Measuring the Quality of Judging: It All Adds Up to One

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We know what we want our civil justice system to achieve. Rule One gave us the words 75 years ago: “to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹ Many people worry that we fall short, in ways both large and small, and devote themselves to thinking about how to improve our ability to achieve Rule One’s goals. Getting information about what makes judges and their work “good” is vital to this effort. This information can help us improve judges, the results they achieve, and the efficiency of their work. But this information can be mischievous. Depending on how “good” judging is measured, the information can be presented and used to mark judges who take brave but unpopular positions as judges whose work is “poor” or otherwise lacking. It is important to measure good judging, but it is paramount that the measuring be conducted thoughtfully and accurately.

Judge William Young and Professor Jordan Singer have given us an intriguing new approach to the task of measuring judicial productivity. They have developed an approach that measures judging according to the quality of the justice provided.² In doing so, they help fill a substantial gap in the existing research. Prior studies have measured judicial productivity by how quickly judges resolve their cases. That’s a relevant consideration to be sure, but metrics that look only at disposition rates fail to account for, and often obscure, the quality of the judge’s work. Yet, as Young and Singer ably demonstrate in their study, productivity depends at least as much on the quality of the output as it does on its quantity and the cost of producing it.³ In the language of Rule One, a comprehensive approach to

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¹ FED. R. CIV. P. 1.
² See Hon. William G. Young & Jordan M. Singer, Bench Presence: Toward a More Complete Model of Federal District Court Productivity, 118 PENN. ST. L. REV. 55 (2013). Judge Young and Professor Singer are a powerful combination of talents. Judge Young draws on lessons learned from years on the bench and disciplined thinking about how to improve the justice system. Professor Singer brings the insights and tools gained from his fine work as a social-science researcher focused on civil justice systems.
³ See id. at 59–60 (explaining how the measurement of productivity in the public sector

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measuring judicial productivity must ask whether judges are securing just determinations, and not merely whether they are securing speedy and inexpensive ones.4

The trick is figuring out how to measure the quality of adjudication. The concept defies easy or objective assessment, which may explain why prior researchers have focused on other more readily measurable factors.5 Young and Singer’s innovation is to use “bench presence” to measure quality. Their methodology, with apologies for oversimplification, goes like this: (1) one of the two key elements of quality in adjudication is procedural fairness; (2) procedural fairness can be expressed as four major values; (3) the most direct and powerful way for a judge to communicate fidelity to those values is by appearing in open court; so (4) we can measure the procedural fairness of the judging—and therefore the quality of the judging—by measuring how much time a judge spends on the bench.6

We are honored by the invitation to reflect on Young and Singer’s important work, though it might strike some that we are unlikely commentators. Judge Young is well known for many things, chief among them his passionate advocacy for more jury trials.7 Much of our own recent work focuses on the civil pretrial process, and in particular on active judicial case management.8 Aren’t we supposed to be at war—natural and evolved beyond measuring cost and time to include quality). The basic point is that higher output and lower cost signal increased productivity only if quality stays constant. An important corollary to this relationship is that an increase in quality leads to an increase in productivity even if cost and output stay the same. See id.

4 See, e.g., Maurice Rosenberg, Federal Rules of Civil Procedure In Action: Assessing Their Impact, 137 U. PA. L. REV. 2197, 2211 (1989) (calling for more empirical study of procedure, especially “[m]ore attention to the quality of procedural justice”). Even the studies that focused on measuring speed and disposition rates understood that those variables could not be meaningfully examined without also considering any impact on quality. STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 68–70 (1977) (acknowledging need for and difficulty of assessing quality but limiting analysis to whether techniques for increasing speed had been shown to negatively impact quality).

5 See Young & Singer, supra note 2, at 65 (“The longstanding focus of researchers on court efficiency is understandable. From a practical perspective, data on time to disposition and termination rates are relatively objective and easy to obtain.”).

6 See infra notes 9–15 and accompanying text.


8 We have written on these subjects together and separately. See, e.g., Steven S. Gensler &
irreconcilable enemies in a battle for the soul of the court system? Well-respected and influential scholars and judges have argued that judicial managers are not adjudicators and that those who stress judicial case-management threaten to transmogrify our beloved civil justice system from a judiciary to an administrative agency.

We do not think case management undermines the act or the art of judging. We have found that assertion not to be borne out in practice—how judges work—or in theory—how we conceive of the tools and procedures judges use to structure and carry out their tasks. We don’t think Judge Young and Professor Singer hold that view either. Indeed, as we were reading their study, we were struck at how much their work finds harmony with our own, even to the point of using similar imagery. We’ve written about judges “reappearing” to the lawyers, litigants, and public, inspired in part by Judge Young’s vigorous protest against “disappearing” trials and trial judges. “Bench presence” and the “reappearing” judge are simply different ways of describing a certain type of judge and a certain approach to judging. While we have some differences (which we talk about in this essay) we, like Young and Singer, think that this type of judge and this approach to judging are valuable in ways that are important to recognize and encourage.

We want to use this opportunity to reject the myth that judges must choose between actively managing their cases and dispensing public justice. Active judicial case management is not an inherently faceless, invisible, or bureaucratic process. Active case managers are not doomed to become administrators as opposed to adjudicators, or to embrace organizational work at the expense of deciding substantive legal issues and trying cases. Done properly, active judicial case management provides judges with opportunities to interact with the parties, counsel, and the public. Done properly, active judicial case management serves many—and sometimes all—of the procedural values that Young and Singer cite as indicia of judicial quality and productivity. Good judicial case management is participatory and interactive, not remote and dictatorial. Good judicial case management frees judges to focus on the substantive legal and factual issues that brought the parties to court in the first place. The best case-management practices do not cause judges to vanish from view; they cause them to reappear—to the parties, to the lawyers that represent them, and to

the public.

This short essay proceeds in six steps. First, we briefly explain the methodology behind Young and Singer’s model defining productivity through “bench presence.” Second, we identify the types of case-management activities that qualify as forms of bench presence under their model. Third, we discuss our own views on active judicial case management and introduce the concept of “The Reappearing Judge.” Fourth, we show that our views on interactive case management dovetail with Young and Singer’s metrics for quality and productivity, illustrating our main point that active judicial case management is not at odds with, but supports, the cause of public judging. Fifth, we briefly discuss why it is important to respect the discretion judges have to conduct case-management activities in chambers or by teleconference, and not insist that they always be done in open court. Finally, we argue that active pretrial case management also boosts judicial productivity by improving the accuracy of the outcomes.

I. Defining Productivity Through Bench Presence

Young and Singer’s main objective was to find a way to measure productivity by the quality of the judge’s work rather than merely speed or another efficiency-based metric. To do that, Young and Singer had to develop some method to measure quality, either directly or indirectly by finding a way to link quality to some more objectively measurable characteristic. They do the latter. They begin from the premise that the quality of adjudication has two major components: accuracy and procedural fairness. They then focus on the procedural fairness component and identify four dominant characteristics associated with procedural fairness: “(1) opportunities for participation and voice; (2) the neutrality of the forum; (3) the trustworthiness of legal authorities; and (4) the degree to which people are treated with dignity and respect.” At this point, it may be helpful to look back at the scorecard: productivity = quality = procedural fairness = processes that serve the four basic procedural values.

The next step is to find a way to identify and measure judicial behavior that serves these four basic procedural values. This is where Young and Singer invoke the concept of bench presence. They conclude that the core

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9 See Young & Singer, supra note 2, at 67.
10 See id. at 70–75.
11 See id. at 79–80. Young and Singer discuss some possible methodologies for measuring accuracy, but conclude that none of them are sufficiently reliable or practical to be useful in the context of a large-scale study of judicial outcomes. Id. at 78–79.
12 Id. at 80.
procedural values receive their most direct and full expression through open court proceedings. As they summarize,

> [g]iven the close connection between the courtroom experience and perceptions of procedural fairness, we believe the most meaningful and practical proxy currently available for procedural fairness at the district court level is the total number of hours that a district judge spends in the courtroom, conducting trials or otherwise presiding over an open proceeding.

And that supplies the final piece of the puzzle: judicial productivity depends on quality, quality depends on procedural fairness, and procedural fairness is measured by time spent on the bench in open court. If you want to know which judges are being productive, check their JS-10 forms to see who is using their courtrooms.

II. The Link to Case Management

One final step remains before “bench time” can be used as a way to measure judicial productivity and therefore quality. That step is to determine what counts as bench time. Time spent conducting trials obviously counts, but is that the only thing that counts? What about an evidentiary proceeding other than a trial, like a hearing on a preliminary injunction or an evidentiary hearing on whether information sought in discovery is protected by attorney-client privilege? What about a non-evidentiary pretrial proceeding, like oral argument on a summary-judgment motion or on a claim-construction motion in a patent infringement case? Or what about a hearing for the lawyers to argue a discovery dispute, after which the judge will decide whether to compel requested discovery? These proceedings are all legitimate candidates for counting as bench time. The reason Young and Singer look to “bench time” is its relationship to the procedural values of participation, neutrality, trustworthiness, and dignity. In their own way, and in varying degrees, the proceedings listed above and a myriad of others taking place in our trial courts have characteristics that all would agree serve one or more of those values.

Ultimately, Young and Singer take a functional approach. They define judicial bench presence to include “[a]ny task that involves the judge’s presence in the courtroom in furtherance of an adjudicative purpose.” This definition has two core parts: (1) the activity must occur in the courtroom; and (2) the activity must further the adjudicative process. So,

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13 Id. at 85–88.
14 Young & Singer, supra note 2, at 89.
15 Id. at 90–91.
16 Id. at 89.
bench presence clearly includes the two activities that Young and Singer identify as the “core role of the district judge”—trials and evidentiary hearings held in open court. But their definition of bench presence also includes other activities that further the adjudicative process, like non-evidentiary motion hearings and even status and scheduling conferences, so long as they occur in open court. In contrast, their definition excludes time spent drafting opinions (not in open court) and time spent presiding over settlement conferences (not in furtherance of adjudicating the merits).

There’s one more wrinkle, and it’s an important one. Young and Singer include in their bench presence definition the activities listed above—non-evidentiary hearings and status and scheduling conferences—even when they do not occur in open court but instead take place in chambers or via teleconference. They do so because, while these activities are said to lack some of the indicia of neutrality provided by the open-court setting, they are still interactions between the judge and the parties undertaken in furtherance of adjudicating the merits. They get credit as bench presence because they further the procedural values of participation, trustworthiness, and dignity. However, Young and Singer designate them as a “weak form” of bench presence because they do not serve the core procedural values as fully as activities conducted in open court.

We’re now in a position to summarize the relationship between bench presence and pretrial case management. Rule 16 case-management conferences and motion conferences are forms of bench presence (whether or not evidence is ever offered) because they are activities taken in furtherance of adjudicating the merits. If they are held in open court, they count as a “strong form” of bench presence. If they are held in chambers or via teleconference, they count as a “weak form” of bench presence. But either way they count because they largely (though not always perfectly) serve the procedural values Young and Singer use to measure adjudicative quality and judicial productivity.

III. Active Case Management and The Reappearing Judge

This Essay’s main point is to explore the link between a “bench presence” metric and the active case-management model of judging. In the
preceding sections, we defined the types of pretrial case-management activities that would qualify as bench presence events under the Young and Singer model. We now want to introduce our views on active judicial case management.

During the last thirty years, active judicial case management has become a cornerstone of the federal civil pretrial process. Since 1983, it has been woven into the fabric of the Federal Rules of Civil Procedure. Rule 16 now explicitly authorizes and encourages judges to manage their cases from the moment they are filed, and not just in the days before trial. And it has become a core tenet of modern judicial education. The two most prominent judicial resources on case management—the Civil Litigation Management Manual and the Federal Judicial Center’s Pocket Guide for Judges—extol the benefits of active judicial case management. Just last year, the Federal Judicial Center published the Sixth Edition of the Benchbook for U.S. District Court Judges. For the first time, the Benchbook includes a chapter on pretrial case management, and it is unambiguous in its support for the active case-management model.

23 See Gensler, supra note 8, at 674–75 (“Today, active judicial case management is a defining characteristic of the federal pretrial civil scheme.”).
24 See id. at 677-80. Rule 26 has also been amended several times in the last thirty years to involve judges more actively in the discovery process. In 1983, for example, Rule 26(b) was amended to include “proportionality” limits on discovery and make judges responsible for enforcing them. See Fed. R. Civ. P. 26(b) & advisory committee’s note. In 1993, Rule 26(f) was amended to require parties to hold an early planning conference and submit a report to the judge. See Fed. R. Civ. P. 26(f) & advisory committee’s note. Although the parties’ conference takes place away from and in advance of meeting with the judge, one of the stated purposes of requiring the conference and report was to generate information necessary for the judge to engage in the discovery management called for under Rule 16. See id. Finally, the 2006 electronic discovery amendments further immersed judges in case management. For over three years, the Advisory Committee studied how best to equip judges with the tools needed to deal with the dynamic nature and sometimes staggering volume of electronically stored information now subject to discovery. What emerged in the end was not a new set of tools but a renewed call for judges and the parties to address electronic discovery issues through planning, prevention, and case management. See Rosenthal, supra note 8, at 238 (discussing how the 2006 e-discovery amendments emphasize and rely upon active case management).
27 See also BARBARA ROTHSTEIN ET AL., MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES (2d ed. 2012).
29 See id. at 189 (“Active judicial case management is an essential part of the civil pretrial process.”); id. at 190 (“Active case management promotes justice by focusing the parties and the court on what is truly in dispute and by reducing undue cost and delay.”).
We too have been vocal advocates of active judicial case management. But we have found that it is important to clearly state just what it is that we advocate. For some people, the term “judicial case management” conjures images of judges arm-twisting parties into settlement. For others, it evokes the image of a judge alone at her computer, trapped in the center of an ever-expanding vortex of paper. The picture that often emerges is of a judge obsessed with “terminating” as many cases as fast as possible, for whom reducing the time to disposition trumps all other goals and values. Whatever relation this imagery bears to reality, it is not what we mean when we talk about active judicial case management.

Last year, we wrote a paper titled "The Reappearing Judge." We wrote the paper to address and debunk the idea that judges who choose to actively manage their cases are opting into the judicial equivalent of monasticism. Judges do not have to climb into bubbles in order to manage their cases. The best case management takes place during “live” interactions with the parties and counsel. As we put it then, “[t]he best case-management practices do not cause judges to vanish from view; they cause them to reappear.”

30 In the literature criticizing judicial case management, the practice that has received the most strenuous and sustained criticism is that of judges involving themselves directly in settlement negotiations. See Daisy Hurst Floyd, Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement, 26 ARIZ. ST. L.J. 45, 56 (1994) (criticizing certain techniques for risk of abuse or bias); Todd D. Peterson, Restoring Structural Checks on Judicial Power in the Era of Managerial Judging, 29 U.C. DAVIS L. REV. 41, 75 (1995) (criticizing case management as a means by which judges coerce settlement); Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374, 424–31 (1982) (criticizing case management as leading to coerced settlements).


32 Id. at 854.
In *The Reappearing Judge*, we explored in detail several case-management practices that we found particularly effective and valuable, and that we urge judges to consider incorporating into their own individual methods and styles:

- holding “live” Rule 16(b) case-management conferences;\(^{33}\)
- holding pre-motion conferences (for discovery motions and dispositive motions);\(^{34}\) and
- hearing oral argument on motions that proceed to full briefing.\(^{35}\)

A brief sketch of these practices is helpful.\(^{36}\)

First, the most important thing judges can do to reconnect with the parties and counsel is to hold “live” Rule 16(b) case-management conferences.\(^{37}\) In-person is best, but it can also be done by some form of video or other conferencing. As technology improves, the options multiply and become more widely available and effective, from videoconferencing to Skyping and beyond. The key is that the conferences be “live,” not merely on the papers. There is no better opportunity than a live pretrial case-management conference for the judge to help the parties focus their efforts and establish priorities. Questions to be discussed may include: What are the genuinely contested claims and issues? Which ones will have the greatest bearing on how the case is resolved? What discovery do the parties really need? Where should discovery start?\(^{38}\) Lawyers have

\(^{33}\) Id. at 857–61.

\(^{34}\) Id. at 861–64.

\(^{35}\) Id. at 864–65.


\(^{38}\) This is a point we cannot emphasize enough. The buzzword in discovery these days is proportionality. Too often, however, when people think of proportionality they think of setting outer limits on discovery. That thinking gets it backwards. The key to achieving proportionality in discovery is not figuring out where discovery must end, it is figuring out where discovery should start. It will rarely be clear at the beginning of a case for anyone to know precisely where proportional discovery ends. But it will almost always be clear where discovery should focus initially, with the parties identifying the key sources of information relevant to the most important issues. That information may be all that is needed. And if more discovery is required, the information gathered from the core sources will help everyone
understandably resented being required to attend short and perfunctory “scheduling” conferences that covered little more than setting a few deadlines. But lawyers crave the opportunity to meaningfully engage with the judge early in the case about the issues and how best to investigate and resolve them.

Second, we strongly encourage judges to hold a conference (in-person or as live as technology, distance, and resources allow) with the parties to discuss motions before they are briefed and filed. Some matters need to be fully briefed. But we must break our addiction to filing motions and briefs on everything. It is an incredibly expensive habit. It takes a huge amount of time and can freeze cases in their tracks as one side moves and briefs, the other then responds with a brief, and perhaps there is a reply, and then the judge must read all the submissions. For many matters, this is entirely unnecessary. How many discovery disputes really require briefing? Most discovery disputes are matters of reasonableness, not high legal theory. If the judge holds a pre-motion conference, the judge can hear the lawyers exchange views on what one side needs and the other side does not want to produce, ask questions, and—most of the time—rule on that basis. It saves everyone the time and cost that otherwise would go into lengthy briefs and a written opinion. It keeps the case on track and keeps the parties focused on the disputes about the claims and defenses, not disputes about discovery.

We also encourage judges to hold pre-motion conferences before summary judgment motions are filed and fully briefed. Here, the question is less one of whether any motion will be filed but of the scope of what gets filed and briefed. As we have discussed in detail elsewhere, summary judgment motions are routinely over-briefed, both by the moving and responding parties. All too often they are “kitchen sink” affairs that address every claim and defense, raise every possible issue, and set forth page after page of fact assertions on even the tiniest details, all of which then requires volumes of “supporting” exhibits. And yet in most cases, the motion will turn on a fraction of that content. So why is it all there? Uncertainty and its cousin, anxiety. The fear of being second-

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40 See id. at 862. On occasion, the initial conversation will indicate the need for full briefing on a particular issue, at which time the judge can ask for briefs directed to that issue. Id. (“Even when the judge decides that there are issues that do require legal research or briefing, the conference greatly narrows the issues.”).
41 See id. at 863–64; Gensler & Rosenthal, Managing Summary Judgment, supra note 8, at 549–55.
guessed (colloquially known as “CYA”) looms large here.\textsuperscript{43} Absent any guidance from the judge, the parties cannot know in advance what will matter. The only safe strategy is to hit every target with all of the ammunition they have. Isn’t it better for the judge and the parties to talk about intended motions before they are filed and briefed? Occasionally, the conversation may eliminate the need for the motion entirely.\textsuperscript{44} The conversation may help address concerns that some have expressed that summary-judgment motions are too often filed for strategic or even abusive reasons, including the reason that can make judges unhappy—to “educate” the court.\textsuperscript{45} More often, the conversation will reduce the scope of the motion. And in virtually every case, the conversation will help expose the genuinely contested matters, establish those things that are not in dispute (and therefore don’t need to be briefed), and focus the briefing on what really matters.\textsuperscript{46}

Finally, we encourage judges to consider giving parties more opportunities for oral argument on motions that are briefed.\textsuperscript{47} In many ways, this is an extension of our belief that judges and lawyers alike have become entirely too reliant on resolving pretrial matters through written submissions. We do not oppose briefing in general. Written advocacy has many virtues. It allows for reflection and thoroughness. The work of composing can force the writer to think more carefully and critically. But briefing can be a double-edged sword if the writer knows that it will be her only opportunity for advocacy. Will it fuel a “leave no stone unturned” approach? Will it create an incentive to manufacture issues, forcing the other side to invest efforts responding or risk leaving them seemingly unchallenged? Will it result in briefs that do not truly engage each other, leaving the judge to try to reconcile the ships that passed in the night? Oral argument can have a very positive disciplining effect on the briefing. And it can be of real value to the judge’s understanding of the issues.\textsuperscript{48}

Over the years, we came to favor these practices for multiple reasons. One reason is efficiency. All of these practices can be very helpful in streamlining the pretrial process, focusing the parties’ efforts, and

\textsuperscript{43} Id. at 550–51. We recognize that many lawyers, especially defense lawyers, also may have a profit motive for drawing out the summary-judgment process. See D. Brock Hornby, \textit{Summary Judgment Without Illusions}, 13 GREEN BAG 2D 273, 282 (2010) (“Some lawyer economic self-interest feeds the complexity, perhaps unintentionally.”); Diane P. Wood, \textit{Summary Judgment and the Law of Unintended Consequences}, 36 OKLA. CITY U. L. REV. 231, 250 (2011) (“Discovery and summary judgment are the engines of a lot of billing.”).

\textsuperscript{44} Gensler & Rosenthal, \textit{Managing Summary Judgment}, supra note 8, at 552.

\textsuperscript{45} Id.

\textsuperscript{46} Id. at 553.


\textsuperscript{48} Id. at 865.
eliminating needless cost and delay. But efficiency is not the only benefit these practices offer, and it may not even be the most important benefit. As we wrote in *The Reappearing Judge*, lawyers frequently lament that they no longer interact with the judges in their cases. That lament reflects a growing sense that trial judges have become isolated, distant, and bureaucratic, holed up in their chambers while overseeing a largely paper process. Consider the case-management practices discussed above as a response to that lament. They are all interactive, not isolating. They do not divide the bench from the bar. They reconnect the judge with the parties and the lawyers that represent them.

IV. Bench Presence and *The Reappearing Judge*

We began by describing our views on judicial case management as being “in harmony” with Young and Singer’s model for measuring judicial productivity. Young and Singer believe that judges should be seen and heard, not just written to and read. We agree. Young and Singer want more trials. We do too. But Young and Singer also recognize that judges can serve the values of “public judging” by interacting with the parties and counsel during the pretrial process. It should be perfectly clear how we feel about that.

If readers take away anything from this Essay, we hope it is this: judicial case management is not the enemy of public justice. Judges do not have to choose between managing their cases and interacting with the outside world. Case management does not have to be a “paper in, paper out” process. It should not be. From the Rule 16(b) conference to ongoing discovery management to motion practice, often the best way a judge can manage the pretrial process is to engage directly with the parties and counsel, whether that is in open court, in chambers, or via some form of videoconference or teleconference. And in doing so, judges establish the “presence” that signals to the parties, the lawyers, and the public that justice is being served with fidelity to the values of participation, neutrality, trustworthiness, and dignity.

We want to be clear that we are not saying that interactive case management is a substitute for trials. We agree with Young and Singer that trials hold a unique role in the American justice system. We do not know what the ideal trial rate is. As we have explored elsewhere, of all the civil

49 See id. at 870–72.
50 Id. at 849.
52 See supra notes 8–9 and accompanying text.
53 See Young & Singer, supra note 2, at 75–76.
cases filed, only some fraction will ever be realistic candidates to get to trial. Many will be appropriately resolved as a matter of law. Even for the cases that warrant a trial, most will settle, not because of strong-armed judges but because the parties come to the conclusion that it is the rational thing to do. However, judges can create an environment that makes trial a viable option in those cases where the parties would choose it. And the way to do that is to control the cost of getting there.

This brings us to a second point of emphasis and, we think, of agreement with Judge Young and Professor Singer: whether your primary concern is promoting trials or promoting case management, we are all on the same side. Case management is not an end in itself but a means to other ends, and one of those ends is trial. Judge Young made very much the same point in his Open Letter to U.S. District Judges. Too often, he said, people discuss jury trials and case management as though one has to choose between them. He called that a false choice, and he’s exactly right. Skilled case management is one of the best means of shepherding cases to trial because it helps get them to that end before the parties become exhausted (financially and otherwise) and give up. As Judge Young put it, “[t]he truth of the matter is that good management and traditional adjudication go hand in hand.”

V. In Defense of the “Weak Form”

We have one final point to make about the relationship between pretrial case management and procedural fairness. Young and Singer subdivide pretrial activities into two types of bench presence, a “strong

55 Id. at 867–72 (discussing settlement dynamics in litigation); see also John H. Langbein, The Disappearance of Civil Trial in the United States, 122 YALE L.J. 522, 558–66 (2012) (discussing judicial involvement, litigation costs, and predictability of results in choosing settlement).
56 Gensler & Rosenthal, The Reappearing Judge, supra note 8, at 869–72. Judge Joseph F. Anderson, Jr. reached the same conclusion in his colorful ode to the civil jury, Where Have You Gone, Spot Mozingo? A Trial Judge’s Lament Over the Demise of the Civil Jury Trial, 4 FED. CTS. L. REV. 99, 111–12 (2010) (suggesting that judges make trials viable by reducing the cost of discovery). Judge Patrick E. Higginbotham also cites judicial management of discovery costs as a key to restoring access to trials. See Higginbotham, supra note 51, at 763 (“[C]ourts should require parties to identify the necessary issues of fact and law and should permit only such discovery as is necessary to these issues, allowing the parties to supplement their list of issues as necessary at designated points in the litigation.”).
57 Young, An Open Letter, supra note 7, at 33–34.
58 Id. at 32. See also, e.g., Judith Resnik, Managerial Judges, Jeremy Bentham and the Privatization of Adjudication, 49 S. CT. L. REV. 205, 221 (2010) (“The charge to judges to manage their cases competes with and marginalizes the charter to adjudicate.”).
59 Young, An Open Letter, supra note 7 at 33.
form” and a “weak form.” The strong form consists of activities in open court. The weak form refers to activities in chambers or via teleconference. Does this mean that strong form bench-presence activities are “better” than weak form activities? If so, does that mean judges should always conduct their case-management activities in open court? We don’t think Young and Singer intended to suggest a “yes” answer to either proposition. But it is worth asking where the “strong” and “weak” lines should go and why.

To start, we find nothing in the article to suggest that Young and Singer meant in any way to disparage the so-called weak forms of bench presence. They could easily have limited their definition of bench presence to include only open-court activities, excluding activities like in-chambers and teleconference interactions altogether. Instead, Young and Singer expanded their definition of bench presence to include them. They did so because they recognized how significantly these interactive case-management activities can promote most of the procedural values they considered to be key indicators of fairness. The label “weak form” is not meant to signal that the fairness benefits of “in chambers” or teleconference interactions are weak in any absolute sense. The term is comparative only. It is meant solely to say that the benefits might be even greater—in kind or degree—if conducted in open court.

And lest anyone be tempted to think that judges should be required to hold all pretrial activities in open court in order to maximize the benefits of public justice, there are good reasons to resist that siren call. First, what would the marginal benefit of such a requirement be? At the very least, the lawyers will be present. They are witnesses to the event and are free to report to anyone they wish about what happened, how the judge behaved, and how they were treated. Often the judge will conduct the matter on the record, in which case a transcript will be available. Pretrial conferences can be on the record whether they are held in the courtroom or in chambers, or whether some or all are participating by telephone, video conference, or in person. Any briefs that were filed and any orders entered will be available at the courthouse and on the Internet through PACER, wherever the conference is held.61 We are not faced with an all-or-nothing choice between open courts and secret proceedings.

This is not to say that these other forms of publicity and access are full surrogates for the public’s ability to attend an open-court hearing and see and hear the judge in action. Direct observation surely captures something

60 See supra note 2 and accompanying text.

61 Many judges who hold pre-motion conferences require or allow the parties to summarize the topics to be discussed in short (2–3 page) “letter briefs.” When judges follow this or a similar practice, they should be sure these submissions are filed and become part of the record.
more than what can be gleaned from the record or conveyed through a retelling by someone who was there. But in practice, members of the public rarely attend open-court proceedings of any type unless compelled to do so (as when they are summoned to jury duty) or the case enjoys a particularly high profile.\textsuperscript{62} Public attendance at a pretrial proceeding in a run-of-the-mine case is likely to be zero.\textsuperscript{63} And when a case is high profile enough to attract public and press interest, most judges tend to respect this and hold all proceedings in the courtroom.

Second, whatever the marginal benefits of requiring all pretrial conferences to take place in open court might be, what would be the price for capturing those benefits? Nothing in the current Civil Rules requires judges to hold Rule 16(b) case-management conferences at all, or to conduct pre-motion conferences. Judges who hold them may prefer to do so in chambers, believing that the exchange is better if the setting is more relaxed, or for other reasons. If these judges had to hold every conference with the lawyers in open court, these judges might well hold them even less often than they do now. Some judges might forego them altogether, increasing the worst-case scenario of cloistered judges overseeing a purely paper process. Requiring that all interactions between judge and the parties or counsel be held in open court could increase costs, adding to the risk of driving more cases into settlement or out of the court system altogether. If what you really want is trials, requiring all pretrial case management to be conducted in open court does not seem the best way to get them.

We have two final points to make about weak and strong forms of case management. First, just as there is no conflict between encouraging active judicial case management and the traditional judicial functions, so too there is no conflict between active case management and allowing individual judges to follow their own styles. Case-management approaches can, and must, be flexible enough to accommodate, and benefit from, judges doing their work in the ways that work best for them. Judges tend to have a fierce attachment to this kind of autonomy. Case management can and must mesh with this aspect of judicial independence. The line between strong and weak forms of bench presence should as well.

\textsuperscript{62} Cf. Herbert M. Kritzer, \textit{The Trials and Tribulations of Counting “Trials,} 62 DePaul L. Rev. 415, 437 (2013) (raising the question of whether trials are public events “given that the vast majority of trial-like proceedings that are open to the public attract no attendance from the public at large”).

\textsuperscript{63} Even Jeremy Bentham, who championed the idea that open courts and public attendance would help prevent injustice, recognized the practical reality that the state might need to \textit{hire} people to attend most judicial proceedings in order to achieve the benefits of public observation. See \textit{Jeremy Bentham, Rationale of Judicial Evidence} (1827), \textit{in 6 The Works of Jeremy Bentham} 354 (Bowring, ed. 1962).
Second, drawing the line at the door of the courtroom seems to understate what we think best explains why the strong form of bench presence deserves that description. Bench presence is what makes the judge present to the lawyers and parties, working interactively on the case. It is that live interaction that makes for strong bench presence every time, more than the opportunity for the public to observe every proceeding. If we were drawing the lines, we would place all interactive conferences and exchanges between the judge and the lawyers, litigants, or parties in a case, working on the case, in the “strong form” category. What matters most is that the judge is engaged and communicating in real time, or, as we termed it, that the judge has “reappeared.”

VI. The Unexplored Aspect of Quality—Accuracy

Our final observation relates to a component of quality that Young and Singer acknowledge but do not address. As detailed above, Young and Singer’s main premise is that judges who spend more time on the bench are more “productive” because the extra time interacting with the public enhances procedural fairness values, thereby enhancing the quality of the judge’s work. But procedural fairness is just one component of quality. An equally, if not more, important component is accuracy.\(^\text{64}\) Measuring accuracy is notoriously difficult, however, because doing so requires a way to determine what the “correct” outcome should have been.\(^\text{65}\) Accordingly, Young and Singer focus their efforts on measuring advancement of the procedural values—with bench presence as their measuring stick—and express their hope that in the future improved methods for measuring accuracy will emerge to allow an even fuller analysis of judicial productivity.\(^\text{66}\)

We appreciate the caution that Young and Singer have exercised in not making claims about accuracy. Nonetheless, we cannot help but wonder whether bench presence also correlates with greater accuracy. In particular, we are intrigued by the possibility that increased pretrial bench presence improves the accuracy of pretrial outcomes. When judges interact with the parties and counsel during the pretrial process, the judges acquire a better understanding of the case, the parties have a chance to correct any misunderstandings the judge might have, and the interaction helps to ensure that the pretrial record squarely addresses the pivotal issues before the judge rules. Doesn’t it stand to reason that judges with better information will make better—more accurate—decisions?

\(^{64}\) See Young & Singer, supra note 2, at 70–72.

\(^{65}\) See id. at 78–79.

\(^{66}\) See id. at 98.
Consider again our vision of active judicial case management, in which judges interact with the parties (usually through counsel) to identify the real issues in the case, to efficiently navigate the discovery process, and to expedite and inform the summary-judgment process. At each step of the way, the dialogue gives the judge a clearer understanding of the claims and defenses in question. For example, a judge who holds a live Rule 16(b) conference will have a clearer understanding of what the parties hope to accomplish during the pretrial process. And when interacting with counsel to resolve discovery issues, the judge will invariably learn more about the parties’ theories and how they plan to support them. These activities are important steps in educating the judge and focusing the parties’ efforts.

But it is at the summary-judgment stage that live interactions provide the greatest benefit to the judge’s understanding of the case. As discussed above, we urge judges to consider holding pre-motion conferences before summary-judgment motions are filed and briefed. That is not just a device for avoiding unnecessary summary-judgment motions; it is also an opportunity for the judge and the lawyers to communicate with each other to clarify the issues and identify the questions the judge has so that, when motions and briefs are filed, the parties can focus on answering those questions in their briefs. We also advocate granting oral argument for summary-judgment motions. Oral argument provides yet another communication opportunity, where the judge can pose follow-up questions, probe into insufficiently briefed areas, or even invite the parties to comment on tentative rulings. A judge who takes an interactive approach to summary judgment acquires a much more focused and detailed understanding of the issues and the record than can be gleaned from the typical kitchen-sink-style motions and briefs. With that increased understanding comes, we think, greater accuracy.

Do judges who actively manage their cases in fact make more accurate pretrial decisions? That we cannot say. In terms of empirics, the best we can do is join Young and Singer in their hope that others will someday overcome the difficulties that currently hamper efforts to measure the accuracy of judicial outcomes. But our role today is as commentators, and we hope that we are not taking too much advantage of that position in making the common-sense suggestion that judges who actually talk with the parties and counsel will be in a better position to make more accurate judgments as the case proceeds toward its ultimate disposition, whatever that may be.

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In conclusion, we want to again thank Judge Young and Professor Singer for challenging the existing models for measuring the quality of judges’ work and for advancing how we think about judicial productivity. We also thank them for the opportunity to share our own views on active
judicial case management. Whether these components of good judging are described as bench presence or as the “reappearing judge,” whether they are labeled as weak or strong, we know that all the measured components of good judging add up to one—Rule One. It is Rule One that has reminded us for 75 years that we are not to choose between quality, speed, and cost-effectiveness. We are to work toward achieving them all.