available at*

fixing case as to the presence of an agreement—and not damages, market definition, or antitrust injury. The process of narrow early discovery as to discrete issues is best illustrated in class action cases, where initial discovery is often limited to only certification issues.[11]

Staged discovery will encounter resistance—in a recent Sherman Act § 1 case involving eleven defendants, I offered to proceed in stages, first seeking to address the conspiracy allegations. But opposing counsel refused. Over 100 depositions were taken in discovery. Ultimately the case settled after the court denied summary judgment on the conspiracy issue.[12] In some cases the dispositive issues require such broad probing as to make phased discovery meaningless. But in most cases, with the early participation of the Court, the parties can thoroughly assess and identify the critical issues before the costly formal discovery process begins. As discussed in detail below with respect proposal 3, even with staged discovery depositions should be limited to the parties unless the parties agree or the Court grants leave.[13]

2. Require Counsel to Develop An Early Electronic Discovery Plan

Uncontrolled electronic discovery is a prime source of exploding costs that in many cases could be substantially reduced if the parties met at the beginning of the case and agreed to a thoughtful e-discovery plan. Such a process will save both sides of e-discovery requests substantial attorney time and client resources. Simply put, the sometimes extraordinary burdens of searching, reviewing, and producing electronically-stored information make it imperative that counsel meet and cooperate at the outset of the case.[14] This meeting should not only include the lawyers for both sides, but also an informed information technology representative or e-discovery consultant for the parties. Suggesting cooperation will not be enough in some cases—that is where the Court must intervene, requiring the parties to bring with them informed representatives or consultants who can assist the Court in resolving the parties' perceived differences.

The electronic discovery plan should lay out: (1) who will serve as custodians of each party's information, (2) the time period from which data must be preserved, (3) the scope of a litigation hold, and (4) search terms for examining data. Such plans fit within the current Civil

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http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf [hereinafter JACKSON REPORT].

[11] FED. R. CIV. P. 23(c), Adv. Comm. Note (2003) ("[D]iscovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the merits, limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination.")

[12] *See* Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., 527 F. Supp. 2d 1257 (D. Kan. 2007) (granting in part and denying in part defendants' motions for summary judgment).

[13] *See* Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 Act and '34 Act Claims*, 76 WASH. U. L.Q. 537, 579-83 (1998) (proposing managed discovery in securities cases, and giving example of limiting plaintiffs to either document discovery or depositions at beginning of case).

[14] The Sedona Conference, the source of many recommendations on electronic discovery practices, has embarked on an extensive effort to encourage attorney cooperation in this area. *See* SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION (2008), *available at* http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf; *see also* Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339 (2009) (elaborating on Cooperation Proclamation and explaining value of cooperation from ethical and economic standpoints, as well as the intentions of the Federal Rules).

Rules. Rule 26 already encourages attorneys to develop a discovery plan together, and it specifically directs counsel to discuss electronically stored information.[15] Numerous districts have already promulgated local rules that elaborate on electronic discovery obligations; a few mandate actual agreement.[16] Professor Steven Gensler suggests that parties focus discussions on the parameters of how electronic data will be searched.[17] Gensler also singles out agreement on methods of preservation and production as steps that would make discovery smoother.[18] A recent British report on litigation costs suggested that parties be required to file an initial memorandum describing their electronic information systems and agreeing on the scope of the search.[19]

In sum, trial courts should take advantage of their authority under the existing Federal Rules, as well as the capacity to shape their own local rules, to encourage attorneys to agree to major electronic discovery issues up front; courts should be ready to close the gap with further details in the case of an impasse.[20] Aggressive management of issues surrounding electronically stored information will substantially reduce the cost of pre-trial litigation in most cases.

3. Permit Only Party Depositions, with Experts and Third Parties Deposed Only with Leave.

In many cases, deposition discovery can and should be limited to the parties or representatives of the parties who have been indentified under Rule 26(a) as having relevant information. This limitation goes hand in hand with identifying upfront the dispositive issues in the case and focusing depositions of the parties on those issues. If those depositions indicate a need to expand beyond the parties—i.e., former employees or agents acting on behalf of the parties, or other third parties with knowledge of critical facts—the parties should be able to agree to expanded discovery. If not, the parties should seek guidance from the court.

Missouri Supreme Court Judge Michael Wolff recently called expert depositions "the biggest waste of time and money in the system."[21] Under the current federal disclosure requirements for experts, there is little reason to permit expert depositions.[22] In nearly every case where I have produced an expert for deposition, it would have been far more effective for the opposing side to have saved their questions for trial and preclude my expert from correcting

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[15] Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 347-48 (2009) (describing evolution of Rule 26 with respect to directing attorneys to discuss and plan discovery process).

[16] Steven S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363, 372-74 (2009). Professor Gensler notes that the Northern District of Ohio and the District of Delaware require "that the parties 'shall reach agreement' as to search terms and methodology." *Id.* at 374 (quoting D. Del., Default Standards for Discovery of Electronic Documents ("E-Discovery"), Std. 5; N.D. Ohio, Default Standards for Discovery of Electronic Documents ("E-Discovery"), Std. 5).

[17] *Id.* at 371.

[18] *See id.*

[19] JACKSON REPORT, *supra* note 10, at 365-66.

[20] *In re* Rail Freight Fuel Surcharge Antitrust Litig., Misc. No. 07-489 (PLF/JMF/AK), 2009 WL 3443563 (D.D.C. Oct. 23, 2009) (discovery order in case where parties had stipulated as to certain discovery protocols, including search terms, but still disputed some issues).

[21] State *ex rel.* Crown Power & Equip. Co. v. Ravens, No. SC89671, 2009 WL 3833830, at *5 (Mo. Nov. 17, 2009) (Wolff, J., concurring). Judge Wolff cited Oregon's positive experience not having expert depositions, and proposed a compromise between the prevalent regime and Oregon's approach in which extensive expert disclosure is mandated, but further discovery can only occur by agreement of both parties. *Id.* at *6-7.

[22] *See* FED. R. CIV. P. 26(a)(2)(B) (providing for comprehensive expert disclosures prior to trial).

mistakes or massaging opinions in response to attacks raised in the deposition. I do not depose experts in jurisdictions where full disclosure requirements are enforced. Federal courts have properly limited trial testimony of experts to what was disclosed in the expert's report. Unless counsel for the parties can show good cause, there is no need in most cases to expend the substantial attorney time and expert costs that are incurred in preparing and producing experts for deposition

Limiting deposition discovery has been the rule, not the exception, in binding arbitrations for decades. Often, these cases involve complex claims and allege damages of tens or hundreds of millions of dollars. I handled a $70 million dollar arbitration dispute with only one representative from each side being deposed and no expert depositions. Criminal cases have no or very limited deposition discovery. I have successfully defended pro bono clients with their liberty at stake with no fact or expert deposition discovery.[23] Simply put, lawyers must assess in each case what discovery is essential to prepare the case for trial. They must consider the costs involved in extensive deposition discovery—including expensive transcripts, videography, travel costs, and expert fees, along with the extensive attorney time devoted to preparation and taking of depositions. My experience has been that the time and expense related to depositions constitute a substantial portion of the costs in a case that could and should be eliminated.

4. Shorten the Discovery Timeline

An important part of discovery's burden comes from its length. When combined with some of the other controls proposed here, a briefer discovery period should make an impact in lessening the direct costs of lawyer time, as well as the indirect costs parties incur when litigation stretches on too long.

Proposals for shortening the discovery period have long occupied discussion over civil rules changes.[24] The most extensive work on this topic occurred in the mid- to late 1990s in light of the Civil Justice Reform Act.[25] The CJRA, which piloted various programs for reducing litigation burdens, led to a study by the RAND Institute for Civil Justice, which found that a shortened time to the cutoff of discovery was associated with a lower cost (in terms of attorney time) and faster case disposition.[26] This offset the increase in cost associated with early judicial case management.[27] Around the same time as the RAND study, John Burritt McArthur published a detailed proposal for how to implement time limits on discovery—his plan combined a nine-month timeline with firm trial dates.[28] However, a Federal Judicial Center study found no

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[23] *See* FED. R. CRIM. P. 15(a)(1) (providing that, in general, depositions may only be taken with leave of the court "because of exceptional circumstances and in the interest of justice").

[24] *See* Hon. Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 523-24 (1998) (summarizing consensus at 1997 Boston Conference of the Civil Rules Advisory Committee) ("Early discovery cutoff dates and firm trial dates were recognized as the best court management tool to reduce the costs of discovery . . . .").

[25] Civil Justice Reform Act of 1990, Pub. L. 101-650, 104 Stat. 5089 (Dec. 1, 1990) (codified at 28 U.S.C. §§ 471-82 (2006)).

[26] James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 44 (1997).

[27] *Id.* at 46.

[28] John Burritt McArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits*, 24 HOFSTRA L. REV. 865 (1996).

relationship between the length of the discovery periods and the time to case disposition.[29] Ultimately, the Advisory Committee decided not to move forward with shortening the time for discovery:[30] "its decision seemed to hinge primarily on the difficulty of setting firm trial dates to accompany any discovery cutoff and the belief that an early discovery cutoff made little sense without an early firm trial date."[31]

The authors of the FJC study correctly point out that this area could be aided by more research.[32] But my experience over the past twenty years on both sides of cases has convinced me that longer discovery periods generate more document requests, more depositions, more delays, and more needless motion practice that eats up limited resources. The Advisory Committee rightly saw that discovery cutoffs need to come with firm trial dates; the time has come to adopt both, which leads to the next topic.

5. Set Firm Trial Dates

Shortened discovery and firm trial dates go hand-in-hand.[33] When attorneys face an actual, hard deadline for working up their cases, they will have to work more efficiently. Professor E. Donald Elliott summed it up well:

> Perhaps the most important single element of effective managerial judging is to set a firm trial date. Limiting the amount of time before trial establishes a zero-sum game, in which part of the cost of working on one issue is the opportunity cost of not being able to work on other issues within the limited time available before trial. This creates incentives for attorneys to establish priorities and narrow the areas of inquiry and advocacy to those they believe are truly relevant and material and to reduce the amount of resources invested in litigation.[34]

The RAND Study did not find a statistically significant relationship between early establishment of a trial date and attorney work hours.[35] But the study did observe that "[i]ncluding early setting of trial date as part of the early management package yields an additional reduction of 1.5 to 2 months in estimated time to disposition."[36] Even if attorneys end up billing the same amount, the reduction in the length of cases has inherent value because it clears dockets for other matters and allows parties to move on with business.

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[29] Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 558-59 (1998).
[30] Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1180 (2002).
[31] *Id.* (citing Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Discovery Time Cut-off (Mar. 16-17, 1998), *available at* http://www.uscourts.gov/rules/Minutes/0398civilminutes.htm (last visited Feb. 5, 2002)).
[32] Willging et al., *supra* note 29, at 559.
[33] Willging, *supra* note 30, at 1180. *See also* McArthur, *supra* note ___, at 949 ("Firm trial dates are an essential part of a firm pretrial schedule."); *id.* at 950 ("Parties have no particular reason to believe they will be forced to adhere to a nine-month discovery schedule, or any rapid schedule, if the court has a three-or four-year backlog of cases awaiting trial.")
[34] E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 313-14 (1986) (citations and quotations omitted). *See also* Hon. William G. Young, *An Open Letter to U.S. District Judges*, FED. LAW., July 2003, at 33 ("the best case management tool ever devised is an early, firm trial date").
[35] Kakalik et al., *supra* note 26, at 31.
[36] *Id.*

6. Establish Procedures to Rule on Discovery Disputes Informally and Rapidly

Discovery will always produce some disagreements, but they should be resolved in a more straightforward manner. Counsel should present complaints through short letters to the district or magistrate judge handling pre-trial matters, followed by a brief teleconference or formal hearing if absolutely necessary. Several federal districts follow this approach. The Western District of Missouri requires that attorneys first confer among themselves about a dispute, and then have a teleconference with the judge, before any discovery motion can be filed.[37] This procedure has dramatically reduced the cost of resolving discovery issues in the several cases I have had in this Court. Similarly, the Local Rules for the Southern and Eastern Districts of New York provide that discovery disputes will only be handled through teleconferences or through letters to the court of no more than three pages.[38] Further submissions may occur only on invitation of the Court.[39] Several judges have actively emphasized the importance of this practice in handling discovery.[40]

Of course, deciding even abbreviated disputes takes time. The 1990s FJC study indicated that judicial availability to rule on disputes plays a critical (possibly the most critical) role in reducing costs.[41] Given current caseloads, district and magistrate judges are already stretched to the limit. Therefore, in large cases, courts should consider appointing special masters to handle discovery.[42] To meet the challenges of electronic information, Judge Furgeson has called for special masters who have expertise in information technology and could take the time to understand the intricacies of both parties' computer architecture.[43]

By utilizing extra personnel in the most complex cases and by streamlining the process when parties do seek judicial intervention, courts can work within the existing rules regime to reduce the acrimony that fuels discovery costs.

7. Shorten Page Limits on Briefs

As if judges do not have enough to read, litigators insist on inundating courts with verbose briefs. Both judges and litigants would benefit if this word-count arms race ended. Courts should impose meaningful limits on the length of filings. Most of the commentary about

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[37] W.D. MO. L.R. 37(a).
[38] S. & E.D.N.Y. CIV. R. 37.3(c).
[39] *Id.*
[40] *See* Golub v. Trans Union LLC, No. 07 Civ. 6308 (JGK) (DFE), 2008 WL 2117204, at *2-3 (S.D.N.Y. May 19, 2008) (Eaton, J.) (setting forth procedure for parties to submit joint letter outlining dispute, along with other optional procedures); Lumbermens Mut. Cas. Co. v. Holiday Vehicle Leasing, Inc., 212 F.R.D. 139, 141 n.2 (S.D.N.Y. 2002) (Kaplan, J.) (noting judge's practice of resolving "discovery disputes, whenever possible, on the basis of letters and informal conferences") (citation omitted).
[41] Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 584 (1998) ("The change most likely to reduce discovery expenses, in the view of these [surveyed] attorneys, is to increase the availability of judges to resolve discovery disputes. Eighteen percent (18%) said this would have helped in the specific case, and 54% expect it would help in civil cases generally.")
[42] Furgeson, *supra* note 1, at 822.
[43] *Id.*

brief length has been at the appellate level.[44] But the point applies just as strongly in trial courts, which must deal not only with a mass of paper, but also with trials, criminal pleas, and other hearings. In a 1999 survey of federal judges (the great majority of respondents – 286 out of 355 – were district judges[45]), "ninety percent of the judges said that conciseness is 'essential' or 'very important'" to a brief's persuasive value, but a mere "nineteen percent said that advocates are 'usually' concise."[46] Judges' individual comments and recommendations reflected frustration with the length and rambling nature of many briefs.[47] In my experience, when lawyers must write shorter briefs, they must think harder about the value of each argument in advancing the case. Tight page limits also remove the all-too-frequent smears, personal attacks of parties and their representatives, and hyperbole rampant in briefing today. Shorter briefs end up clearer and higher-quality, and also save the court valuable time.

8. Provide Nationwide Subpoena Power for Trial

Lawyers too often today insist on deposing every witness. This is in part due to the expansive use of summary judgment. But it also due in part to lawyers who try very few cases and thus are unwilling to conduct the highly effective but gutsy "blind" examination at trial. In a trial last year in a jurisdiction that rarely grants summary judgment, I had several blind examinations of fact and expert witnesses, with very favorable results. While assembling a mountain of depositions assuages attorneys' stage fright, it also runs up an astronomical bill. Today's federal rules reinforce this costly practice by allowing nationwide depositions but providing much more limited geographic coverage for trial subpoenas.[48] The Committee should correct this imbalance by recommending that the district courts have nationwide subpoena power for trial. This will allow the parties and the courts to more freely limit pre-trial depositions to the parties. If the third party witness or expert is unavailable for trial, the court can allow trial depositions prior to the commencement of the trial.

The 100-mile bulge rule made sense when it was adopted in 1793.[49] Needless to say, transportation has grown cheaper, faster, and safer, and the convenience considerations that held sway two centuries ago do not have as much force now. It is my strongly-held view that the blind examination often proves more valuable than the deposition because it maintains the

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[44] *See, e.g.*, Hon. Ruggero J. Aldisert, *Perspective from the Bench on the Value of Clinical Appellate Training of Law Students*, 75 MISS. L.J. 645, 651 (2006) ("In presenting a brief summary of criticisms of the briefs in a view from the bench, I chant the mantra of the appellate judiciary: *Briefs are too long, too long, too long*."); *id.* ("After deducting Saturdays and Sundays, each [circuit] judge must decide more than one case each day."); Hon. Robert R. Baldock, Hon. Carlos F. Lucero & Vicki Mandell-King, *What Appellate Advocates Seek from Appellate Judges and What Appellate Judges Seek from Appellate Advocates: Panel Two*, 31 N.M. L. REV. 265, 269 (2001) (transcript of 2000 Tenth Circuit Judicial Conference) (reflecting opinion of circuit judges that briefs should be shorter).

[45] Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 257, 261 (2002).

[46] *Id.* at 279 & n.41 ("Judges were asked to rate the importance of conciseness in persuasive writing as essential, very important, somewhat important, or not important.")

[47] *Id.* at 280-81.

[48] *Compare* FED. R. CIV. P. 45(a)(2)(A), 45(b)(2), 45(c)(3)(A)(ii) (providing for trial subpoenas in district or state in which action is pending as well as within 100 miles of courthouse) *with* FED. R. CIV. P. 45(a)(2)(B), 45(b)(2), 45(c)(3)(A)(ii) (providing for deposition subpoenas in any district).

[49] Cathleen A. Roach, *It's Time To Change the Rule Compelling Witness Appearance at Tria:l Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 GEO. L.J. 81 (1990) (reviewing history of bulge rule, which for out-of-state witnesses has stayed the same since 1793, and advocating nationwide civil trial subpoena power for most cases).

factfinder's attention and allows for a much more meaningful assessment of demeanor and credibility. The choice is whether armies of attorneys and their assistants should have to travel to a single witness, or one witness should travel to the trial—if and only if the case goes to trial. The latter option will save substantial costs in the approximate 98% of civil cases that do not end in trial.[50] Nationwide trial subpoena power has garnered discussion in this Committee and in scholarly commentary,[51] and the Criminal Rules already allow for nationwide service.[52] The Committee should move forward with a recommendation for nationwide civil trial subpoena power.

9. Expand Use of the Motion to Dismiss in Conjunction with Pre-trial Conferences

Discovery has become the main event for parties and the court to find a case's focus. This may have worked in 1938, but it does not work in today's costly and complicated litigation environment. I much prefer to have legal questions decided early in the case by the trial court. If I am on the losing end I can seek an immediate appeal, attempt to resolve the case based on the new procedural status, or vigorously pursue the case knowing where the Court stands on a significant issue in the case. Judges should meet with counsel up front, identify any legal issues that will narrow or dispose of the case, and if there are any such issues order briefing on those issues. Using the motion to dismiss after more rigorous up-front inquiry could narrow the case and thus reduce discovery costs.

The Civil Rules already contemplate early involvement of the court in defining and narrowing areas of legitimate dispute.[53] Rule 16(c)(2)(A)-(B) provides:

> At any pretrial conference, the court may consider and take appropriate action on the following matters: (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses; (B) amending the pleadings if necessary or desirable . . . .[54]

This process is not merely an alternative to fleshing a case out through discovery – it serves an integral role in controlling litigation. As the Supreme Court explained early on in the Rules regime, "various instruments of discovery . . . serve . . . as a device, *along with the pre-trial hearing under Rule 16*, to narrow and clarify the basic issues between the parties."[55] Since the 1950s, commentators have called for expanded use of pre-trial conferences,[56] and the *Manual for Complex Litigation* suggests that judges set initial conferences before the initiation of

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[50] ACTL, *"Vanishing Trial," supra* note 4, at 417-18 (noting that approximately 1.5% of civil cases are disposed of by judgment following trial).

[51] ADVISORY COMM. ON CIVIL RULES, MEETING IN CHI., ILL., AGENDA MATERIALS 294, 356 (Apr. 2009) (discussing proposal to amend trial subpoena geographic scope); AM. LAW INST., COMPLEX LITIGATION PROJECT, TENTATIVE DRAFT NO. 2 (Apr. 1990), at 24-46 (recommending that the federal civil rules grant nationwide trial subpoena power).

[52] FED. R. CRIM. P. 17(e)(1) (allowing for nationwide jurisdiction for trial subpoenas in criminal cases).

[53] *See generally* FED. R. CIV. P. 16.

[54] FED. R. CIV. P. 16(c)(2)(A)-(B). Rule 16(c)(2) also advises the use of pretrial conferences for other purposes, such as dealing with expert testimony.

[55] Hickman v. Taylor, 329 U.S. 495, 501 (1947) (emphasis supplied).

[56] *See* 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. CIV. § 1530 (2d ed.).

discovery.[57] Courts should make the Rule 16 conference a mandatory part of major cases before discovery gets under way.

Expanded use of the motion to dismiss, in conjunction with pre-trial conferences, can occur without formal changes. By structuring conferences with an aim of resolving appropriate legal issues on motions to dismiss, courts can address criticisms that have been leveled at both managerial judging[58] and the Rule 12(b)(6) process.[59] Yet in contrast to informal case management, the court-invited motion to dismiss will resolve critical legal issues early into a case and be in writing, under established legal standards, and subject to appellate review.[60]

10. Narrow and Simplify use of Summary Judgment

While an important tool in some cases, all too often summary judgment has become an insatiable consumer of resources. How can we narrow the use of summary judgment while preserving its utility in the appropriate case? First, the expanded use of partial motions to dismiss up front in cases should dispose of many non-fact based issues long before summary judgment. Second, courts must stop lawyers from letting the pleading stage creep into the summary judgment stage by preventing parties from raising partially or completely dispositive legal issues for the first time at the summary judgment stage. Third, and most importantly, to ensure that parties can and will agree to limit the scope of discovery—particularly the expansive deposition discovery which is the rule rather than the exception these days—Courts should allow affidavits from counsel regarding non-party fact witness testimony if needed to substantiate the existence of factual issues. Courts should ensure the integrity of the process by imposing appropriate safeguards.

Under Rule 56(f), a court may deny summary judgment "[i]f a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition."[61] It is proposed above that trial subpoena jurisdiction be extended nationwide in order to allow examination for the first time at trial, instead of forcing the parties to incur the attorney time and costs of a deposition. Yet under Rule 56(e), a party cannot make it past summary judgment by explaining what a witness's projected trial testimony will show.[62] In order to realize the cost savings of nationwide trial subpoenas, Rule 56(e) should change to allow parties to make declarations, based on substantial facts,[63] of what they reasonably project that a

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[57] MANUAL FOR COMPLEX LITIGATION, FOURTH, § 11.31.

[58] Elliott, *supra* note 34, at 314-18 (reviewing criticisms leveled at "managerial judging" approach based on concerns that the technique prevents presentation of merits, is ineffective, and can lead to arbitrary outcomes).

[59] ABA SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 54 (2009) ("46.8% of plaintiffs' lawyers, 61.8% of defense lawyers, and 55.5% of mixed practice lawyers agree or strongly agree that these motions [to dismiss for failure to state a claim] are not effective tools to narrow discovery.")

[60] *Cf.* Elliott, *supra* note 34, at 311 ("A judge who narrows the issues in a case by granting a motion to dismiss or for partial summary judgment must act according to law and provide a reasoned justification, subject to appellate review. The idea that decisions to foreclose certain issues and lines of inquiry are 'managerial,' on the other hand, implies that these decisions are not based on the legal merits of the parties' positions.")

[61] FED. R. CIV. P. 56(f).

[62] *See, e.g.,* del Carmen Guadalupe v. Negron Agosto, 299 F.3d 15 (1st Cir. 2002) ("A genuine issue of material fact does not spring into being simply because a litigant claims that one exists [or] promise[s] to produce admissible evidence at trial.") (quoting Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990)) (bracketing in original) (further citation and internal marks omitted).

[63] This might include, for instance, photographs of a scene at which another person can place the witness, or e-mails and letters sent under the witness's name.

non-party trial witness's testimony will demonstrate. This declaration should also show why receiving the witness's direct testimony through affidavit is not feasible. For example, often third party fact witnesses are willing to testify only if subpoenaed. Through expanding the set of materials that can create fact issues, parties would save the substantial costs of deposition testimony.[64] Parties who make representations through counsel regarding third party testimony that proves false at trial can and should be subject to the Court's broad sanction powers, including under Rule 56(g).

Conclusion

Our system seeks "just, speedy, and inexpensive"[65] results determined against the unique backdrop of the civil jury trial. Skyrocketing pre-trial discovery costs threaten this method for resolving disputes. Fortunately, the existing Civil Rules, with some modification, provide the roadmap for saving the system we have long known and that once worked. Most of these reforms can be implemented immediately and will result in dramatic cost reductions, enabling parties to resolve cases through a jury trial or beforehand—based on the merits, not the excessive costs of pre-trial discovery.

[64] For further discussion of how Rule 56(f) may help reduce costs, see Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 95 (2002) (proposing greater discretion for judges to deny technically proper motions) ("In deciding whether to deny summary judgment, judges should conduct a balancing test . . . . If the burden on the court in deciding summary judgment would be substantially greater than the adverse effect of a denial on the movant, then a denial may be appropriate, without determining the existence of a factual dispute.")

[65] FED. R. CIV. P. 1.