The Managerial Judge Goes to Trial

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Abstract: Scholars have examined the phenomenon of pre-trial judicial management, but have ignored the ways in which this problematic set of attitudes has invaded the trial phase of litigation. This article examines the use of managerial discretion at the trial stage and demonstrates that trial-phase managerial decisions suffer from all the problems of their pre-trial counterparts: 1) trial management involves judges so intimately in the parties’ information and strategies that it may compromise the judges’ impartiality; 2) it leads to a loss of transparency as more decisions are made off the record or in chambers; 3) management decisions are not guided by meaningful judicial standards, resulting in inconsistent ad hoc rulings influenced by subjective biases; 4) management decisions can redistribute strategic advantages and disadvantages and even affect case outcomes; and 5) there is often no effective appeal of a trial court’s management decision. Further, the managerial trial rulings can threaten the parties’ perceptions of process fairness. The article concludes by arguing that management’s myopic focus on speed, inherent lack of standards, inconsistent application, and marked ability to skew the merits threaten important procedural values.
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INTRODUCTION

Scholars have spent a lot of time, and rightly so, discussing the phenomenon of the managerial judge.¹ We worry that trial court judges have transformed themselves from people who apply law to facts and rule on legal issues to people who manage lawsuits. Judges use this gigantic discretion during the pretrial period to shape pleadings, schedule and limit disclosure and discovery, require alternative dispute resolution, encourage settlement, and otherwise sculpt the lawsuit. Equity, we fear, has run amuck in the pretrial phase, leaving us without meaningful or consistent limits.² Implicit in some of this concern is a belief that if the focus of litigation shifted back to trial, we would be back to a rule-driven regime where discretion is constrained and judges judge. This article examines that belief, and concludes that the opposite is true: discretion permeates the world of trials, the philosophy underlying managerial judging has


expanded into the trial phase, and trial-phase managerial decisions are just as resistant to appellate review as pre-trial ones.

The procedure rules that govern the actual trial do almost nothing to guide or constrain judicial discretion. There are rules about juries and evidence and jury instructions, but in substance and in application most are almost wholly discretionary. Boiled down to the mandatory elements, they require that if a jury is requested in a timely manner, there will be a jury of six to twelve people, and their decision must be unanimous. There will be some kind of evidence, mostly in open court. If there is a jury, the judge will give it some kind of charge, requesting some kind of verdict. The parties must be treated in a way that is not blatantly facially unequal. But that’s about it.

There is so much discretion in the federal rules that beyond these extremely basic limits, a judge can take a wide range of actions without being reversed. From the immediate pretrial

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3 FED. R. CIV. P. 16(c)(2), 16(e); CIVIL LITIGATION MANAGEMENT MANUAL section VI (Judicial Conference of the United States 2001); Richard L. Marcus, Completing Equity’s Conquest, 50 U. PITT. L. REV. 725, 744 (1989) (“The second and more interesting aspect of case management is the impact it has had on the conduct of the trial itself.”)

4 U.S. CONST. amend. VII; FED. R. CIV. P. 38 (timing of jury demand); FED. R. CIV. P. 48 (number and unanimity requirements).

5 Marcus, supra note x at 736 (concluding that “under the Federal Rules it seems to have been assumed that the mode of trial . . . would include opening statements, live testimony of witnesses, and closing arguments.”) For a discussion of the discretion inherent in the Federal Rules of Evidence, see Thomas M. Mengler, The Theory of Discretion in the Federal Rules of Evidence, 74 IOWA L. REV. 413 (1989); Jon R. Waltz, Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence, 79 NW. U.L. REV. 1097 (1985).

6 FED. R. CIV. P. 43 (taking testimony).

7 FED. R. CIV. P. 49 (jury instruction formats).

8 Alston v. West, 340 F.2d 856, 858 (7th Cir. 1965) (noting that judge must treat both sides substantially alike and not give one side preference or advantage over the other).
period through the charge to the jury, the court can enter orders that schedule the trial;\(^9\) shape and order the proceedings;\(^{10}\) construct a trial plan;\(^{11}\) influence the selection of the jury;\(^{12}\) contract or expand the scope of admissible evidence and control its format;\(^{13}\) and in various ways limit the time for trial.\(^{14}\) The judge also enjoys enormous leeway over the end of the process, including the length and timing of closing argument, the format of the charge to the jury, and the power to grant a mistrial or new trial.\(^{15}\) With very few exceptions, these decisions are governed by rules with little inherent content, and those rules can be deployed in the service of judicial management.

The benefit of such extensive discretion is the power to perfectly tailor the structure of the trial to the needs of a particular case. Ideally, both before and during trial, managerial judges will use their intelligence in light of their experience and rule justly and well.\(^{16}\) But managerial judging is not an absolute good and its downside can be significant. The managerial side of

\(^9\) Fed. R. Civ. P. 40 (“Each court must provide by rule for scheduling trials.”). The discretion continues in the grant or denial of continuances. 8 Moore’s Federal Practice: Civil §40.02[5] (“A district court’s ruling on a motion for continuance will rarely be disturbed.”). See also Martel v. County of Los Angeles, 56 F.3d 993, 995 (9th Cir. 1995) (holding that even if district court abused its discretion, error is not reversible absent “clearest showing” of actual and substantial prejudice).

\(^{10}\) See, e.g., Fed. R. Civ. P. 16; 42; 50; 52.

\(^{11}\) Fed. R. Civ. P. 16.

\(^{12}\) See text accompanying notes x infra.

\(^{13}\) Mengler, supra note 5 at 414-15; see, e.g., Saverson v. Levitt, 162 F.R.D. 407 (D.D.C. 1995); see also Marcus, Conquest, supra note x at 744-45.

\(^{14}\) Fed. R. Civ. P. 16(c)(2).


\(^{16}\) See 3 Moore’s Federal Practice §16.03. Moore’s chapter on case management under Rule 16 was written by influential U.S. Magistrate Judge (and former American Bar Foundation researcher) Wayne Brazil.
these rules requires a balance of perceived importance and probable cost. A judge with a conscious or unconscious bias can string together a set of procedural rulings that make it much more difficult to prove or defend certain cases or types of cases. That judge can also cause dramatic shifts in settlement leverage through managerial orders. Even a judge aiming only at efficiency can “manage” in a way that leads to a result that is less reliable in its finding of facts or its application of law to fact. Any significant effects on trials can have important consequences, since the few cases that actually go to trial form a body of outcomes that shape everything from settlement values to the development of precedent.

This article explores the ways in which the managerial focus of judges, born in the pretrial stage, has expanded into the actual trial of cases. Part I introduces the theory of the managerial judge and its application to the pretrial phase of litigation. It identifies the motivations behind judicial management as well as the management movement’s underlying assumptions about the comparative roles of judges and lawyers. This section also outlines the scholarly critique of judicial management.

Part II examines the role that discretion plays at the trial phase of litigation. It contends that any nostalgic vision of the trial as the place where judges play a constrained and passive role bears little resemblance to the work of the modern federal trial judge. Instead, the same forces

17 Marcus, *Conquest* at 755-74.


19 Rule 16 was amended in 1993 to authorize and facilitate the migration of management into the trial itself. As the Advisory Committee noted, “The primary purposes of the changes in subdivision (c) are to call attention to the opportunities for structuring of trial under Rules 42, 50, and 52 and to eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed either to facilitate settlement or to provide for an efficient and economical trial. The prefatory language of this subdivision is revised to clarify the court’s power to enter appropriate orders at a conference notwithstanding the objection of a party.” *Fed. R. Civ. P.* 16 advisory committee’s notes (1993 amendments).
that cause judges to seek efficiency and settlement before trial also cause them to “manage” the actual trial in search of time savings and settled outcomes. This should not be surprising – the judge who exercises detailed hands-on management of a case before trial is unlikely to revert to a wallflower if the case goes to trial – yet the mechanisms and effect of this trial management have not previously been explored.

Part III considers whether the scholarly critique of pretrial management also applies to management in the trial phase. While the trial process is more transparent and more immediately appealable than pretrial decisions, I argue that trial management is just as ad hoc, just as affected by individual judges’ experience and biases, and just as able to grant strategic advantages and disadvantages as its pretrial counterpart. In addition, trial-stage management can interfere with another process value not implicated in pretrial management: the limited, truncated trial created by the managerial orders disrupts the process value of litigation to the parties, the importance of which is well documented in the empirical literature. Further, recent empirical research indicating that subtle biases find their way into judicial decision-making, coupled with the politicization of the judicial selection process, make the existence of discretion unguided by standards more worrying.

Nor does appeal add meaningful regulation that could guide trial judges in their use of managerial techniques. The abuse of discretion standard of review, coupled with the harmless error rule, protect trial stage management from reversal. The rules themselves do not provide a framework for evaluating the trial judges’ managerial orders, and the standard of review is so extremely deferential as to render the rules almost vacuous in all but the most egregious cases.

Part IV compares pretrial and trial management in terms of their susceptibility to reform. Although in some ways trial management could be guided with less disruption than pre-trial management, the article concludes that the adoption of such measures is politically unlikely. In the end, for both pre-trial and trial managerial activities, the judiciary’s own internal standards will remain the most powerful arbiter of management decisions.

The article concludes by looking at the big picture – what impact do managerial orders have on distributive and procedural justice? It argues that management’s myopic focus on speed, inherent lack of standards, inconsistent application, and marked ability to skew the merits threaten important procedural values. While efficiency is important, it is only one piece of the due process calculus. As Rule 1 reminds us, the system should be administered to secure the “just” administration of disputes. Consistency, transparency, party participation, and unbiased decision makers are key elements of a just system, and all can be undermined by extensive judicial management. Uncritical enthusiasm for managerial judging needs to be replaced with a more measured and thoughtful approach, so that the competing needs of the court system can come back into balance.

I. THE THEORY OF MANAGERIAL JUDGING

The phrase “managerial judges” was coined by Judith Resnik in her classic 1982 article, and her terminology has become a standard part of civil procedure vocabulary. She uses it to describe the judge’s hands-on supervision of cases from the outset, using various procedural

\(^{21}\) Fed. R. Civ. P. 1 (“These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”)

\(^{22}\) Resnik, Managerial judges, supra note 1.
tools to speed the process of dispute resolution and encourage settlement. Resnik described the evolution of managerial judging like this:

As work load pressures grew, reformers in the 1960’s and 1970’s shifted their attention from procedural to administrative problems. Social scientists and popular writers, investigating trial courts for the first time, described growing backlogs of pending cases and “lazy” judges devoting little time to their work. Commentators, alarmed by delays and the absence of judicial accountability, proclaimed a “crisis in the courts.” Many saw systems management as the solution. Federal judges met to design procedures for case allocation and to analyze methods of expediting case disposition. Congress created the Federal Judicial Center, which began to train newly appointed trial judges in techniques of docket management. . . . [S]ome district courts promulgated local rules that obliged litigants to submit pretrial plans, to conform to judicial timetables for trial preparation, and to seek permission to engage in extensive discovery.  

The business of managerial judging is accomplished not by applying the law but by using the judge’s own beliefs about the techniques best suited to lead a case to a quick and efficient end. While it began as a way to handle the “protracted case,” pretrial management expanded to become the norm for ordinary cases.  

Since the 1980’s, amendments to Rule 16 of the Federal Rules of Civil Procedure have not only blessed judicial management but also made it a requirement in almost every case. The Advisory Committee Notes to the 1983 amendments proclaim that “[e]mpirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the

23 Id. at 399 (footnotes omitted).

24 Handbook for Protracted Cases, 25 F.R.D. 351, 359 (1960) (“Let it be emphasized this is not the ordinary litigation; our subject is rare in number, the truly complicated, a few hundred amid the tens of thousands of cases on federal court calendars.”); Judith Resnik, Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging, 49 ALA. L. REV. 133, 167 (1997).
parties are left to their own devices.”25 The 1993 amendments made explicit the court’s power to use “various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation.”26 Settlement is preferred to adjudication both because it is faster and because of the belief that a consensual outcome is preferable to a litigated one.27

With efficiency as the system’s predominant value, other assumptions follow. First, as Resnik notes, the quantity of judicial activity – which is measured – becomes more important than the quality of that activity, a much more slippery concept.28 Second, perhaps to reassure us about quality, pro-management writers question whether more process even leads to better outcomes. Or, in a less drastic version, they argue that neither the litigants nor society can afford to provide full procedural treatment of every dispute.29 Third, underlying all of this is the


28 Resnik, Managerial Judges, supra note 1 at 421-22.

29 See Jon O. Newman, Rethinking Fairness: Perspectives on the Litigation Process, 94 Yale L.J. 1643, 1644 (1985). See also Elliott, supra note 1 at 321 (“Nourishing the fiction that justice is a pearl beyond price has its own price.”) Resnik summarizes the critics’ attitude: “If outcomes after trial or other forms of adjudication cannot, systematically and in the aggregate, be demonstrated (or at least felt) to be better than outcomes produced with little or no process, if attorney misbehavior and incompetence are widespread, if the adversarial model is applied in settings which render it farcical, why insist upon formal procedure?” Resnik, Failing Faith, supra note 25 at 529. See also John Lande, Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions, 3 Harv. Negotiation L. Rev. 1 (1998).
assumption that the lawyers cannot be trusted to efficiently manage their own cases. A combination of self-interest (hourly billing), risk aversion (limited discovery might miss key evidence), strategic actions (promoting better settlement by increasing the opponent’s cost), and actual benefit from delay (for the party who profits from the status quo or loss of evidence) is said to lead lawyers to over-work and delay cases in their own and their clients’ interests. Only the judge, if one buys this argument, is in a position to make decisions in the interest of the lawyers’ clients, as well as taxpayers and the other users of the court system. Managerial judges thus act to limit (through imposition of costs or actual numerical limits) the lawyer’s options from the full menu of possibilities provided by the Federal Rules of Civil Procedure; they put litigation on a diet.

Academics questioned pretrial managerial judging both empirically and normatively. The normative critique is the focus of this article. Resnik and others argued that managerial

30 Rhetorically, the focus on criticizing lawyers rather than clients is a shrewd move. Greedy, ineffective, or expensive lawyers are culturally an easy target. See Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform 38 (1995); Marc S. Galanter, Lowering the Bar: Lawyer Jokes and Legal Culture 2005. However, it is ultimately the client’s autonomy that is threatened when the judge, rather than the lawyer/client’s agent takes control.

31 Elliott, supra note 1 at 309 (“Managerial judges believe that the system does not work; that something must be done to make it work; and that the only plausible solution to the problem is ad hoc procedural activism by Judges.”) (emphasis in original). Id. at 330-31.

32 See, e.g., the RAND evaluation of the impact of the Civil Justice Reform Act-required management techniques. James S. Kakalik et al., An Evaluation of Judicial Case Management Under the Civil Justice Reform Act (Rand Institute for Civil Justice 1996) (finding that early case management was associated with shorter time to disposition and significantly increased attorney work hours and that setting an early trial date was the only management tool that had a statistically significant effect on time to disposition, cost of litigation, lawyer satisfaction, or perception of fairness).
judging not only is not based on rules but also is not even guided by standards;\(^ {33} \) that it is ad hoc and thus varies from case to case;\(^ {34} \) that it is often done out of the public view and results in sealed private settlements, making it doubly nontransparent;\(^ {35} \) that it involves judges more directly in interactions with the parties and reveals party strategy in ways that threaten judicial impartiality; and that a combination of a deferential standard of review, the harmless error rule, and the final judgment rule make it effectively unreviewable. Worse, managerial decisions have the ability to affect the outcome of litigation, yet vary depending on the identity and attitudes of the individual judge.\(^ {36} \)

One experiment demonstrated dramatically the very different choices that judges might make in the same case – disturbing but not surprising in a context where decisions are ad hoc and the standard is “be efficient.” At a conference at Yale Law School in 1985, participating judges were presented with a hypothetical case in which thousands of named plaintiffs, all of whom resided within two miles of a hazardous waste disposal site, sued 162 corporate defendants after an EPA study revealed the presence of high concentrations of pollutants, including several “probable human carcinogens.” Judges’ reactions to this case ranged from a judge who recommended establishing a $60 million settlement fund (designed to “curb litigation energy”

\(^ {33} \) Resnik, *Failing Faith*, supra note x at 548 (“I am deeply skeptical of the capacity of individual judges to craft rules on a case-by-case basis.”)

\(^ {34} \) Elliott, *supra* note 1 at 316-17.


\(^ {36} \) Elliott, *supra* note 1 at 314-15.
upfront) to a judge who, because she believed the case lacked merit, recommended forcing each individual plaintiff to file a separate complaint, pleading his or her claim with particularity, or to face dismissal. This judge noted that she would “use procedural tools at her disposal to stall the litigation in order to promote settlements.” As Yale professor E. Donald Elliott, the organizer of the conference, noted:

at least when judges make legal decisions, the parties have an opportunity to marshal arguments based on an established body of principles, judges are required to state reasons to justify their decisions, and appellate review is available. None of these safeguards is available when judges make managerial decisions. It seems beyond serious debate, then, that discretionary managerial decisions may influence the outcome of litigation in ways that are arbitrary because judges act without the procedural safeguards that accompany decisions on the merits.

The Federal Courts Study Committee agreed: “Each judge is free to consult his or her own conception of the importance and merit of a case and the proper speed with which it should be disposed.” Each judge is also free to craft whatever combination of managerial techniques appeal to the judge. “The huge range of practices under Rule 16 among sitting federal judges is one of the more unnerving facts of litigation life that confronts the contemporary lawyer.” The judges are fully aware of the extent of their discretion. For example, the federal court system’s Civil Litigation Management Manual finds authority for management, among other places, in Rule 61’s harmless error rule. Management advocates, then, are very aware that they are

38 Elliott, supra note 1 at 317.
39 1 Federal Courts Study Comm., Working Papers and Subcommittee Reports 55 (1990) (also noting that judges do not need to supply a “reasoned justification”).
41 CLMM, supra note x at 1.
operating in ways that the rules may not sanction but that are effectively protected from control by appellate courts.

II. MANAGERIAL JUDGING AT TRIAL

A. Introducing the Model

In *Managerial Judges*, Resnik constructed two hypothetical cases to illustrate the implementation of pre-trial and post-trial management. This section of the article will take her pretrial example, update it, and consider how the judge’s management might continue into the trial phase of the case. Then the next section will discuss the rules and case law that provide the judge with authority to manage the case in the ways described.

On July 1, 2008, Sarah Paulson bought a “Nano,” a small fuel-efficient car manufactured by Prem Kumar Motors, an Indian company. She bought it from Kumar’s dealership in the state of Essex. When driving it at the speed limit on an interstate highway on January 23, 2009, she was rear-ended by another vehicle. The gas tank exploded immediately, and Paulson was badly burned. Her lawyer, Danny Boyle, filed *Paulson v. Kumar Motors* in the United States District Court for the District of Essex. Paulson alleged that Kumar was guilty of negligence and gross negligence in the design of the Nano, that the Nano was defectively designed, and that Kumar failed to warn purchasers about the car’s dangerous gas tank design. Paulson sought actual damages of $750,000 and punitive damages of $1.5 million. Kumar answered, denying liability and also alleging that any defects in the car were not the cause of Paulson’s damages.

After holding an initial pretrial conference, entering a scheduling order, referring the case to mediation, and trying repeatedly but unsuccessfully to convince the parties to settle, Judge Kinser summoned the parties for a final pretrial conference. At the conference Judge Kinser sustained most of Kumar’s objections to discovery, finding that the need for the information was
outweighed by the expense of production and the commercial sensitivity of the information.

After he disposed of the pending motions, Judge Kinser once again held separate conferences
with each side in an effort to convince them to settle the case.

When settlement efforts did not succeed, Judge Kinser announced that he had decided to
consolidate Paulson’s case with five other similar cases against Kumar pending in his court (all
of the plaintiffs are Essex citizens) and, further, that he intended to bifurcate the proceedings. In
phase I, the parties will present evidence on the issues of causation; phase II will try fault
(including contributory fault). If the jury findings in the first two phases do not preclude
recovery, all eligible plaintiffs will go on to a third phase in which their individual damages will
be determined. Finally, in phase four, if the jury found gross negligence in phase two, the jury
will hear further evidence and find an appropriate amount for punitive damages, if any. Because
Judge Kinser expects each phase to move quickly, the same jury will hear all phases of the case,
thus removing any Seventh Amendment problems. At the end of each phase, the jury will be
asked to make findings using a special verdict, in which each component of each issue is decided
separately. Although no jury demand was filed in a timely way under Rule 38’s guidelines,
Judge Kinser has decided to allow the late-filed request and will submit all appropriate issues to
the jury.

Judge Kinser scheduled phase I to begin in three weeks. He also ordered counsel for all
parties to confer and to submit no later than a week before trial an agreed pretrial memorandum
and proposed order. The submission must include: 1) a list of uncontested facts; 2) a list of
contested facts; 3) a list of all witnesses (with a summary of anticipated testimony and
anticipated time required for direct and cross-examination); 4) a list of all testimony to be
presented by deposition, together with the actual text or video to be submitted; 5) a copy of all
exhibits to be offered by each party (pre-marked for trial); 6) any objections (other than relevance) to any other party’s exhibits, failing which the objections will be waived; 7) all motions in limine and accompanying briefs; 8) briefing on any unusual anticipated trial issues; 9) estimated time required for each phase of the trial; and 10) proposed jury instructions for each phase, preferably agreed but otherwise one from each litigant, annotated with supporting authorities.

When Judge Kinser received the parties’ requested pretrial order, he convened a telephone conference. Judge Kinser considered the parties’ estimate for the trial of phase I, and informed them that based on his knowledge of the case, he believes that it can be completed in half of the requested time. He himself will do the voir dire questioning of the jury (the parties may request subjects for questioning), and each side will receive three peremptory strikes (with plaintiffs to exercise theirs jointly). He will also present an opening summary of the issues in the case in lieu of party opening statements (which he directed the parties to jointly prepare for him). Judge Kinser informed the parties that he will not allow any questions about the impact of publicity about a “litigation crisis” or “runaway juries” on the jury panel’s attitudes about lawsuits. All direct testimony will be presented in a narrative in writing and read to the jury, with only cross and re-direct examination done live. Any deposition testimony to be presented will be by summary rather than by question and answer. Each side will be limited to one expert witness on any topic. Sidebar conferences will be allowed only when absolutely essential, and offers of proof, if needed, will be made by narrative statement after the close of all the evidence. Closing argument will be limited to ten minutes per side. At the end of each day’s testimony, each party will produce a lawyer and a client with settlement authority to participate in
settlement discussions led by Judge Kinser.\textsuperscript{42} The judge went on to impose limits on the number of witnesses, number of exhibits, and total trial time for each phase (a shot clock will measure each party’s use of time, and time for evidentiary objections will be counted against the loser), although he assured the parties that he may allow more time if developments shows it to be essential.

OR—maybe it went this way: Judge Kinser granted the plaintiffs’ discovery requests, ordered compliance in one week, and set the trial for a month from the date of the pretrial conference. Looking ahead to the trial, Judge Kinser ordered that phase I would consider the amount of each plaintiff’s actual damages, Kumar’s liability for punitive damages, and the multiplier to be used to calculate punitive damages. Phase II will try defendant’s fault liability for negligence and product liability, phase III plaintiff’s contributory fault, and phase IV will try causation. Each phase (unless its results negate plaintiffs’ ability to recover) will be followed by short but intense settlement talks. Otherwise, however, Judge Kinser did not impose advance limits on the nature or quality of evidence or the time for trial, and indicated that each phase would utilize the broadest form of jury charge feasible for the issues being tried.

OR—maybe it happened like this: Judge Kinser, who is not a fan of managerial judging, neither consolidated nor bifurcated the trial. He set a firm trial date for Paulson’s case two weeks from the conference, assuring the parties that no continuance will be granted. Other than that, he left trial planning and settlement discussions to the parties and their lawyers.

What gives Judge Kinser the right to enter (or not) this wide array of orders? The answer is the federal rules’ inherent flexibility, the specific management provisions of Rule 16, and a

\footnote{The Civil Litigation Management Manual encourages judges to suggest settlement discussions during trial. “Raising the issue at that time may help the parties gracefully cut their losses.” CLMM, \textit{supra} note x at 59.}
good deal of encouragement from the federal judicial establishment. The trial of a federal civil lawsuit is shot full of discretion. This discretion pre-dates the serious advent of managerial judging, and it puts the real power over procedural decisions firmly in the hands of the trial courts. When judges became more worried about efficiently disposing of their dockets, those who were so inclined adapted the existing power to allow the kind of intense involvement in trials that they had come to expect in pretrial matters.

B. The Many Layers of Discretion

1. Shaping the Trial

A judge’s decisions about how to structure the trial of a case come into focus in the period immediately preceding trial. Some of these decisions must take substantive law into account, at least indirectly. Others are more purely administrative in nature. Perhaps more troubling, the decisions are made in a context in which neither the rules nor the case law provides much in the way of governing standards against which the judge’s exercise of discretion can be measured.

Some of the most managerial forms of discretion to be used in shaping the trial are enabled by Rule 16.\(^{43}\) For example, the rule authorizes the judge to set a trial date; rule in advance on the admissibility of evidence; avoid “unnecessary” proof and “cumulative” evidence; limit the use of expert testimony; order a separate trial of particular claims or issues; order the

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\(^{43}\) These options for shaping the trial dovetail nicely with Rule 26(a)(3), which requires pretrial disclosure of witness and exhibits (except for rebuttal evidence) and pretrial objections to the exhibits on all bases other than relevance.
presentation at the beginning of trial of evidence on a potentially dispositive issue; establish a “reasonable” limit on the amount of time to present evidence; and formulate a trial plan.\textsuperscript{44}

In deciding whether to separate or join issues for trial, the court can combine its Rule 16 management powers with the discretion given by other procedure rules to sever claims, order separate trials, and consolidate claims.\textsuperscript{45} The court may also schedule a unitary trial, but make decisions that govern the order in which information will be presented to the jury.

Rule 16 does not limit its recommendations to huge, complex litigation – judges are intended to consider these options in every case. The list of tools contained in Rule 16 is augmented by a manual published by the Federal Judicial Center and designed for all civil trials: the Civil Litigation Management Manual. The Manual lists numerous techniques that judges can consider in exercising their Rule 16 management responsibilities, and chapter IV focuses specifically on managing the trial.

These final pretrial orders have managerial goals in two senses: they aim to encourage settlement and, if the case does not settle, they aim to limit issues and shorten the trial itself. The

\textsuperscript{44} Fed. R. Civ. P. 16(c) & (e). A trial plan may be quite specific, including the precise order of proceeding, time limits for each witness, pre-prepared summaries, pre-admitted exhibits, jury instructions, and more. 16 Moore’s Federal Practice § 16.77 (“A detailed trial plan might specify the following matters: The juncture at which the opening statements will be made (a defendant may elect to give some or all of its opening statement after the plaintiff has presented its case in chief) and how much time will be allotted for the opening statements; The order in which each witness will testify (except those called solely for impeachment or rebuttal) or each excerpt from a deposition transcript will be read, and the time allotted for each direct and cross-examination; the sequence in which the documentary and other exhibits will be introduced, and which witnesses will sponsor which exhibits; When any demonstrations will be performed or site visits made; the junctures, if any, at which interim summarizations or arguments may be presented by counsel; The order in which closing arguments will be presented and the time allotted for each.” (bullets omitted)).

\textsuperscript{45} Fed. R. Civ. P. 16; 42; 50; 52. For further discussion of the ways in which the consolidation and bifurcation rules can be used to dramatically shape trials, see text accompanying notes xx infra.
burden of complying with standard pretrial disclosure requirements substantially frontloads the cost of trial preparation, and may itself encourage settlement. “Counsel, to relieve themselves of the burden of furnishing this information, settle many of the cases.” In addition, final pretrial orders can put limits on number of witnesses, number of exhibits, number of experts, use of live testimony, and total trial time for each party.

2. Jury Issues

Absent settlement, the day for trial will arrive. If a party has made a timely request for a jury under Rule 39, a jury must be provided to decide all issues for which the Seventh Amendment requires a jury. However, if a party files a belated jury request, Rule 39(b) grants the judge discretion to grant or deny that request. Case law varies dramatically as to how the judge should exercise that discretion, with an earlier presumption that favored allowing a jury losing ground to a more recent anti-jury attitude:

In what appears to be an ever-increasing number of federal courts, . . . it has been held that the district court has no discretion to grant a jury trial when there was no timely demand unless there are special circumstances excusing the oversight or default or, as articulated by some courts, unless there are highly exceptional circumstances, or there is a showing of prejudice. . . . Occasionally a court will articulate what is probably in the minds of many district judges as they deny Rule 39(b) motions – that the court’s docket is overcrowded and it typically takes longer to try a case to a jury.

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47 See text accompanying notes xx, infra.

48 Swofford v. B&W, Inc., 336 F.2d 406, 409 (5th Cir. 1964) (jury should be granted absent “strong and compelling reasons to the contrary”).

In the middle are courts that use a multi-factor balancing test, and the factors include a consideration of any delay that might be caused by the granting of a jury trial.\textsuperscript{50}

If there will be a jury, the judge has discretion to use anywhere from six to twelve jurors.\textsuperscript{51} Some districts specifically provide a number of jurors in their local rules (although that number varies), while others provide a range, and others (like Rule 48 itself) leave the choice entirely to the discretion of the trial judge.\textsuperscript{52} Despite the existence of considerable evidence that the size of a jury makes a difference in the quality and nature of jury deliberations,\textsuperscript{53} it appears that no judge has ever been reversed for the number of jurors chosen so long as the number is between six and twelve and is consistent with the local rules.\textsuperscript{54} A 1995 proposal to remove the discretion and restore the number of jurors to twelve was defeated based on the opposition of the trial judges, who wanted to retain the discretion to choose a lower number and didn’t want that discretion curtailed.\textsuperscript{55}

\textsuperscript{50} See, e.g., Parrott v. Wilson, 707 F.2d 1262, 1267 (11th Cir. 1983) (consider “whether granting the motion would result in a disruption of the court’s schedule or that of the adverse party”).

\textsuperscript{51} Fed. R. Civ. P. 48; Colgrove v. Battin, 413 U.S. 149 (1973) (rejecting all challenges to local rule providing for jury of six).

\textsuperscript{52} 9B Wright & Miller, supra note x, § 2491 (citing rules).


\textsuperscript{54} In fact, judges have been affirmed despite deviating from the number prescribed. See Judith Resnik, Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging, 49 Ala. L. Rev. 133, 143 n.27 (1997).

\textsuperscript{55} See Bruce D. Brown, Judges Kill Plan to Require 12 on Jury, Legal Times 12 (Sept. 30, 1996); Henry J. Reske, The Verdict of Most States and the Judicial Conference is . . . Smaller Juries are More Efficient, 82 A.B.A. J. 24 (Dec. 1996) (both cited in Resnik, Changing, supra note x at 146 n.33).
The trial judge also has tremendous discretion in shaping the selection process. For voir
dire, the judge has discretion as to the form and content of questions and as to who will actually
conduct the questioning. “Ordinarily, . . . the appellate court will decline to find error
regardless of what questions the trial court allowed to be asked of the prospective jurors.” In
ruling on challenges for cause, the court’s discretion is also expansive as case law provides few
limits. The court of appeals has not provided guidance, adopting a standard of review that is
“deferential . . . but not completely supine.”

Treatment of peremptory challenges provides additional leeway. Although the Jury
Selection and Service Act provides three peremptories per side, when there are multiple parties
the trial judge has great discretion to change numbers and allocation in an effort to achieve a fair

56 “District courts have broad discretion to determine the scope of voir dire.” Smith v. Tenet
Healthsystem SL, Inc., 436 F.3d 879, 885 (8th Cir. 2006). The CLMM lists streamlining voir
dire procedures as a management technique. CLMM, supra note x at 86 (citing Manual for
Complex Litigation § 22.41).

57 9B Wright & Miller, supra note x § 2482. As with the number of jurors, district judges
successfully opposed a rule amendment that would have given attorneys the right to participate
in voir dire questioning. Resnik, Changing, supra note x at 149 n.42. Judges generally believe
that court-conducted voir dire saves time. Id. As long ago as 1975, one judge estimated that he
could seat a jury in no more than twenty minutes. Solomon, supra note x at 492.

58 Wright & Miller, supra note x § 2482.

Yount, 467 U.S. 1025, 1038 (1984) (habeas corpus case) (holding that the trial court’s
determination of impartiality is a question of credibility and demeanor and entitled to “special
deference”). In some circuits, even a decision that the trial court abused its discretion will not
lead to reversal if the complaining party was able to use a peremptory challenge to eliminate the
undesirable juror, on the theory that the error was harmless. Getter v. Wal-Mart Stores, Inc., 66
F.3d 1119, 1122 (10th Cir. 1995). But see Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir.
1995) (improper denial is reversible without the need to show harm).
There is also almost no limit on the method that the court chooses to have the parties exercise their peremptory strikes.

3. Presenting Evidence

Surely a huge majority of civil cases begin the evidence phase by allowing counsel to make opening statements, with the plaintiff going first. Nevertheless, it appears that federal judges have the discretion to eliminate opening statements, can limit their length, and also have discretion regarding their order and timing. There is similarly wide discretion as to the order of proceedings and, as noted above, judges are now encouraged to identify severable claims or issues that might eliminate the need to try the rest of the case, or that might promote settlement, and hear those issues first.

The Federal Rules of Evidence themselves allow wide discretion in a number of ways. Some questions, such as the materiality inquiry in a relevance issue, are largely guided by substantive law; the elements of the claims and defenses will determine what information is logically relevant in the sense that it has “some tendency to make the existence of some fact that


61 See U.S. v. Salovitz, 701 F.2d 17 (2d Cir. 1983) (holding that even in criminal cases, “both the granting and timing of opening statements are matters within the discretion of the trial judge”); United States v. 5 Cases, More or Less, Containing “Figlia Mia Brand,” 179 F.2d 519, 522 (2d Cir. 1950); Clark Advertising Agency, Inc. v. Tice, 490 F.2d 834, 836-37 (5th Cir.1974). See also Chambers Practices of Magistrate Margolis, available at http://www.ctd.uscourts.gov/practiceof_jgm.html (“Magistrate Judge Margolis generally does not allow opening statements . . . . She would read a neutral statement about the case, prepared jointly by counsel.”)

is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”\(^{63}\) However, that is not the only determinant of admissibility. Relevant evidence may be excluded if, among other things, the judge thinks that the probative value of the evidence will be substantially outweighed by considerations of “undue delay, waste of time, or needless presentation of cumulative evidence.”\(^ {64}\) Similarly, Rule 611(a) empowers judges to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . avoid needless consumption of time.”\(^ {65}\) Managerial decisions, then, are again a component of the way in which the judge is urged to exercise discretion.

In a larger sense, most of the evidence rules provide a bit of guidance but leave the trial judge free to make an ad hoc decision that balances probative value and potential prejudice. Many evidence rulings at trial provide so much discretion that the trial judge has the last word.\(^ {66}\) The same approach has been applied to managerial decisions made in advance.

Nor does the judge have to allow the parties to fully develop all testimony orally. The judge may order that each witness’s direct testimony be given in writing, with only cross- and re-direct examination being done live. Some judges recommend this requirement only for witnesses whose “direct testimony will involve considerable expository matter but no significant

\(^{63}\) Fed. R. Evid. 401.

\(^{64}\) Fed. R. Evid. 403.

\(^{65}\) F.R. Evid. 611(a). See also F.R. Evid. 102 (“These rules shall be construed to secure [the] elimination of unjustifiable expense and delay . . . ”).

\(^{66}\) Mengler, supra note x at 413. See also Waltz, supra note x at 1120. On appeal, the need to show that an error in admitting or excluding evidence had a substantial impact on the outcome also insulates evidence rulings from reversal. “By its operation, the harmless error rule consequently takes some of the ruleness out of the Federal Rules.” Mengler, supra note x at 457.
issues of credibility,” while others recommend it more widely. The Central District of California specifically provides in its local rules that “any matter tried to the Court, the judge may order that the direct testimony of a witness be presented by written narrative statement subject to the witness’ cross-examination at the trial.” It is more common in bench trials, but can be used in jury trials as well. The Ninth Circuit has characterized such orders as “a laudable effort to save trial time” and has upheld criminal contempt sanctions against a lawyer who refused to prepare narrative witness statements in advance of trial.

The judge’s discretion also extends to the number and form of exhibits. The Civil Litigation Management Manual admonishes judges that “[l]imiting the number of exhibits and shaping those ultimately presented at trial is an important part of structuring an effective trial.” This can include limiting the number of exhibits, forcing the lawyers to redact exhibits, and

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67 W. Schwarzer, Managing Antitrust and Other Complex Litigation 142-43, 435 (1982); CLMM, Sample Form 49, Appendix A.

68 Charles Richey, A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be submitted in Written Form Prior to Trial, 72 Geo. L.J. 73 (1983) (arguing that judges have inherent power to order written testimony).


70 Richey, supra note x at 74.

71 Chapman v. Pacific Tel. & Tel. Co., 613 F.2d 193 (9th Cir. 1979). See also Malone v. United States Postal Serv., 833 F.2d 128, 133 (9th Cir. 1987); Miller v. Los Angeles Bd. of Educ., 799 F.2d 486, 488 (9th Cir. 1986). But see Obrey v. England, 215 Fed. Appx. 621, 623 (9th Cir. Haw. 2006) (finding an abuse of discretion when judge refused to allow live presentation of three witness’s testimony in addition to other scheduling orders). Judges do, however, have to allow for oral supplementation of the written statement and for live cross-examination and re-direct examination of the witnesses. Id.

72 CLMM, supra note x at 82.
compelling the lawyers to justify – before trial – each exhibit’s “independent utility with regard to specific issues or proofs.”

While written testimony is an indirect way to try to bring focus and speed to the trial, other trial management tools go at the task directly by creating explicit time limits. Judges are granted the authority to impose time limits by Procedure Rule 16, which itself augments the provisions in Evidence Rules 403 and 611 encouraging the judge to avoid unnecessary evidence. Both the Civil Litigation Management Manual and Manual for Complex Litigation recommend setting limits on trial time: 1) by limiting the number of witnesses or exhibits to be offered on a particular issue or in the aggregate; 2) by controlling the length of examination and cross-examination of particular witnesses; and 3) by limiting the total time allowed to each side for all direct and cross-examination.

Setting fixed pretrial limits on the quantity of evidence is a fundamentally different kind of decision from the rulings judges make at trial when a litigant objects to the admission of a particular piece of evidence. Both are discretionary, but the timing and rationales vary. In the trial situation, the judge is applying Rule 403 to evidence as it is offered in context, balancing marginal probative value against marginal cost. The ruling is fact-dependent, must be made quickly, and is made at a time when the impact of the evidence is comparatively clear. A pre-

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73 Id. at 83. The Manual also suggests using summaries. Id. at 86.

74 These techniques may or may not succeed in shortening trial time. Marcus points out that reading a large amount of written material may actually take longer than listening to testimony. Marcus, Completing, supra note x at 774.

75 Indeed, judges are encouraged to require lawyers to estimate the number of days required for trial as early as the first pretrial conference. See CLMM at 21.

76 Manual for Complex Litigation § 11.64 (4th ed. year); CLMM, supra note x at 85-86 (but suggesting full consultation with counsel).
trial management order, on the other hand, sets overall time limits and then requires the attorneys
to prioritize their evidence in order to fit within the prescribed limits.\textsuperscript{77} The judge’s decision is
thus not based on the way in which a specific piece of offered evidence connects to the elements
of a claim or defense, or whether the time saving “substantially outweighs” the probative value
of that evidence; it is instead based on the judge’s decision that some time period is sufficient for
the overall trial of the case. On appeal, it is measured only by whether that overall limit imposed
was so miserly or so inflexible that it abused the trial court’s discretion.

Nor does the discretion accorded the management decisions fit neatly within the reasons
that trial judges are normally given significant discretion in evidentiary rulings. The Federal
Rules of Evidence grant great discretion to trial judges in order: 1) to allow the admission of
reliable evidence that would (under the common law) have been inadmissible for some technical
reason but which is thought to be reliable and probative; and 2) to allow contextual snap-
judgments that defy a simple set of inflexible rules, in a context in which the judge cannot be
expected to be perfect.\textsuperscript{78} When trials are managed for speed, though, the discretion is used to
exclude rather than include, and reliability is not even an issue. In addition, the ruling is not a

\textsuperscript{77} Patrick E. Longan, \textit{The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials}, 35

\textsuperscript{78} The policy favoring the admission of all relevant evidence pervades the Federal Rules. Rule
402 states the policy explicitly. \textit{Fed. R. Evid.} 402. While Rule 403 calls for weighing, it implies
that weighing should result in exclusion only if the prejudice substantially outweighs the item’s
probative value. \textit{Fed. R. Evid.} 403. \textit{See also Fed. R. Evid.} 801(a), advisory committee’s note
(in determining whether nonverbal conduct is assertive, “ambiguous and doubtful cases will be
resolved . . . in favor of admissibility”). Members of the Advisory Committee also represented
to Congress that the Rules favor admissibility. \textit{See, e.g., Proposed Rules of Evidence: Hearings
Before the Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the
Judiciary, 93d Cong., 1st Sess. 87 (1973) (testimony of Albert Jenner, Jr., Chairman of the
Advisory Committee); Federal Rules of Evidence: Hearings Before the Senate Comm. on the
Judiciary, 93d Cong., 2d Sess. 46 (1974) (testimony of Edward W. Cleary, Reporter to the
Advisory Committee); \textit{id.} at 206 (testimony of Chairman Jenner).
snap judgment made on the fly but one made at leisure before trial, when there is time for deliberate thought and research.

Additional discretion comes into play in actually measuring each party’s use of its time once a limit is imposed, and methods vary. Some courts use a stop watch (more dignified than a basketball-like shot clock mounted on the wall) to intricately allocate the time taken for direct testimony (if live presentation is allowed), cross-examination, objections, arguments on objections, and rulings. Others prefer an “hourglass” method that assess all time against the party calling a witness.\(^79\) Instead of creating an overall limit, some judges instead limit the time for specific components of the trial, “the time that counsel may use for direct or cross-examination of specified expert or percipient witnesses, to present specified tangible evidence, to conduct demonstrations, or to make opening statements or closing arguments.”\(^80\) And while the time limits must be flexible, the decision whether to grant additional time is again in the hands of the trial judge, on a case-by-case basis.\(^81\) There are no explicit limits on that discretion in the trial or evidence rules, nor has case law articulated a standard that does much to guide managerial discretion: “When the manner of the presentation of information to a jury is judicially restricted to the extent that the information becomes incomprehensible then the essence of the trial itself has been destroyed.”\(^82\) Since any limit that stays on the “comprehensible” side

\(^79\) Id. at 714-15.

\(^80\) *Moore’s Federal Practice* § 16.77. The CLMM also recommends that the judge consider limiting the number of expert witnesses. CLMM, *supra* note x at 82.

\(^81\) MCI Comm. Corp. v. AT&T, 708 F.2d 1081, 1171 (7th Cir. 1983); Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987); U.S. v. Reaves, 636 F. Supp. 1575, 1581 (E.D. Ky. 1986).

\(^82\) Sims v. ANR Freight System, Inc., 77 F.3d 846, 849 (5th Cir. 1996) (emphasis added). That test has been met at least once, when a combination of limits was in place. Judge McBryde, who was at that time out of favor with the Fifth Circuit, limited a jury trial to only one day for trial,
of short is permissible, case law neither contains discussions that helpfully enunciate standards nor gives enough examples of proper and improper management to fill in the blanks.

Bench trials permit even greater management. The Civil Litigation Management Manual recommends that the parties be required to submit, in advance, narrative statements of the direct testimony of all witnesses under a party’s control, and that the judge limit testimony and exhibits, require advance submission of briefs, and control the order of witnesses (e.g. hearing opposing experts back-to-back). 83 One judge suggested to his colleagues an even more aggressive method for limiting testimony:

I hold pretrial conferences in my chambers. I first ask plaintiff’s counsel to name his witnesses and, unless he has already filed written summaries of the witnesses’ testimony, to tell me what he expects each witness will testify to. In Oregon, most lawyers use a full range of discovery, and they usually depose every adverse witness. After plaintiff’s counsel tells me what a witness will testify to, I ask defendant’s counsel if the statement of the witness’ testimony is accurate. He may say, “yes”, or he may say, “I can’t admit the truth of the witness’ statement, but I have no evidence to contradict him. I will admit that if the witness were called, he would so testify.” In either event, if it is a court case, we usually eliminate that witness. Then we take up the testimony of the other witnesses. 84

And all this is done not at trial, but as a part of the final pre-trial conference.

4. Getting a Decision

When the reception of evidence has been completed, the judge also has a great deal of discretion regarding how the case will be decided. It appears that the lawyers must be afforded

imposed strict time limits for each segment of trial, refused to permit evidence as to uncontested background facts, refused to read stipulated facts to the jury, ordered presentation of witnesses in specific order, and repeatedly limited direct and cross examination. The appellate court found that the cumulative restrictions were an abuse of discretion, but affirmed anyway based on a conclusion that the plaintiff’s claim was so weak that she would have lost even without the limits. Id. Regarding Judge McBryde more generally, see McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conf. of the United States, 264 F.3d 52, 54-55 (D.C. Cir. 2001).

83 CLMM, supra note x at 89-90.

84 Solomon, supra note x at 489.
at least some time for closing argument, but that time may be limited. This principle was well
established in the early days of judicial management. For example, one 1965 case upheld a thirty
minute closing argument in a trial that was tried over parts of five days (eight calendar days
including a long weekend), saying “a trial judge in the federal judicial system has wide discretion
in such matters as length of counsel’s argument as long as he treats both sides substantially alike,
and does not give one side a preference or advantage over the other.”85 Although lamenting the
frequent interruptions in the trial (noting that it was “not good trial practice”), the appellate court
found no abuse of discretion because “we realize that the trial judges in the Northern District of
Illinois are extremely busy.”86

As between the parties, it is customary for the party with the burden of proof (usually the
plaintiff) to open and close closing argument, but the court also has discretion here. In fact,
some authorities indicate that not only is the decision discretionary, it is not reviewable at all.87

In cases involving multiple parties, especially if there is some adversity between co-parties, the

85 Alston v. West, 340 F.2d 856, 858 (7th Cir. 1965). See also Grey v. First Nat'l Bank, 393 F.2d
371, 386 (5th Cir. Tex. 1968) (holding that time for closing argument would be reversed only for
“egregious abuse of discretion”). The same is true in state courts. See generally 75A Am. Jur. 2d,
Trial § 456 (2009) (“The time allowed counsel for argument is within the sound discretion of
the trial court, the exercise of which will not be interfered with by an appellate tribunal in the
absence of a clear showing of abuse of discretion. . . Generally, where each side is given a single
opportunity of equal length to address the jury, no abuse of discretion is present.”); 71 A.L.R. 4th
130, Propriety of Trial Court Order Limiting Time for Opening or Closing Argument in Civil

86 Id. Even in criminal cases, review of time limits is very deferential. See, e.g., U.S. v. Sotelo,
97 F.3d 782, 794 (5th Cir. 1996) (limiting closing argument to ten minutes for each defendant in
a case covering a six-year period and involving multiple conspiracies, 40 witnesses, 133 exhibits,
a 12-count indictment, and 22 pages of jury instructions was not abuse of discretion).

87 Moreau v. Oppenheim, 663 F.2d 1300, 1311 (5th Cir. 1981), citing Day v. Woodworth, 54
court’s discretion is quite broad.\textsuperscript{88} The order of closing argument may be prescribed in the final pretrial order.\textsuperscript{89}

The court also has discretion about the timing of closing argument with relation to the court’s charge to the jury. Rule 51 provides that the court “may instruct the jury at any time before the jury is discharged.”\textsuperscript{90} The rule was amended in 1987 specifically for the purpose of giving the court discretion to instruct the jury either before or after argument, and again in 2003 to explicitly give permission for interim instructions when issues are being separately tried.\textsuperscript{91}

The substantive law does guide the content of the court’s instruction to the jury, making management decisions a non-issue here. However, even substantively the instructions need not be perfect. “No harmful error is committed if the charge viewed as a whole correctly instructs the jury on the law, even though a portion is technically imperfect. A district judge has wide discretion to select his own words and to charge in his own style.”\textsuperscript{92}

The actual format of jury instructions has long been recognized as completely within the trial court’s discretion. Rule 49 merely grants permission to use special verdicts or general verdicts with interrogatories, and does not even mention the most common verdict format – the general verdict.\textsuperscript{93} It neither requires any particular format nor provides any guidance as to the internal format of whatever option is chosen. If the judge chooses a general verdict with special


\textsuperscript{89}Moore’s Federal Practice § 16.77

\textsuperscript{90}Fed. R. Civ. P. 51(b)(3).


\textsuperscript{92}Sandidge v. Salen Offshore Drilling Co., 764 F.2d 252, 262 (5th Cir. 1985).

\textsuperscript{93}Fed. R. Civ. P. 49.
interrogatories, the judge does not need to include all the issues in the case, but instead has discretion to highlight those he chooses. In fact, the judge can make a format decision “for any reason or no reason whatever” without being reversed.

Jury charge formats, however, could also be employed by a judge seeking to save time. For example, even in a case tried in a unitary way, a judge could identify a single issue or cluster of issues with the potential to dispose of the case, place questions framing those issues at the beginning of the charge, and instruct the jury that certain answers to those questions mean that no further action is required. The judge can also create a potentially shorter deliberation period by conditioning the need to answer the damages issue on a positive finding of liability.

Similarly, Rule 51’s explicit permission to give the jury interim instructions reinforces and enables the court’s decision to use separate trials and bifurcation as management tools.

III. ASSESSING TRIAL-STAGE MANAGEMENT

As Judge Patrick Higginbotham, one-time Chair of the Advisory Committee on the Federal Rules of Civil Procedure, emphasized, “We need trials, and a steady stream of them, to ground our normative standards - to make them sufficiently clear that persons can abide by them in planning their affairs - and never face the courthouse - the ultimate settlement. Trials reduce

94 WRIGHT & MILLER § 2512.

95 Skidmore v. Baltimore & Ohio R. Co., 167 F.2d 54, 66-67 (2d Cir. 1948) (Frank, J.). One broad survey of all the issues arising out of charge format concluded that “on almost every issue that has arisen, the appellate courts have told their colleagues of the trial bench only that the decision rests in their sole discretion. . . The monotonous regularity [of this recitation has] the flavor of a litany pronounced in lieu of a consideration of the issues involved in an appeal.” Robert Dudnik, Comment, Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure, 74 YALE L. REV. 483, 518-19 (1965).

96 See CLMM, supra note x at 84 (proposing seriatim verdicts, general verdicts with interrogatories, and or special verdicts as ways to manage the jury more efficiently).
disputes, and it is a profound mistake to view a trial as a failure of the system. A well conducted trial is its crowning achievement.\(^97\) Yet an over-managed trial may prevent that trial from serving its normative and educational function.

Actual trials of civil cases are increasingly rare. In 1962 there were 5,802 civil trials in the federal district courts, making up 11.5% of all terminations.\(^98\) In 2004, when there were five times as many cases filed, there were only 3,951 trials, making up a mere 1.7% of terminations. Over this forty-two year period the total number of civil cases terminated rose 400 percent while the number of trials fell 32 percent.\(^99\)

This might make the issue of managerial trials seem insignificant – it affects only a handful of cases. However, such a conclusion understates the impact of trial management in at least two ways. First, orders entered in the immediate pretrial period that structure the trial are designed, in part, to create settlement pressure, and the tactic often works. In that sense, the “management” of trials exacerbates the “vanishing trial” phenomenon. Second, the small number of trials makes the quality and transparency of those that remain extremely important. Cases that settle do so “in the shadow of the law,” and so the outcomes of cases that are tried

\(^97\) Patrick Higginbotham, *So Why Do We Call Them Trial Courts?* 55 SMU L. REV. 1405, 1423 (2002).

\(^98\) Figures on the number of trials are from Table C4 of the annual reports of the Administrative Office of the U.S. Courts. The Administrative Office counts as a trial “a contested proceeding before a jury or court at which evidence is introduced.” Because of the way the AO keeps its records, cases are counted as “trials,” even if they settle during trial, and so this count is actually a bit high. For a full discussion of the methodology for counting trials, see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459, 460-61, 475-76 (2004).

influence the results of a larger number of cases that are not. If judicial management is increasing settlements and skewing outcomes, it is affecting both the strength of the signal and the message it sends.

Critics of judicial management in the pretrial context have charged that while managerial judging may (or may not) result in a saving of judicial time, it raises substantial concerns: 1) it involves judges so intimately in the parties’ information and strategies that it may compromise the judges’ impartiality; 2) it leads to a loss of transparency as more decisions are made off the record or in chambers; 3) management decisions are not guided by meaningful judicial standards, resulting in inconsistent ad hoc rulings; 4) management decisions can redistribute strategic advantages and disadvantages and even affect case outcomes; and 5) there is often no effective appeal of a trial court’s management decision. This section will consider whether these same critiques apply to managerial trials. It will also examine whether trial-stage management introduces additional process concerns by decreasing party autonomy and participation in the trial itself.

A. Judges in the Trenches

The traditional adversary system judge is passive. Rather than injecting himself into the proceeding, he waits for the lawyers to bring a dispute to him. While it’s questionable that this

100 Samuel R. Gross & Kent D. Syverud, Don’t Try: Civil Jury Verdicts in a System Geared to Settlement, 44 UCLA L. REV. 1, 4 (1996) (but noting that since the cases that are tried are not typical, this reliance may be misplaced). See also Marc Galanter & Mia Cahill, “Most Cases Settle”: Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339, 1349 (1994) (“In a forum where most cases settle, legal signals may lose clarity.”)
purely reactive role was ever the norm, the managerial judge clearly is – and is intended to be – far more involved. And what distinguishes the judge as manager from the judge as arbiter of disputes is the nature and purpose of that involvement. In the interest of moving a case along more expeditiously, the managerial judge imposes early deadlines, enters orders limiting use of discovery devices and time for pretrial developments, and uses the many tools at his disposal to try to push the parties toward settlement. This greater involvement imparts more detailed information about the case. The Federal Courts Study Committee found that most judges agreed that the settlement role, in particular, “effectively requires the judge to obtain a detailed knowledge of the parties’ contentions, the facts in dispute, and the legal theories involved.”

For example, the Civil Litigation Management Manual suggests, as a settlement tool, that the judge require the parties to submit confidential memos outlining “the pivotal issues, the critical evidence, and their settlement positions.”

In the pretrial context, this greater involvement comes with the risk of judicial bias about the case, the parties, or the lawyers. As Resnik pointed out, “The extensive information that judges receive during pretrial conferences has not been filtered by the rules of evidence. Some of this information is received ex parte, a process that deprives the opposing party of the opportunity to contest the validity of information received. Moreover, judges are in close contact with attorneys during the course of management. Such inter-actions may become occasions for

101 Peckham, Judicial Response, supra note x at 253 (“Judges have long engaged in some form of case and calendar management as well as court administration, mediation, regulation of the bar, and other professional activities.”).

102 Resnik, Managerial Judges, supra note 1 at 384-85, 399-400. See also Elliott, supra note 1 at 309.


104 CLMM, supra note x at 61.
the development of intense feelings – admiration, friendship, or antipathy. Therefore, management becomes a fertile field for the growth of personal bias.” 105 This is not the type of bias, however, that generally leads to disqualification or recusal under judicial ethics codes. Unless a judge finds that her involvement in pretrial management means that her “impartiality might reasonably be questioned,” the judge’s awareness of the parties’ contentions or even their evidence is not thought to constitute prohibited bias or “personal knowledge of disputed evidentiary facts.” 106

But does the “over-involvement” critique apply to managerial trials as well? Of course it does. Pretrial and trial are actually parts of a continuum, and a detailed trial plan is the place where pretrial bleeds into trial. Perhaps the judge will already have learned a lot while managing pretrial, and that knowledge is not magically forgotten when the trial begins. In addition, trial management requires a continuation of the kinds of involvement that marked the pretrial period. In fact, trial management compounds the systemic drawbacks of pretrial management like bias and arbitrary decisions. In order to choose time limits that are fair and efficient, a judge must fully immerse herself in the issues and evidence in the case. 107 Further, a desire to take over jury

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105 Resnik, Managerial Judges, supra note 1 at 427. Resnik also suggests that the judge may acquire interests of his own that conflict with those of the litigants. “Further, judges with supervisory obligations may gain stakes in the cases by they manage. Their prestige may ride on ‘efficient’ management, as calculated by the speed and number of dispositions. Competition and peer pressure may tempt judges to rush litigants because of reasons unrelated to the merits of disputes.” Id.

106 Code of Conduct for United States Judges, Canon 3C(1).

107 Longan, supra note x at 711. Longan suggests that judges will have acquired expertise in setting trial time limits from their experience setting time limits for discovery and assigning cases to various time “tracks” in managing pretrial proceedings. The Advisory Committee Notes to Rule 16 suggest that the court should impose time limits “only after receiving appropriate submissions from the parties outlining the nature of testimony to be presented through various
selection and opening statements requires extensive knowledge of the parties’ evidence and litigation strategies. For these reasons, the final pretrial conference and its associated disclosure requirements will continue the judge’s intimate involvement with the parties and lawyers. For example, a judicial order to file narrative summaries of the testimony of all witnesses will reveal information not normally disclosed until each witness testifies at trial. Judicial pressure to agree, at the conference in chambers, that the opposing side’s witness is telling the truth and to expand the scope of undisputed facts also expands the judge’s knowledge and involvement.

Nor are there structural limits in place to protect against the judge carrying any bias that may have resulted from the earlier contacts into the trial of the case. The ethical rules for federal judges actually encourage them to engage in settlement activities, including ex parte communications. 108 And while there is considerable sentiment that a judge who has participated closely in encouraging settlement should not preside over a bench trial on the merits, fewer judges doubt that they may continue to act in a trial to a jury. 109

Once the trial has begun, the judge’s information about the case (other than continuing involvement in settlement negotiations) seems more likely to come from evidence offered at trial, in a manner consistent with the traditional role of the judge. Even though the judge will

108 Code of Conduct for United States Judges, Canon 3A(4)(d) and Commentary (authorizing ex parte contact with consent of parties and endorsing judges’ participation in settlement efforts so long as no party is coerced into surrendering the right to have the dispute resolved by the courts) (July 1, 2009).

109 CLMM, supra note x at 58; WAYNE D. BRAZIL, SETTLING CIVIL SUITS: LITIGATORS’ VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES 102 (ABA 1995). But see Hon. John C. Cratsley, Judicial Ethics and Judicial Settlement Practices, 21 OHIO ST. J. ON DISP. RESOL. 569, 589 (2006). To the extent that district judges react to the criticism of their involvement in pretrial management by referring those duties to magistrate judges, the total pool of persons making unreviewable discretionary decisions has expanded.
continue to make managerial decisions – about issues such as number of jurors, jury selection methods, deviation from time limits, rulings on evidence, and the format and content of the jury charge – few are accompanied by additional disclosures of otherwise-private information.

In summary, trial management that comes in the immediate pretrial period is subject to the same critique as pretrial management when it comes to the judge’s exposure to the intimate details of trial planning and to continued efforts to encourage settlement. Once the trial begins, on the other hand, additional danger on this account is limited, albeit the judge’s reactions at trial will be affected by all that came before.

B. Loss of Transparency

Critics of pretrial management often note that the judge’s involvement in the case is more likely to be in chambers, off the record, and less visible than traditional case processing.110 This is more often the case with settlement-oriented management, from conferences with the judge to court- annexed ADR techniques. Pretrial conferences themselves are also off the public radar, although orders documenting any decisions made at those conferences will generally be filed in the public record and the Civil Litigation Management Manual recommends that the judge have a transcript made of the final pretrial conference.111 Settlement conferences, though, will be as non-transparent as those held before trial and settlement agreements are often un-filed, or sealed, in the interests of promoting the parties’ willingness to settle.

It is important to note that there are three facets to the lack of transparency. One is literal unavailability – conversations about the case that are neither made in open court nor filed in the

110 Resnik, Managerial Judges, supra note 1 at 378.

111 CLMM, supra note x at 78. If never transcribed and filed, however, the public will have little access to the information.
court’s records. Another is non-transparency of reasons – a lack of explanation for the basis of a court’s decision. Since many managerial orders are case-specific and not based on concrete standards, those orders often provide no reasoned explanation for the decisions (why 8 jurors; why 30 minutes of opening statement; why 5 days of trial; why written evidence; why a special verdict). In that latter sense, trial-based case management orders can be as non-transparent as pretrial ones. Third, there is a lack of big-picture transparency for the purpose of evaluating the systemic effects of managerial decisions. Trial court orders setting out management limits, even if they were more informative, are not apt to be published; settled cases will not be appealed; and there are few appellate decisions evaluating specific examples of implemented management techniques, and certainly nothing broad-based enough or representative enough to serve as a basis for policy decisions.

The trial itself will, in the overwhelming majority of cases, be open to the public. However, despite Rule 43’s requirement that the testimony of witnesses “be taken in open court,” courts have interpreted evidence Rule 611’s directive to “exercise reasonable control over the mode and order of interrogating witnesses and taking evidence” to authorize a requirement that all direct testimony be presented in writing. This management technique will result in a


113 FED. R. CIV. P. 43(a). While the U.S. Supreme Court has not decided whether the public and the press have a constitutional right to attend civil trials, lower courts have so held. See Grove Fresh Dists., Inc. v. Everfresh Juice Co., 24 F.3d 893 (7th Cir. 1994); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 56 Cal. Rptr. 2d 645 (Cal. Ct. App. 1996) (reversing trial court order barring press from civil trial proceedings).

114 In re Gergely, 110 F.3d 1448, 1451 (9th Cir. 1997); In re Adair, 965 F.2d 777, 778 (9th Cir. 1992) (bankruptcy case); Kuntz v. Sea Eagle Diving Adventures Corp., 199 F.R.D. 665, 667 (D. Haw. 2001). To avoid the Rule 43 problem, courts will ask the parties to waive the “open court”
loss of orality, and a courtroom spectator might easily hear only the live cross examination rather than a witness’s entire testimony. As Marcus has argued, “there should be concern about whether the in-court activities that remain can be understood. If the proceedings are dispositive but cryptic, they could undermine the values protected by the public’s right of access. How does the public evaluate, or even follow, a ‘trial’ in which most of the evidence has been delivered in writing in advance?” While the written statements will be admitted into evidence, and thus be part of the record, they are not as accessible to the public as live oral testimony.

Lack of transparency in terms of lack of explanation remains a problem for trial-stage management. Lack of transparency in terms of inaccessible information also occurs during the trial phase, particularly when final pretrial conferences are not transcribed, when written testimony is used, and when in-chambers settlement efforts by the judge continue into the trial phase. Information not offered into evidence in order to comply with time limits is also lost to public view. Greater public access to an actual trial makes the privacy critique less applicable, however, to trial management that occurs in open court during the trial itself, and the fact of the trial will make the content of the evidence offered a part of the public record.

C. Inconsistent, Ad Hoc Decision Making

Trial court judges have a great deal of discretion in making most of their procedural decisions. In some ways, neither the existence of discretion nor the concern for efficiency is

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115 A sample pretrial order appended to the CLMM, for example, requires that the witness be called to authenticate the statement, that the statement be marked and introduced as an exhibit, after which any live cross-examination or re-direct examination will take place. CLMM, supra note x, Form 49, Appendix A.

116 Marcus, Completing, supra note x at 779.
unique to decisions that would be labeled specifically “managerial.” For example, the Federal Rules of Civil Procedure require the judge to consider efficiency (sometimes under the rubric of “prejudice”) when making decisions about issues such as joinder of claims and parties, pleading amendments, intervention, scope of discovery, use of discovery devices, extra time to respond to a motion for summary judgment, and late-demanded juries. In fact, the very first rule posits the efficiency issue, as judges are instructed to interpret the rules to achieve the “just, speedy, and inexpensive” determination of cases. The Federal Rules of Evidence make the avoidance of prejudice, including prejudice from delay, a pervasive consideration.

Yet commentators agree that there is something qualitatively different about the kinds of decisions that are managerial in nature and the kind of discretion exercised in more traditional rulings. Even other discretionary procedural decisions differ from those designed solely to manage the litigation. Why? The decisions are different because managerial ones are guided not by substantive law but by the judge’s “feel” for what the case deserves, because they focus on the court’s benefit more than the parties’ comparative needs, and because they ask the court to look beyond the particular lawsuit to consider the needs of other users of the court system. Beyond a generalized desire to be more efficient or speedier, these decisions are not limited by the kind of articulated standards that can actually guide the exercise of discretion.

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117 See Yeazell, supra note x at 673-74 (“Because decisions on pretrial motions are likely to evade appellate review, such decisions also have large doses of the uncontrolled discretion that marks “management.” Seen from a more distant historical perspective, virtually all of modern litigation is more “managerial” than was litigation in earlier periods.”)

118 See Fed. R. Civ. P. 13, 14, 15, 18, 20, 24, 26, 38, 56.


120 See Fed. R. Evid. 403, 611.
With regard to pretrial management decisions, Resnik observed in her original article that:

no explicit norms or standards guide judges in their decisions about what to demand of litigants. What does “good,” “skilled,” or “judicious” management entail? Judge Kinser [the judge in her hypothetical pretrial case] hoped to speed pretrial preparation, because he thought quick preparation was better than slow preparation. Yet he had no guidelines, other than his own intuition, to inform him what was too slow or too fast. Judge Kinser wanted the parties to settle, because he believed that whatever outcomes settlement produced would be better – and less expensive – than those litigation could achieve. But how was he to determine, for the litigants and for the system as a whole, what was “better” or less “expensive”?¹²¹

Elliot noted that management is also not defined by the use of a limited number of devices.

“What makes the managerial judging movement coherent is not so much the existence of specific techniques on which all managerial judges agree. Rather, managerial judges are distinguished by common themes in their rhetoric.”¹²²

As Yablon argued in his discussion of judicial discretion, one can analyze discretionary decisions according to the way the judge explains those decisions. In some situations, which Yablon describes as the invocation of “discretion as skill,” judges justify decisions based not on the application of a correct rule but on the judge’s skill and experience.¹²³ The judge has a large, but not exhaustive, set of options and will justify her decision by claiming that she is exercising “skillful, practical judgment” to choose the most appropriate result for the case. “The justification of discretion in such cases, the deference to trial court decisions, rests on a claim that the trial judge has special knowledge that enables her to achieve an answer better than any

¹²¹ Resnik, Managerial Judges, supra note 1 at 426.
¹²² Elliott, supra note 1 at 309.
that could be obtained by simply following rules laid down by a higher court or legislature.”

While judges entering managerial pretrial orders seldom articulate the basis for their decisions, when they do so they will justify their decisions by a highly fact-based demonstration that they have made their decision in a skillful way. In the case of decisions based on managerial principles, the decisions will discuss the procedural details of the case and invoke the need to reduce length and expense of litigation.

Nor does appellate review provide guidance that the trial judges themselves do not invoke. Most managerial orders never reach the court of appeals, since they are not immediately appealable and most cases settle. Even when they do, appellate courts are extremely deferential to this type of decision, based as it is on a claim of superior trial court competence. Unless the trial court takes some action that exceeds the court’s power, the appellate court will merely recite that the standard of review is “abuse of discretion” and that the court has acted appropriately within the scope of available options. There is no “rule” to apply to compare the judge’s decision with accurate application of the law. For all these reasons, no body of appellate

124 Id. See also Maureen Armour, Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11, 24 Hofstra L. Rev. 677, 751 (1996) (“This unwillingness to justify by any means other than to point to the facts, their discretion and their experience may in fact be one of the more interesting defining characteristics of the courts’ practice.”)

125 “Trial court opinions . . . seek to demonstrate that the decision was made skillfully, carefully, and with attention to all the facts. . . . Thus, the trial court judge justifies her decision not by showing that it is correct, but by demonstrating her superior institutional competence to the appellate court.” Yablon, supra note x at 267-68.

126 There is, for example, a split over whether district judges had the power to order parties to participate in summary jury trials, with one line of cases finding such orders beyond the power granted by the rules. Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988). The authorization became more explicit in the 1993 amendments to Rule 16. See Fed. R. Civ. P. 16(c)(2)(I). Nevertheless, at least some circuits continue to find mandatory summary jury trials to exceed the power of the court. In re NLO, 5 F.3d 154 (6th Cir. 1993).
Does the critique of managerial judging as essentially ad hoc also apply to trial management decisions? The Seventh Amendment and Rule 38 preserve the right to trial by jury (when a timely request is made). The substantive law, because the elements of claims and defenses outline the borders of relevance and required findings, constrains some decisions about the shape of the lawsuit and the admissibility of evidence. But most managerial decisions that attempt to settle the case and that govern the order, length, and nature of trial proceedings are as standard-free as those made for pretrial. An imperative for brevity and focus prevails, but with little guidance about how precisely to get there, and how to balance those desires against the parties’ desire to fully tell their stories and present their cases.

Decisions that slice and dice the trial – consolidation, separate trial, and bifurcation – require a mixture of law and management. Rule 42, which governs both consolidation and separate trial, turns in part on whether claims will overlap and whether issues are separate.

Rule 42. Consolidation; Separate Trials

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:
   (1) join for hearing or trial any or all matters at issue in the actions;
   (2) consolidate the actions; or
   (3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.

The question of whether actions share a “common question of law or fact” and so may be consolidated turns on whether there is sufficient evidence overlap or other logical tie that creates

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127 See Resnik, Managerial Judges, supra note 1 at 378; Peterson, supra note 1 at 77 (discussing the lack of effective appeal).
a convenient trial package. The question whether separate claims and issues may be tried separately turns on whether they are “separate.” Both of these determinations depend on what evidence the substantive law makes relevant.\textsuperscript{128} Thus in our hypothetical case, Judge Kinser must have concluded that the five cases involving the Nano pending against the defendant car manufacturer would, based on the applicable substantive law, involve enough overlapping evidence that consolidation would be proper. Similarly, in bifurcating the trial of the Nano cases, Judge Kinser must have found that the issues could be separated without substantial overlap. For this part of the consolidation/bifurcation analysis, if the judge writes an order justifying his decision, the judge’s reasoning will be based on articulable standards and substantive law.

Yet both decisions also turn on efficiency, and thus directly invite case management. Consolidation is designed to avoid “unnecessary cost or delay,” but the existence of common questions does not require a joint trial. The court must balance the potential savings of time and effort against inconvenience, delay or expense that might result from consolidation.\textsuperscript{129} When considering whether to bifurcate, Rule 42 expressly directs the judge to consider how to “expedite and economize.” When it comes to the management part of the decision, Rule 42 “giv[es] the court virtually unlimited freedom to try the issues in whatever way trial convenience

\textsuperscript{128} See, e.g. Henderson v. Raybestos-Manhattan, Inc., 776 F.2d 1492 (11th Cir. 1985) (consolidating four asbestosis claims); Kershaw v. Sterling Drug Inc., 415 F.2d 1009 (5th Cir. 1969) (consolidating two claims against drug manufacturer); Hamre v. Mizda, 2005 WL 1083978 (S.D.N.Y. 2005) (bifurcation of liability and damages in medical negligence case); Corrigan v. Methodist Hospital, 160 F.R.D. 55 (E.D. Pa. 1995) (bifurcation denied because of substantial evidence overlap). When the bifurcated elements will be tried by separate juries, Seventh Amendment concerns can prevent bifurcation if a finding might be “re-examined” because of overlap. See Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978).

\textsuperscript{129} Rohm & Haas Co. v Mobil Oil Corp., 525 F Supp 1298 (D. Del. 1981).
The highly contextual nature of these decisions makes it difficult to generalize, and the courts of appeals are extremely deferential to the trial court’s predictions of time saving. Guidance on this part of the balancing calculus remains sparse, and decisions are thus far more likely to be based on excessive overlap of the elements in trial components or strategic prejudice (such as preventing the jury from seeing severely injured plaintiffs) rather than on the estimates of time savings.

This critique of the arbitrary nature of managerial decisions holds even more true for more direct trial-stage time management, because these decisions lack the substantive law element the provides at least some constraints on consolidation and bifurcation. There is the same general feeling that shorter is better, but that the desire for efficiency should not completely deprive the parties of a fair trial. Nor is there an established body of legal principles on which the parties can rely when making arguments about litigation timing. There will be no body of case law from which one can conclude that ten minutes is too little but thirty is enough; that two witnesses are too little but five are enough; that that a little settlement pressure is fine but that too much is too much.

Trial judges tend to enter orders that set a time limit but that do not explain the choice of the particular number of days, hours, minutes, witnesses, or exhibits. A fellow judge trying to provide consistency, and thus trying to deduce the basis for other judges’ limits, would have to

\footnotesize{\noindent \textsuperscript{130} 9A WRIGHT \& MILLER \S 2387. As Marcus has noted, different judges may react to proposed consolidation differently: “a given level of joinder might be efficient for Judge A, but not for Judge B.” Richard Marcus, Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power, 82 Tul. L. Rev. 2245, 2254 (2008). \textsuperscript{131} In re Bendectin Litigation, 857 F.2d 290 (6th Cir. 1988). \textsuperscript{132} Id. at 317; Peterson, supra note 1 at 76 (“The vast majority of all managerial decisions are unwritten and unreported. Thus, there is neither case law nor written rules to guide a judge or to provide parties with arguments to control a judge’s discretion.”).}
seek out the pleadings and pretrial orders in a number of cases to begin to see patterns, and even then the connections between that information and the chosen practices will be inferential. The orders also rely on information orally conveyed to each judge, which will not appear in the record. Ultimately, the rulings are based on what that judge, in her own experience, thinks is the time needed for a streamlined trial. The tie between proposed evidence and time limits is even murkier, because the managerial judge is not merely balancing the competing needs of the parties to the case before him; she is balancing the needs of this case against the public’s interest in giving the court system time to handle other cases.\textsuperscript{133}

Systematic guidance is also rare because the managerial trial decisions are rarely appealed, and thus no body of appellate law has developed from which one could infer a range of appropriate actions. The occasional appellate decision that does discuss a managerial order, such as a time limit, tends only to note that the particular decision was within the judge’s discretion. The rare cases finding an abuse of discretion often address a collection of techniques, making it difficult to assess the propriety of any single decision.\textsuperscript{134} Most merely find that the use of a particular device was not an abuse of discretion.\textsuperscript{135}

That leaves judicial training and conferences and presentations in which judges recommend management techniques to other judges as potential sources of standards,

\textsuperscript{133} Jon O. Newman, \textit{Rethinking Fairness: Perspectives on the Litigation Process}, 94 \textit{Yale L.J.} 1643, 1644 (1985) (“A broadened concept of fairness – one that includes fairness not only toward litigants in an individual case but also to all who use or wish to use the litigation system and to all who are affected by it – can lead to changes that directly confront the challenges of delay and expense.”)

\textsuperscript{134} Sims v. ANR Freight System, Inc., 77 F.3d 846, 849 (5th Cir. 1996).

\textsuperscript{135} \textit{See, e.g.}, MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1171 (7th Cir. 1983) (time limits); Alston v. West, 340 F.2d 856, 858 (7th Cir. 1965) (time for closing argument); In re Gergely, 110 F.3d 1448, 1452 (9th Cir. 1997) (bankruptcy court required written testimony).
consistency, or guidance. The Civil Litigation Management Manual, designed to help guide judges, tends not to provide guidelines regarding when to use particular devices or what limits to impose. Instead, the book’s format introduces a stage of trial, discusses the general benefits of management, and then suggests actions that the judge should “consider” without providing guidance as to the relevant considerations. With regard to time limits, for example, the manual states, “Counsel should be forced to estimate, and you can subsequently hone and accede to, time necessary for each major trial event from opening statements through closing arguments.” The manual goes on to list specific elements of trial that can be limited, but other than being clear that limits are a Good Thing, shares no instruction on how to know how far to go in choosing methods or numbers.\textsuperscript{136} The manual goes on to discuss trial management techniques generally. Which ones to use? “Not all [of the listed management techniques] will be appropriate for any given trial, but all are worthy of your consideration in the process of arriving at a suitable trial management plan.”\textsuperscript{137}

The result is a hodge-podge of potentially inconsistent rulings that vary from judge to judge and case to case. Some judges, who are not managerially inclined, will do only the minimum amount of managing required by Rules 16 and 26. Others, who are enthusiastic proponents of case management, will do their best to incite settlement, control many aspects of the case and impose strict limits on the lawyers. Most, somewhere in the middle, will do their best to use their own experiences and intuitions and will use some management techniques and impose some limits on the course of litigation and trial.

\textsuperscript{136} CLMM, supra note x at 84-85. Cf. Solomon, supra note x at 486 (urging other judges to try all of the techniques he describes).

\textsuperscript{137} Id. at 86. The bulleted list that follows includes limits on voir dire, daily conferences, limits on the volume of exhibits, limits on use of depositions, encouraging stipulations, and minimizing disruptive sidebar conferences.
Whether one views management as on the whole a good idea or a bad one, inconsistency in management has consequences. If managerial trials involved no more than slightly increased paperwork and enforced focus, the variations would be annoying but not very important. However, at least in some cases decisions labeled as managerial can affect the parties’ strategic advantages and influence the outcome of the case. The next section discusses this possibility.

D. Management and the Merits

Commentators who have examined pretrial management techniques have noted a variety of ways in which decisions made in the interest of efficiency may shape the outcome of the case. Most notably, if restrictions on discovery scope, devices, and time period preclude the party with the burden of proof from pursuing various avenues of information, the court has indirectly limited the issues in the case, or created a situation in which the information-poor litigant may fail to discover evidence that would support a claim or defense.\(^{138}\)

Judge Robert Peckham, an early and enthusiastic supporter of case management, conceded that managerial orders could take issues out of the case. “Admittedly, in limiting the scope of discovery, setting schedules, and narrowing issues, the [managerial judge] restricts somewhat the attorneys’ freedom to pursue their actions in an unfettered fashion and eliminates entirely some theories or lines of inquiry.”\(^{139}\) While the judge has not ruled on the merits, as when he grants a 12(b)(6) motion or motion for summary judgment, the judge has forced the

\(^{138}\) Elliott, supra note 1 at 314-15.

\(^{139}\) Robert F. Peckham, A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution, 37 Rutgers L. Rev. 253, 262 (1985).
litigant to prioritize within the budgeted time. As Elliott points out, the effect of these early managerial orders can be to re-introduce two problems that plagued common law and code pleading, “premature definition of issues, and outcomes based on preliminary procedural skirmishing rather than the legal merit of claims.” Peterson’s assessment, which adds the judge’s pressures to settle, is even more critical:

Cases are made and broken by judges at the pretrial stage. A district judge can substantially determine the outcome of a case, including the amount and terms of the settlement, by defining the scope of a claim or permissible defenses, controlling and regulating discovery, and then encouraging and directing settlement negotiations. Without guidelines or appellate review to regulate the pretrial process, similar cases will have decidedly different outcomes.

Do trial-stage management techniques also have the potential to shape outcomes? Absolutely. While this will not always be true, several of the trial-stage management techniques can affect the comparative fortunes of the parties. In addition to management techniques imposing pressure to actually drop claims or defenses, some can affect outcome by changing the flow of the case. Empirical studies have shown that the bifurcation of cases can influence outcomes – the breaking apart in and of itself affects juror thought processes, and the order of decisions is also important. The use of written testimony and summaries can dampen its immediacy in ways that may disadvantage the party with the burden of proof. Time limits require the same kind of triage as limits on discovery, only this time by means that are closer in time and impact to the outcome of the case. And jury instruction formats can have the same kind of effects as bifurcation.

140 Elliott, supra note 1 at 315.
141 Id. at 321.
142 Peterson, supra note 1 at 81.
Putting things together and taking them apart can provide strategic advantages and disadvantages. Litigants clearly believe this. For example, it is generally defendants who request bifurcation of liability and damages, and researchers report that the defense wins almost twice as often when the issues are separated.\(^{143}\) Explanations for those results differ, with many believing that bifurcation prevents the jury from ruling for the plaintiff based solely on sympathy, and others contending that the difference results from bifurcation’s disruption of the inherent interrelationship of issues and normal human information processing.\(^{144}\)

The results in routine personal injury cases also appear to hold true in more complex litigation. One influential article reported that experiments with sixty six juries showed that plaintiffs did better significantly more often in unitary trials.\(^{145}\) Consolidation, at least when it involves very large numbers of parties and associated management techniques (including


\(^{144}\) Thornburg, *Power, supra* note x at 1859-60; Marcus, *Completing, supra* note x at 768 (jury comprehension); Tom Alan Cunningham & Paula K. Hutchinson, *Bifurcated Trials: Creative Uses of the Moriel Decision*, 46 BAYLOR L. REV. 807, 812 (1994) (sympathy). What matters here, though, is that there is a difference in outcome when different management techniques are chosen, not the reason for the differences.

\(^{145}\) Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22 (1989) (but also reporting that plaintiffs who made it to the damages phase of a bifurcated trial received significantly higher damage awards than the plaintiffs in the unitary trials).
bellwether trials and sampling) may also affect the outcome. In mass tort cases, some argue that consolidation and transfer by the Judicial Panel on Multidistrict Litigation has benefitted defendants more than plaintiffs “thanks to several rulings by MDL judges aggressively policing the mass torts transferred to their courtrooms.”

The existence of splitting alone does not necessarily determine with which party advantage lies. As noted above, conventional wisdom is that defendants will benefit from bifurcation. Hence in In re Benedictin Litigation, when the trial court subdivided the trial into causation, liability, and damages, and excluded from the courtroom in the early phase all visibly deformed plaintiffs, it was the plaintiffs who complained that they had been denied the right to “present to the jury the full atmosphere of their cause of action, including the reality of the injury.”

At times, however, courts will shift the order of segments of the bifurcated trial, in a procedure called “reverse bifurcation.” The purpose of this ordering is often to provide the parties with sufficient certainty about potential damages to facilitate settlement discussions.


148 In re Bendectin Litigation, 857 F.2d 290 (6th Cir. 1988), citing In re Beverly Hills Fire Litigation, 695 F.2d 207 (6th Cir. 1982). This is often referred to as the “sterile trial atmosphere” problem.


150 See, e.g., Anemona Hartocollis, Little-Noticed 9/11 Lawsuits Will Go to Trial, NEW YORK TIMES (Sep. 4, 2007) (damages issue will be tried first). Another “order of trial” technique, used
Defendants occasionally seek this order as a way to clarify and limit the plaintiff’s actual damages (or to end the case if they believe that plaintiff has not been damaged, or that the damages were not caused by defendant’s acts). More commonly, however, defendants are appalled by the possibility of beginning the case with the presentation of evidence of the plaintiffs’ damages. For example, a coalition of business and insurance interests filed an amicus brief with a Pennsylvania appellate court, arguing that reverse bifurcation “causes substantial prejudice to asbestos defendants.” The Federalist Society published an article condemning two reverse bifurcation plans in which defendant’s liability for punitive damages (as well as a “multiplier” to use with later-determined actual damages) would be tried first. Order matters, and even if the judge has only efficiency in mind, the managerial decision to cut and arrange the pieces of the lawsuit pie can have effects on the outcome.

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Other decisions about the size and order of proceedings can also provide advantages and disadvantages. Decisions regarding which party gets to open and close evidence, or open and close final argument allocate the well-documented benefits of primacy and recency.\textsuperscript{154}

Limits on the time and subject matter of voir dire have the potential to make an important difference in the composition of the jury. The voir dire process is intended to provide the attorneys with enough information to identify and eliminate potential jurors whose attitudes make them naturally inclined toward one side or the other—either with a challenge for cause, when a panel member is willing to state that he cannot set aside his bias, or with a peremptory challenge when the bias is less pronounced (or when the panelist responds to judicial prompting by stating that he will follow the judge’s instructions despite the bias). A more limited opportunity for voir dire provides less information with which to intelligently exercise those challenges.\textsuperscript{155} It is hard to know in advance whether this limited information will cut in any particular direction, but it is logical to assume that party who is most hurt by pervasive cultural biases will suffer from the inability to raise these issues during voir dire and to identify the potential jurors who hold those views.\textsuperscript{156}

\textsuperscript{154} Longan, \textit{supra} note x at 705, citing \textsc{Jeanne Ellis Ormond}, \textsc{Human Learning, Theories, Principles, and Educational Applications} 149 (1990).

\textsuperscript{155} “Many prospective jurors are more candid when counsel questions them than when the court questions them. The judge sits in an elevated position, wrapped in a robe representing authority and integrity. The judge has introduced the prospective jurors to the case and has admonished them that they must be fair and open minded. In these circumstances, it is very difficult for a person to admit to the judge that he or she cannot be fair.” 9 \textsc{Moore’s Federal Practice} § 47.10.

\textsuperscript{156} One example arises out of the “tort reform” debate: should the parties be allowed to question potential jurors about their exposure and reaction to tort reform advertising? See, e.g., Gary Moran et al., \textit{Attitudes Toward Tort Reform, Scientific Jury Selection, and Juror Bias: Verdict Inclination in Criminal and Civil Trials}, 18 \textsc{Law & Psychol. Rev.} 309 (1994); Valerie P. Hans and William S. Lofquist, \textit{Perceptions of Civil Justice: The Litigation Crisis Attitudes of Civil
Management decisions that limit the presentation of evidence – by imposing an overall time limit, a limit on the number of witnesses or exhibits, or by requiring written statements rather than live testimony – also have the potential to influence case outcomes. Ideally, the limits merely force each party to focus its presentation in a way that is more convincing than a longer presentation would be. Actually, the limits force the parties to make predictions about the marginal value of evidence: which questions to which witnesses are most crucially important? which exhibits are key? what quantity of circumstantial evidence is necessary to support a crucial inference? how many corroborating witnesses are needed to avoid the appearance that a difference in witness testimony is merely a credibility fight? when are two experts better than one? If the omitted evidence would have made no difference, then time limits have speeded the trial without affecting the outcome. If, however, the omitted evidence might have made a difference, then management has tipped outcome. Although this could affect either party, it is more likely to have an adverse effect on the party with the burden of proof, the one whose role in the adversary process requires the production of evidence – the one who loses when the evidence is in equipoise.

Decisions to require evidence – direct witness testimony, expert witness qualifications or basic testimony, or deposition summaries – in the form of written narratives or summaries also has the potential to disadvantage the party with the burden of proof. It is no accident that novelists are advised to “show, don’t tell” – let the reader experience the story through the characters words, actions, and thoughts rather than the narrator’s exposition and summary. Live testimony in the witness’s own words will often be more vivid and more convincing than a

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narrative summary – yet when the written statements are used, the witness is first heard live on cross-examination. Written summaries of deposition testimony provide no “voice” for the witness at all. The “bloodless” trial resulting from extensive use of written summaries may save time at the expense of a more holistic presentation to the fact finder. 158 “Here demeanor evidence – the array of sensory impressions about a person that are available to the decider who observes the live in-court trial – could make a difference in a way that matters.” 159 A management decision made to save time could again skew case outcomes to the detriment of the party who would have benefitted from the more vivid or extended evidence format.

The choice of a granulated format for the jury charge has the potential to affect outcomes in the same way as bifurcation. Some impact can come from the order in which questions are presented. One commentator urged defendants to try to take advantage of this phenomenon: “When using a special verdict form, pay careful attention to the organization and number of questions. A defendant will want some of the earliest inquiries to be knockout questions: If the jury can answer ‘no’ to the question, then it need not proceed to any others.” 160 Empirical research supports this lawyer intuition, finding that the order in which issues are presented to a

158 It is also quite possible that the lawyers play a large role in the actual drafting of the written testimony. And although lawyers will most always prepare friendly witnesses in advance, letting the lawyer draft the written presentation goes a step farther in making that “spin” part of the record, and thus may actually change the information presented from what a live question and answer colloquy would have revealed.

159 Marcus, Conquest, supra note x at 763. See also id. at 755-70 (discussing differences in impact of live and written testimony); CLMM, supra note x at 87 (pointing out that time saved by use of deposition testimony in lieu of live witness should be balanced against “the reasonable desire on the part of counsel to allow a key witness to ‘speak the case’ to the jury”).

160 Norman J. Wiener, Simple Lessons from a Complex Case, LITIG. 16 (Spring 1986).
jury can affect the outcome of the case. The other kind of impact comes from separating related issues into distinct questions, making it harder for the plaintiff to achieve the required unanimity and, like bifurcation, increasing the potential for conflicting answers (and hence mistrial), and decreasing the jurors’ ability to assess the case in a holistic way.

The potential for case-altering impact exists. Some argue that since the possibility of some rogue “activist” judge using the management tools purposely to change case outcomes is slim, we should not let worries about the unlikely bad judge influence the system. The risk that comes from unguided managerial discretion, though, is broader than the possible existence of the occasional venal or corrupt judge deliberately exercising biased discretion. Rather, the problem is that management decisions present unacceptable and unreviewable variations based on individual judges’ feelings about the merits and importance of a case – which are then balanced against the need for speed. These decisions to trim procedural options are decisions about how much time a particular case is worth – and the risk is not bad faith but the impact of each judge’s own view of the substantive law, professional experiences, life experiences, social


162 Thornburg, Power, supra note x at 1885-89.

163 Cf. Mengler, supra note x at 465 (“Behind some of the demands for detailed procedural rules and less trial court discretion is the specter of an evil genius, the biased or unprincipled trial judge. The pat, but nonetheless sound, response to these demands is that procedural rules should not be drafted with the most in-competent or evil judge in mind.”) And as Mengler correctly notes, “No rules, however detailed, can prevent unethical trial judges from treating litigants unfairly.” Id.
values, political views, and subtle biases. These differing backgrounds also result in different attitudes toward the very project of management.\footnote{3\textsc{M}OORE’S FEDERAL PRACTICE §16.04 (“[S]ome civil side litigators who become judges, especially if they have practiced for many years, simply do not agree with the view that it is appropriate for judges to actively intervene in the litigation dynamic. Thus, some judges reject, with varying levels of conviction, the fundamental assumptions on which the dominant current case management philosophy is based. These judges believe in the traditional adversary system: giving the lawyers much freer reign to run the case and in letting the chips fall where they may, and limiting the court’s role to enforcing procedural and evidentiary rules when a party’s demand creates a need for a ruling.”).}

The lack of limits and ad hoc nature of managerial trial decisions are especially troubling in light of our increasing understanding of the ways in which judges’ own experiences with the world affect their decisions. Judges are human beings with the same mental equipment as other people.\footnote{Some prefer to think of judges as umpires, disclaiming any personal component of judging. Senator John Cornyn (R. Tex.), commenting on the nomination of Judge Sonia Sotomayor, invoked this image: “The real question is how she views her role as a judge: whether it is to advance causes or groups or whether it is to call balls and strikes.” Actual umpires, however, understand that even their job involves the application of discretion and search for the “spirit” of the rules. Commenting on the supposedly fixed strike zone, one umpire said, “It’s like the Constitution . . . The strike zone is a living, breathing document.” Bruce Weber, Umpires v. Judges, N.Y. TIMES, July 12, 2009 at WK1.} Sometimes this happens simply because a judge, based on her life encounters with the world, can summon knowledge from a context that is not so familiar for judges who grew up in a different environment. During the most recent term of the Supreme Court, for example, Justice Ginsburg was able to help her male colleagues understand the impact of a strip search on a thirteen year old girl suspected of hiding Advil in her underwear. Consider the oral argument in \textit{Safford Unified School District v. Redding}.\footnote{129 S. Ct. 2633 (2009). The oral argument transcript is available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html (April 21, 2009).}

Justice Breyer (thinking of his own experience as a boy, and much amused): “When I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day. We changed for gym, O.K.? And in my experience, too, people did sometimes stick things in
my underwear. . . . I’m trying to work out why is this a major thing to say, ‘Strip down to your underclothes,’ which children do when they change for gym.”

Justice Ginsburg: “I don’t think there’s any dispute what was done in the case of both of these girls. . . It wasn’t just that they were stripped to their underwear. They were asked to shake their bra out, to -- to shake, stretch the top of their pants and shake that out.”

As she later explained to a reporter, “They have never been a 13-year-old girl. It’s a very sensitive age for a girl. I didn’t think that my colleagues, some of them, quite understood.”

In the same kind of way, Justice Marshall was able to share with his judicial colleagues an understanding of the way race and racism impact society. When Marshall retired in 1991, Justice O’Connor spoke of the ways in which she had learned from him and of “the experience of listening to his stories during the decade that they served together, stories that ‘would, by and by, perhaps change the way I see the world.’”

This phenomenon is not limited to the rarified world of the Supreme Court. Social scientists have analyzed judicial reasoning processes in various ways, and their results tend to show that judges are subject to the same kinds of subtle biases as the rest of us. For example, researchers tested 133 sitting trial judges and found that, for the most part, the judges held the same kind of implicit discriminatory biases that most adults hold. Chew and Kelley studied

167 Justice Breyer’s comments were the source of great hilarity among the Justices and the spectators. See D.C. Dicta, Breyer and the case of the funny underwear, available at http://lawyersusaonline.com/dcdicta/2009/04/21/breyer-and-the-case-of-the-funny-underwear/.

168 Joan Biskupic, Ginsburg: Court needs another woman, USA TODAY (May 5, 2009).


170 Jeffrey J. Rachlinski et al., Does Unconscious Bias Affect Trial Judges? 84 NOTRE DAME L. REV. 1195 (2009) (“We find that judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases.”). This study used the implicit association test, versions of which are available at Project Implicit, https://implicit.harvard.edu/implicit/. See
400 workplace racial harassment cases, and found that “judges’ race significantly affects outcomes in these cases. African American judges rule differently than White judges, even when we take into account their political affiliation and case characteristics. At the same time, our findings indicate that judges of all races are attentive to relevant facts of the cases but interpret them differently.”

Nor are issues of race and gender the only ones where a judge’s background can subtly influence the way a judge evaluates a case. In 2007, the Supreme Court decided a case in which Victor Harris sued police officers after they ended a high speed chase by ramming his car (which resulted in Harris becoming quadriplegic). The chase itself, from the perspective of some of the police cars involved, had been captured on videotape. After watching these videotapes, the Court ruled eight to one that the tapes demonstrated conclusively that Harris’s flight posed a deadly risk to the public. To “prove” their point, the majority posted the video on the Court’s website. But the Justices’ confidence that their viewpoint was universal was incorrect. Kahan, Hoffman, and Braman showed the video to 1350 people with interesting results. “Whites and African-Americans, high-wage earners and low-wage earners, Northeasterners and Southerners

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171 Chris Guthrie et al., Blinking on the Bench: How Judges Decide Cases, 93 CORNELL L. REV. 1 (2007) (reporting on a study showing that trial judges rely on intuition in making their decisions).


172 Scott v. Harris, 550 U.S. 372 (2007). Justice Stevens disagreed, and described the videotaped chase in detail. He also reflected on the impact of experience. 550 U.S. at 390 n.1 (“I can only conclude that my colleagues were unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane. Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways -- when split-second judgments about the risk of passing a slow poke in the face of oncoming traffic were routine – they might well have reacted to the videotape more dispassionately.”)
and Westerners, liberals and conservatives, Republicans and Democrats – varied significantly in their perceptions of the risk that Harris posed."¹⁷³

What does all this have to do with managerial judging? The potential impact is subtle, but potentially worrying. A decision about case management, including trial management, is not just a time estimate. It is a weighing of the cost in time and expenses that additional process would require against the value of giving the case that time. The “value” part of the analysis will reflect the judge’s assessment of the merits of the particular case and of how important it is to society more generally for that type of controversy to be litigated.¹⁷⁴ Especially where no standards guide the weighing process, subjective and subconscious value judgments creep in, just as they did in the pretrial management hypothetical posed to the judges at Yale twenty five years ago.¹⁷⁵

The inevitability of different judicial perspectives may be exacerbated by the very politicized process that produces federal judges. While district judgeships are not yet as carefully watched as appointments to appellate courts, the deliberate consideration of politics and attitudes has increasingly affected the process at all levels.¹⁷⁶ If Presidents and Senators succeed in choosing judges with congenial attitudes – whether about particular substantive claims (like civil rights cases or antitrust cases) or about the costs of litigation, then the combination of

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¹⁷⁴ See Peterson, supra note 1 at 80 (reflecting on the ways in which various biases could affect pretrial management decisions and citing federal race and gender bias task force reports).

¹⁷⁵ See text accompanying notes x supra.

politics, judicial attitude, and the application of ad hoc managerial judging has the potential to systematically rather than randomly skew settlements and trial outcomes, especially if a single political party dominates judicial selection for a substantial period of time.\textsuperscript{177}

E. No Meaningful Appellate Review

When considering pretrial management, the obstacles to securing appellate review are manifold. The pretrial orders are interlocutory (and only occasionally reviewable as collateral orders, by mandamus, or because a lawyer was willing to be held in contempt to secure an appealable order). Substantial time may pass between the entry of the order and an eventual appeal. Some of the judge’s management activity is not on the record and hence somewhat impervious to review. Some of the judge’s management suggestions are agreed to by the parties, in an effort to avoid antagonizing a decision maker who will continue to wield substantial discretionary power over the development of the case. If the managerial judge succeeds in convincing the parties to settle, there will be no appeal where a review could happen.\textsuperscript{178} Even without a settlement, review and reversals will be rare.\textsuperscript{179}

At first blush, one might expect trial-stage management to escape this particular critique. After all, when a case goes to trial it often is not going to settle (so that insulation goes away),


\textsuperscript{178} When “judicial efforts succeed, they guarantee that appellate courts will play no role in the suit: neither the settlement itself nor any preceding judicial ruling will be appealable.” Yeazell, \textit{supra} note x at 656.

\textsuperscript{179} \textit{Id}. at 651-52.
the trial will result in a final, appealable judgment, and the appellate court can go to work.\textsuperscript{180} (For pretrial decisions shaping the trial, though, the unhappy litigant will still have to wait until after the trial is over to assert an appellate complaint.)\textsuperscript{181} Aside from the timing difference, however, the same factors that de-claw appellate review of pretrial management do the same for trial-stage decisions. Both share the double hurdle of a deferential standard of review and the difficulty of showing harmful error.\textsuperscript{182}

The “abuse of discretion” standard of review governs all of these decisions:

- the decision to consolidate or bifurcate\textsuperscript{183}
- decisions granting or denying continuances\textsuperscript{184}
- decisions imposing time limits, including opening statements and closing argument\textsuperscript{185}
- decisions limiting the number of witnesses or exhibits\textsuperscript{186}
- decisions about the number of jurors\textsuperscript{187}

\textsuperscript{180} Those that do settle in the immediate pretrial period, or even during trial, are as fully insulated from review as those that settle earlier in the process.

\textsuperscript{181} 3 Moore’s Federal Practice § 16.59 (noting that pretrial orders are not final and not generally appealable as collateral orders).

\textsuperscript{182} “Many matters of pretrial process . . . are reviewed, when they are reviewed at all, under the ‘abuse of discretion’ standard. As a result trial courts exercise essentially final power on such matters even when the trial decision is appealable.” Yeazell, supra note x at 665.

\textsuperscript{183} 8 Moore’s Federal Practice § 42.20.

\textsuperscript{184} 9 Wright & Miller §2352

\textsuperscript{185} MCI Comm. Corp. v. AT&T, 708 F.2d 1081, 1171 (7th Cir. 1983).

\textsuperscript{186} Id.

\textsuperscript{187} Hanson v. Parkside Surgery Ctr., 872 F.2d 745, 749-750 (6th Cir. 1989) (eight-member jury under Rule 48 upheld in absence of stipulation, despite fact that local procedural rules provided for six-member jury).
• decisions about voir dire\textsuperscript{188}
• decisions about challenges for cause and peremptory challenges\textsuperscript{189}
• decisions about the order of proceeding\textsuperscript{190}
• decisions about the format of evidence\textsuperscript{191}
• decisions about admitting or excluding evidence\textsuperscript{192}
• decisions about the jury charge format\textsuperscript{193}

The very deferential nature of this review can be glimpsed in the articulation of the test in cases that specifically challenge scheduling decisions. For example, when the appellant challenges the trial court’s enforcement or modification of its pretrial scheduling order, there is no abuse of discretion unless “no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion can be found.”\textsuperscript{194} The same is true for any challenge to a scheduling decision – there’s no abuse of discretion unless no

\textsuperscript{188} Kanekoa v. City of Honolulu, 879 F.2d 607, 614 (9th Cir. 1989) (abuse of discretion found only when questions are not sufficient to test for bias or partiality); Darbin v. Nourse, 664 F.2d 1109, 1114 (9th Cir. 1981) (court of appeals will apply abuse of discretion standard).


\textsuperscript{190} Secretary of Labor v. DeSisto, 929 F.2d 789, 794 (1st Cir. 1991) (noting that the judge “may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion”).

\textsuperscript{191} In re Gergely, 110 F.3d 1448, 1452 (9th Cir. 1997) (written testimony).

\textsuperscript{192} Mengler, supra note x at 413; 2 D. LOISELL & C. MUELLER, FEDERAL EVIDENCE, § 125, at 8, 15 (1985).

\textsuperscript{193} Ryther v. KARE 11, 108 F.3d 832, 845-847 (8th Cir. 1997) (jury instructions, read as whole, are reviewed for abuse of district court’s broad discretion); 9C WRIGHT & MILLER §2556. In fact, so long as the charge is reasonably accurate legally, the format is not reviewable at all. Skidmore v. Baltimore & Ohio R. Co., 167 F.2d 54, 66-67 (2d Cir. 1948).

\textsuperscript{194} See, e.g., Gorlikowski v. Tolbert, 52 F.3d 1439, 1443 (7th Cir. 1995).
reasonable person could agree with the trial judge.\textsuperscript{195} Reviews of trial limits on time and witnesses are affirmed unless “the manner of the presentation of information to a jury is judicially restricted to the extent that the information becomes incomprehensible.”\textsuperscript{196} It is no surprise that the entire chapter on Rule 16 in Wright & Miller cites no cases in which the trial court was found to abuse its discretion in making a trial management decision,\textsuperscript{197} or that Moore’s Federal Practice cites only two cases in which an issue related to the trial court’s trial pretrial order was reversed as an abuse of discretion.\textsuperscript{198} No cited cases reverse based on time limits, witness limits, written testimony requirements, or decisions about the order of proceedings.

Even if the abuse of discretion standard were not so forgiving, appellants complaining about the denial of procedural opportunities face a significant hurdle in the harmless error rule. Recent cases indicate that Rule 61 allows reversal only when “it is ‘highly probable’ that the error affected the party’s rights, that the error ‘affected a party’s rights to a substantial degree,’ or that the verdict ‘more probably than not’ was tainted.”\textsuperscript{199} Often, because they are complaining about things they were \textit{not} allowed to do, appellants are in a position of asking the court of appeals to speculate both about what greater opportunity would have allowed and about the impact of that information.

\footnotesize

\begin{itemize}
\item \textsuperscript{195} See, \textit{e.g.}, Arthur Pierson & Co. v. Provimi Veal Corp., 887 F.2d 837, 839 (7th Cir. 1989).
\item \textsuperscript{196} Sims v. ANR Freight System, Inc., 77 F.3d 846, 849 (5th Cir. 1996).
\item \textsuperscript{197} Wright & Miller does cite \textit{Sims}, 77 F.3d at 849, in its discussion of \textit{Fed. R. Evid.} 611. \textit{Sims} finds an abuse of discretion for a combination of limiting orders, but does not reverse because it found the error to be harmless.
\item \textsuperscript{198} Both involve decisions about whether to modify the pretrial order to allow the testimony of unlisted witnesses rather than the provisions of the order itself. United States v. First Nat’l Bank, 652 F.2d 882, 887 (9th Cir. 1981); Bradley v. United States, 866 F.2d 120, 124-127 (5th Cir. 1989).
\item \textsuperscript{199} \textit{12 Moore’s Federal} \textit{Practice} \textsection 61.02.
\end{itemize}
Tied to this issue is the problem of preserving error. For example, three federal appellate panels have criticized the use of time limits, but found that the appellant had not preserved error (and thus not demonstrated harm). While exclusion of a concrete piece of evidence can be preserved for review by making an offer of proof, the impact of the court’s decision to allow only a certain number of hours or a certain number of witnesses is more difficult to document. Even if more time were belatedly offered, that opportunity may come too late. Similarly, the prejudice alleged to result from bifurcation of trial has been resistant to a showing of harm, even when the court is concerned about the potential impact of a first trial phase that excludes the human plaintiffs from the jury’s sight and precludes testimony about their damages.

In summary, although the proximity of trial to appeal makes the final judgment rule slightly less of an obstacle to judicial review of trial-stage managerial judging, the deferential abuse of discretion standard and the difficulty in demonstrating harm from the managerial

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200 Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987) (no reversal because there was no offer of proof before the close of evidence); Flaminio v. Honda Motor Co., 733 F.2d at 473 (7th Cir. year) (refusing to reverse because “the plaintiffs have failed to indicate what evidence they would have put in, or cross-examination they would have conducted, if they had had more time”); McKnight v. General Motors Corp., 9087 F.2d at 115 (7th Cir. year) (refusing to reverse because GM had only requested thirty additional minutes and had not demonstrated what it would have done with the additional time). And if counsel were required to make offers of proof in question and answer format for any uncalled witness or unasked question, the time saving involved in imposing the limits in the first place would disappear.

201 As Longan points out, a decision at the end of a party’s case comes too late to help a party who has trimmed time from a strong opening witness is not helpful. “A lawyer who wants to finish strong but still meet his limit will leave out the less persuasive evidence first. If, as he approaches the climax of the trial he learns that he has the option to add more evidence, he will have to finish in a weaker manner or forego the opportunity. The court’s kindness in being flexible is no blessing.” Longan, supra note x at 716.

202 In re Bendectin Litigation, 857 F.2d 290 (6th Cir. 1988); In re Beverly Hills Fire Litigation, 695 F.2d 207 (6th Cir. 1982).
rulings mean that trial management, like pretrial management, is effectively final in the trial
court in the vast majority of cases.

F. A New Problem: Loss of Party Participation, Control, and Confidence

In the pre-trial phase of civil litigation, there are few opportunities for direct party
participation. While ethics rules leave ultimate control in the hands of the parties, attorneys are
the primary actors and even have discretion to make various procedural choices. The parties
may testify by deposition, and may participate in mediation, but on the whole the pre-trial period
is not the time when litigants personally experience the benefits of process. Probably for this
reason, the critique of pre-trial management did not touch extensively on the impact of
management techniques on the parties’ satisfaction with the process as process.

At the trial stage, however, these concerns come to the fore. Quite apart from the impact
of management decisions on the merits, the managed trial has the potential to decrease
significantly the litigants’ perception of fairness. Researchers have identified four components
of procedural justice: 1) voice; 2) neutrality; 3) respectful treatment; and 4) trustworthy
authorities. “Voice” requires that parties be allowed to participate in the proceedings, to
express their viewpoints and tell their stories. “Neutrality” requires consistently applied legal
principles, unbiased decision makers, and transparent decisions. “Respect” requires that parties


204 See, e.g., Donna Shestowsky & Jeanne Brett, Disputants’ Perceptions of Dispute Resolution

205 Tom R. Tyler, Citizen Discontent with Legal Procedures: A Social Science Perspective on
be treated with dignity, politeness, and respect for their rights. And “trustworthy” authorities are those who listen carefully to the parties and who explain their decisions. In order to try to assure themselves that these values will be respected, litigants tend to prefer procedures in which they retain control over the process.  

Trial management can harm the parties’ perceptions of fairness in a number of ways. The most obvious is loss of voice. When a party is required to draft a written statement in advance (probably with a lot of lawyer input), and gets to “speak” to the trier of fact only when being cross-examined, the experience of telling one’s own story and confronting opposing parties will be severely diminished. Less dramatically, time limits or limits on number of witnesses that deprive parties of the opportunity to present information that they believe to be important also decreases the litigants’ sense of voice. Winick has suggested that even between client and lawyer, the client’s need for “voice” extends to the content of opening statement and closing argument. Consider how much stronger the loss would be when the control comes not from the party’s own lawyer but from the judge.

The neutrality principle is also threatened by extensive management. As explained above, managerial judging does not turn on legal principles, is not consistently applied, and is not at all transparent. This combination means that a party’s litigation experience is dependent on the idiosyncratic perspectives of individual judges, undermining confidence that the system provides “equal process” for all. Even though the parties to a single lawsuit will probably


receive similar limits, those limits will not affect them the same way.\textsuperscript{208} Moreover, similar lawsuits will receive different treatment because of the different judges’ different assessment of the managerial needs of the cases.

The “trustworthiness” principle overlaps with voice and neutrality. The loss of voice will detract from the litigant’s feeling that she was listened to; the loss of explanation and transparency will also decrease a feeling of trust. In addition, concerns that the judge’s deep participation in the development of the case will result in biases about the parties, the lawyers, and the dispute also are reasons to fear that certain kinds of management can compromise the trustworthiness principle and, by extension, the parties’ confidence in the judicial system.

Managing a trial is not likely to lead to disrespectful treatment of individual litigants, in the sense that a judge will be verbally rude or insulting. Nevertheless, techniques that decrease the party’s participation – such as limits on testimony and bifurcation that removes or delays the plaintiffs’ accounts of their experiences – may be perceived as disrespectful in that they are based on a judicial decision that the excluded information is not worthy or is suspect in some way. Some judges might even communicate the feeling that the right that the party is asserting is comparatively unimportant.

Consider the perspective of the parties in the workplace harassment case, \textit{Sims v. ANR Freight}.\textsuperscript{209} Although all parties agreed that the case would take five to seven days to try, the judge allowed each side five minutes for opening statement, and two and a half hours for the presentation of evidence (the plaintiff’s time was divided between two hours for her case-in-

\textsuperscript{208} \textit{See} text accompanying notes xx \textit{supra}.

\textsuperscript{209} 77 F.3d 846 (5th Cir. 1996).
chief and thirty minutes for rebuttal).\textsuperscript{210} The judge determined the order in which Sims could present her witnesses. In addition, he “repeatedly limited both direct and cross examination, frequently ordering counsel to “move on,” and continually reminded counsel of the time limits.”\textsuperscript{211} The judge also refused to allow the parties to read stipulated facts to the jury (although the judge had required the parties to make the stipulations). It is unlikely that this treatment appeared to any of the parties to be respectful.

Nor was the plaintiff likely to feel that the appellate process corrected the deficiencies in her treatment by the trial court. The Fifth Circuit commended the trial judge for attempting to manage a large docket and praised management generally. As to Sims’ case specifically, the appellate panel found that “the methodology imposed on this trial by the court and the restrictions that were placed on the lawyers regarding the manner of the presentation of evidence adversely impacted on the comprehensibility of the evidence to the point that Sims was denied a trial” – but it refused to remand for a new trial.\textsuperscript{212} Without any explanation, or any analysis of the difference between a three day presentation and a two hour presentation, the court found the error harmless: “the evidence is so overwhelming against Sims that there is no reasonable possibility that the outcome would be different if the case were re-tried, even if Sims were allowed to present fully all her evidence in a comprehensible manner.”\textsuperscript{213}

\textsuperscript{210} In response to the court’s requirement that the parties file detailed lists of facts they intended to prove at trial, Sims had listed 640 facts from 18 witnesses to be proved for her tort claim and 1510 facts to be proved through 27 witnesses for her Title VII claim.

\textsuperscript{211} \textit{Id.} at 848.

\textsuperscript{212} \textit{Id.} at 848.

\textsuperscript{213} \textit{Id.} at 849.
The managerial trial by definition involves a loss of litigant control. Important decisions about the structure of the trial, the composition of the jury, the nature and quantity of evidence to be presented to the judge or jury, the order of presentation, and the ultimate questions to be asked all shift from the parties (and their lawyers) to the trial judge. Even if one is convinced that the judges’ managerial decisions are empirically superior to those that the lawyers would have made, the loss of control is itself a significant change in the quality of the process.

IV. MANAGING THE MANAGERIAL JUDGE

Judicial management, used properly, can improve both process and results in individual cases, but both systemically and in specific situations it poses serious problems. Managerial ideology is here to stay, but it needs to be more thoughtfully cabined and its use more restrained. As with pretrial management, the challenge for critics of the system is to suggest what to do about management’s downside.

Identifying the systematic weaknesses in pretrial management did not lead to its demise, or even slow its pace. Pretrial management is more firmly entrenched now than it was in the 1980s. Many developments after Resnik’s article institutionalized and even required management techniques. Each successive amendment to Rule 16 has expanded the management power. In addition, the Civil Justice Reform Act required each district to consider and adopt

214 See Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1433 (7th Cir. 1986) (Posner, J.) (“The rise of the ‘pro-active’ judge, the search for cheap and fast substitutes for the conventional Anglo-American trial, the convergence of the American and Continental systems – all these developments are well under way and are probably irreversible.”).

local rules to manage litigation and to encourage ADR and settlement.\textsuperscript{216} The Local Rules of many district courts incorporate the structures of managerial judging.

Yet in subtle ways the institutionalization has provided a degree of standardization. For example, changes in the discovery rules have introduced standard numerical limits on some discovery devices, made automatic initial disclosures mandatory, and made pre-trial disclosures of experts, fact witnesses, and exhibits mandatory.\textsuperscript{217} They have also made an early discovery conference mandatory and specified its timing. Changes in Rule 16 itself have brought greater uniformity in terms of the flow of management, requiring and specifying the timing for the initial pretrial conference and the content of the scheduling order, and mandating an order reciting the action taken at any conference. Nevertheless, pretrial management remains highly discretionary and generally un-reviewed and irreversible.

Would trial-stage management be any more susceptible to regulation? It might be so in theory, but the political realities of courts and rule makers make significant changes improbable. While enhanced appeal, specific rulemaking, and enforced transparency could be attempted, each comes with its own costs that are unlikely to outweigh the current enthusiasm for judicial management.

The creation of a more effective system of appellate review is the normal method by which the system itself imposes more control on trial courts. In order to provide for meaningful

\textsuperscript{216} Judicial Improvements Act of 1990, 101 P.L. 650, 104 Stat. 5091, codified as 28 U.S.C. § 473 (sunsetting seven years after enactment per section 103(b)(2)). Sophisticated clients, more aware that lawyers were making procedural choices that increased the cost of litigation, also began to more aggressively manage the lawyers, putting them on budgets and prohibiting certain kinds of expensive litigation behavior. Stephen C. Yeazell, \textit{Re-Financing Civil Litigation}, 51 DePaul L. Rev. 183, 198 (2001) (discussing insurance company constraints on defense budgets).

\textsuperscript{217} \textit{Fed. R. Civ. P.} 26(a), 30, 33.
appellate review, we could create an exception to the final judgment rule,\textsuperscript{218} adopt a standard of review with teeth, and relax the application of the harmless error rule.\textsuperscript{219} The challenge would be to do so without creating a system in which appeals would disrupt trials, clog the appellate court system, force appellate courts to immersed themselves in the factual details of trial plans, and require retrials that would add to trial court dockets.\textsuperscript{220} In addition, appellate courts might be reluctant to add to their workloads to undertake a review of this type of decision, and might doubt that the resulting cases would provide sufficient general guidance to be worth the time and effort required.\textsuperscript{221}

Another way to confine trial-management discretion would be to draft rules that limit managerial discretion. Some more recent federal rule amendments do take a more directive

\textsuperscript{218} Since the number of federal civil cases that actually go to trial is relatively small, and since the sub-set of those cases that involve significant management orders is even smaller, more immediate and less deferential appeals would not risk the same kind of burden on appellate courts as would interlocutory appeal of pretrial orders. For a discussion of the issues raised by interlocutory appeals, see Elizabeth G. Thornburg, \textit{Interlocutory Review of Discovery Orders: An Idea Whose Time Has Come}, 44 Sw. L.J. 1046 (1990) (analyzing the advantages and disadvantages of interlocutory review). However, the disruptive nature of appeals immediately before trial militates against this change.

\textsuperscript{219} The standard for reversal could ratchet all the way up to de novo review, but that is not the only option. Consider, for example, the New York standard of review of damage judgments at issue in \textit{Gasperini} (does the decision in this case deviate materially from other similar cases?), which could be a check on inter-judge consistency. \textit{Gasperini v. Center for Humanities, Inc.}, 518 U.S. 415 (1996). Nor does a change in the test for harm require that harm be presumed. \textit{See, e.g.}, Tamburello v. Welch, 392 S.W.2d 114, 118 (Tex. 1965) (holding that harm from improper allocation of peremptory challenges should be determined by looking at whether the trial was “materially unfair,” based on an examination of the entire record to see whether the trial was hotly contested and the evidence sharply conflicting).

\textsuperscript{220} Resnik, \textit{Managerial Judges, supra} note 1 at 433; Yeazell, \textit{supra} note x at 677.

approach and take some of the discretion away from previously unregulated orders. Certain practices – such as the use of written direct testimony in jury trials – could be prohibited. Other orders – such as certain kinds of bifurcation, orders that require evidence to be summarized rather than presented, and orders that provide insufficient time to communicate clearly – might also be candidates for prohibition or severe limits. However, the process of drafting such rules would involve the same kinds of politicized jockeying for procedural advantage that we have observed in recent proposals to amend the rules. In addition, rules that limit judicial discretion are likely to be opposed by the judges themselves. They have fought recent attempts to amend the rules even in moderate ways when their discretion would be limited – as when they prevented amendments that would have restored the twelve-member jury, and that would have mandated the attorney’s right to participate in jury selection. It thus seems unlikely that any significant limitations on managerial trials would result from the rulemaking process unless judicial attitudes change dramatically.

The problems of arbitrariness and lack of consistency might be alleviated by a requirement that trial courts provide reasons for their managerial orders and to publish those

222 See, e.g., the 2003 amendments to Rule 23. Fed. R. Civ. P. 23(e) & (g), and advisory committee’s notes (2003 amendments).


224 See text accompanying notes xx, supra.
decisions, in hopes that a coherent body of cases might result.\textsuperscript{225} One way to make a skill-based discretionary decision depend on something beyond “trust us, we know what we’re doing,” is to require the judges to explicitly exercise that skill by providing a convincing explanation of their decisions.\textsuperscript{226} Unfortunately for either this plan or appeals, each explanation could be so extremely fact-specific that it would require a very large body of cases before one could begin to see any trends.\textsuperscript{227} In addition, the orders themselves would fail to provide information on how well or how badly the trial plan worked, nor would they provide any way to determine whether trial under a different plan, or an “unmanaged” trial would have taken more time or resulted in a different judgment.

The least controlling, but possibly most feasible, alternative is to revise the official training given to trial judges, such as judicial seminars and the Civil Litigation Management Manual, so that they provide less cheerleading and more guidance with regard to trial management. For example, in the Manual’s current form, it helpfully suggests a wide menu of management options. It does not, however, provide meaningful advice about how to decide whether and what tools to use, how to determine the limits imposed, or when \textit{not} to take the

\textsuperscript{225} \textit{Cf.} Fed. R. Civ. P. 11(c)(6) (“An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.”); Peterson, \textit{supra} note 1 at 92-105 (setting forth plan to control discretion by referring managerial issues to magistrates and having district judges review their decisions through written decisions creating and explaining the relevant standards).


\textsuperscript{227} Since the trial judges are relying on a “discretion as skill” paradigm, explanations would likely cite the specifics of the case rather than any kind of legal rule justifying the decisions structuring trial. Yablon, \textit{supra} note x at 263.
decision away from the parties and their lawyers. Training should also sensitize judges to the ways in which their decisions can be subtly affected by their inherent biases, professional experiences, and politics. There is some reason to believe that such efforts could be beneficial; some of the same studies that identify the existence of such biases also indicate that judges may be able to counteract their own biases when the issue is explicitly raised.

For any of the options, the existence of high-quality empirical research would be crucial. “Trust us” is not an adequate basis for a pervasive feature of the judicial system, and both claims of efficiency and fears of arbitrariness would be more convincing if they rested on an evidentiary foundation. In the largest sense, managerial decisions are supported by an argument that the benefits of management outweigh any disadvantages that might come along for the ride. This is essentially an empirical claim that judicially-managed trials: 1) take less judicial time than attorney-managed trials; 2) save time that is used to benefit other users of the court system; 3) save the litigants time and money; and 4) accomplish all these goals without affecting substantive outcomes or warping settlement leverage. If this is not the case – if, for example, the time needed to manage exceeds the time saving, if the frontloading of attorney time required to comply with management orders generate costs that exceed costs avoided, if management decisions are affecting settlements and verdicts – then the rules should change accordingly.

Other types of research would also be helpful. At the level of individual management devices, research showing the comparative costs and benefits of particular management techniques could aid both judges and rule makers in decisions about the use and abuse of

\[\text{See, e.g., Longan, supra note x at 709 (judges should only impose time limits on trials that last more than four days, as the time required to formulate careful limits would exceed the time saving at trial).}\]

\[\text{Rachlinski, Unconscious Bias, supra note x at 1223-25.}\]
managerial orders. Researchers could also examine whether the implementation of managerial
discretion is significantly inconsistent among different judges so that the lack of standards is in
fact a cause for concern.\textsuperscript{230} Research should also include empirical studies of the impact of
various management techniques on the parties’ perceptions of process fairness.

For those who question whether trial judges, individually or collectively, are striking the
right balance, there is little recourse. We are left with the hope that the judiciary will police itself
and supply internally the practice, skill, and values needed to exercise restraint in managing
lawyers and cases, and that they will somehow supply the consistency, self-restraint, and self-
awareness that the rules themselves lack.

\textbf{V. CONCLUSION}

are consistent with the rules that govern pretrial proceedings. They are designed to create wide
leeway to try the issues made possible by the broad rules of pleading and joinder. Just as in the
case of pretrial management, trial management is a pushback against the flexibility and
inclusiveness of the procedure and evidence rules.\textsuperscript{231} Judges can and do impose the same kind of
“less is more and settlement is best” philosophy on trials that they have imposed on the pretrial
stage of litigation. And as was true for the pretrial phase, the trimming is governed not by the
substantive law, but by an unguided desire for efficiency.

Managing trials, like managing pretrial, is not all bad. In an ideal world, “[w]orking
together, the court and counsel can ensure that the trial will be as streamlined, focused, and

\textsuperscript{230} Cf. Jaya Ramji-Nogales et al., \textit{Refugee Roulette: Disparities in Asylum Adjudication}, 60
\textit{Stan. L. Rev.} 295 (2007) (describing empirical study concluding that identity of judge was
single most important variable in whether asylum applications were granted).

\textsuperscript{231} Cf. Elliott, \textit{supra} note 1 at 310 (commenting on pretrial management).
efficient as possible, thus maximizing the likelihood of a fair result and minimizing the burdens imposed on jurors and witnesses.”232 Unfortunately, we do not live in that perfect world and management, spread over hundreds of judges and thousands of cases, threatens important procedural values. With its single-minded focus on speed and efficiency, it can ignore the countervailing importance of that the system be “just.”

The downside of managerial judging threatens both distributive and procedural justice. Its lack of standards allows an inconsistency that affects outcomes and neutrality. Its lack of transparency deters the development of standards, prevents the monitoring of impact, and undermines the trustworthiness of the judiciary. Its muffling of party voice and removal of party control can distort verdicts and settlements and weaken confidence in the court system. Its deference to the judge’s individual view of the resources a case deserves allows unarticulated and potentially biased value judgments to creep into facially quantitative decisions. Its lack of effective review eliminates the kinds of checks on discretion that can improve outcome accuracy and bolster a sense of fairness.

The breadth of uncontrolled discretion allowed by managed trials can strike at the heart of the most basic assumptions of our procedural system – that judicial decisions should be reasoned and explained rather than arbitrary and transparent; that party autonomy and participation are important to the adversary process; that rules should be consistently applied; and that procedural rulings should minimize their effect on party advantage and case outcomes. Far from overcoming the discretion ary excesses of pre-trial management, managerial trials exacerbate them. Switching from pre-trial to trial is not the answer; the courts’ distrust of party control and their automatic resort to judicial management have invaded the trial phase as well.

232 3 Moore’s Federal Practice §16.77.
Unfortunately, only a significant change in judicial attitudes toward the value and importance of their own processes is likely to slow the management tsunami and ensure that the court system’s desire for justice is not swamped by an ocean of cost control.