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BUSTING UP THE PRETRIAL INDUSTRY

Andrew S. Pollis*

INTRODUCTION

It is by now axiomatic that the objective of the civil lawsuit has evolved. Litigants no longer routinely take their disputes to trial.¹ Some claim that a culture of settlement has supplanted the culture of trial resolution.² As one scholar notes, “The focus on conciliation and consensus is so dominant that, stunningly, going to trial is seen as pathological—as a ‘failure’ of the system.”³

But the vanishing trial does not necessarily leave settlement as the singular focus of civil litigation. What has supplanted the trial culture is not settlement alone but rather a culture of pretrial practice.⁴ Twenty-first-century litigation has come to revolve around the two hallmarks of pretrial practice: protracted discovery and dispositive motions. Unquestionably, settlement is one of the driving objectives; adversaries seek to make litigation as painful and expensive as possible for each other so that settlement becomes the better option. Yet there is a second, omnipresent objective: maximization of fees for lawyers who charge their clients by the hour.⁵ One law firm’s fee-driven approach was recently exposed in

* Professor, Case Western Reserve University School of Law. Many thanks to Fordham University School of Law and Bruce Green for the invitation to contribute to this important colloquium entitled *Civil Litigation Ethics at a Time of Vanishing Trials* and to the other participants for their engaging scholarship and insightful comments, particularly Howard Erichson. For an overview of the colloquium, see Judith Resnik, *Lawyers’ Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899 (2017).

1. See, e.g., SUJA A. THOMAS, *THE MISSING AMERICAN JURY 2* (2016) (“The jury has essentially vanished.”); see also *infra* notes 17–19 and accompanying text.

2. See Richard A. Nagareda, *1938 All over Again?: Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 647 (2011) (“Settlement rather than trial has emerged as the dominant endgame of civil litigation, especially litigation complex in substance or procedural format.”); Nancy A. Welsh, *I Could Have Been a Contender: Summary Jury Trial as a Means to Overcome Iqbal’s Negative Effects upon Pre-Litigation Communication, Negotiation and Early, Consensual Dispute Resolution*, 114 PENN ST. L. REV. 1149, 1150 n.1 (2010) (collecting authorities); see also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (critiquing settlement as inconsonant with justice).

3. Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1511 (2016).

4. See *id.* at 1512 (“Part and parcel of the vanishing trial is a focus on pretrial practice.”).

5. See Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 246 (1996) (“Attorneys who work on an hourly fee basis have an incentive to defer settlement

litigation where discovery uncovered a partner gleefully celebrating the size of a bill and encouraging his colleagues to “[c]hurn that bill, baby!”⁶ It is the worst-kept secret in the legal profession.

These twin objectives—extracting settlement and maximizing billable hours—have fostered a subculture of litigation that can obscure the goal of “ascertaining the truth and securing a just determination.”⁷ Particularly in high-stakes litigation, the pretrial phase of a lawsuit has become “a stage unto itself, no longer a prelude to trial but rather assumed to be the way to end a case *without trial*”⁸—in short, a *pretrial industry*. Moreover, its emergence raises important questions about the ethical obligations of lawyers to avoid improperly exploiting the powerful tools afforded by the judicial system for their clients’ or their own personal gain.⁹

The judicial system does a poor job of responding. Judges are typically eager to move cases from their dockets by encouraging parties to settle.¹⁰ They can also be slow and reluctant to rule on civil motions, particularly discovery motions.¹¹ As a consequence, courts often turn a blind eye to abuses, so parties often have the unbridled ability to pursue or to obstruct discovery, regardless of the merits of their positions.¹² To make matters worse, the judicial system has reacted to the pretrial industry by erecting barriers that purport to address the problem but that actually impose disproportionate burdens on the parties least able to bear them.¹³ Through

and to continue working on the case as long as their return per hour of work on the case exceeds their opportunity cost of time. Thus, hourly fee attorneys may sometimes recommend against settlement early in the litigation even when settlement would be in the client’s best interest.”)

6. Andrew Strickler, *DLA Piper Emails a Wake-Up Call on Bill Padding*, LAW360 (Mar. 26, 2013, 9:58 PM), https://www.law360.com/articles/427386/dla-piper-emails-a-wake-up-call-on-bill-padding?article_related_content=1 [<https://perma.cc/R5KH-KQS8>].

7. See FED. R. EVID. 102.

8. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937 (2000).

9. To be sure, some commentators have offered a more charitable view. John H. Langbein ascribes the demise of the civil trial to the “better mousetrap” reflected in the civil rules: “a civil procedure centered in pretrial discovery. Litigants no longer go to trial because they no longer need to.” John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 569 (2012).

10. See Freer, *supra* note 3, at 1508.

11. See *infra* notes 136–38 and accompanying text; see also James G. Carr, *From the Bench: Fixing Discovery: The Judge’s Job*, LITIGATION, Summer–Fall 2012, at 8 (“[A]djudication of discovery motions takes time. The busier the court, the less time it has for such ancillary disputes.”); John Burritt McArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits*, 24 HOFSTRA L. REV. 865, 883 n.51 (1996) (“[J]udges can get bogged down in trial and trial delays gradually back up the judicial time necessary to handle discovery matters.”).

12. See Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 14 (1992) (noting the “injustices of unbridled discovery”); Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN’S L. REV. 893, 914 (2008) (noting the U.S. Supreme Court’s concern about “unbridled large-case discovery and the perceived inability of trial judges to control it”).

13. See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 304 (2013) (stating that the Supreme Court’s support of litigation reforms “seems to have placed a thumb on the justice scale favoring corporate and government defendants”).

higher pleading standards, tighter discovery rules, and greater reliance on summary judgment, judges have made it virtually impossible for parties with legitimate grievances but limited resources to have their day in court, especially against wealthier adversaries.¹⁴ As Arthur Miller explained, “[T]he federal courts have erected a sequence of procedural stop signs during the past twenty-five years that has transformed the relatively uncluttered pretrial process envisioned by the original drafters of the Federal Rules into a morass of litigation friction points.”¹⁵

While some argue that “[r]eturning to a trial model would be a significant step toward fulfilling the traditional expectations for the federal courts,”¹⁶ that step backward is unlikely to occur. But I agree that fixes are in order, and I offer two. First, we should consider requiring at least some parties to engage in early settlement evaluation—ideally before extensive discovery gets underway—by submitting cases to summary jury trials and imposing consequences on parties who choose to disregard the results. Second, we should allocate a greater percentage of judicial resources to discovery management through the routine appointment of special masters to curtail the discovery free-for-all. Neither fix is without its costs, but the costs are likely much lower than the costs of perpetuating the pretrial industry that currently drives civil litigation in the United States.

I. INCENTIVES THAT PROMOTE THE PRETRIAL INDUSTRY

Oft-quoted statistics, relying heavily on Professor Marc Galanter’s research,¹⁷ reinforce the now-familiar truism that most civil cases do not end in trial. Absolute numbers of trials have dropped in the last several decades, even as civil filings have increased dramatically.¹⁸ The percentage of civil cases ending in trial fell from 11.5 percent in 1962 to only 1.8 percent in 2002.¹⁹ Certainly some of the nontrial dispositions are the product of judicial rulings on pretrial motions but most—perhaps as high as 95 percent of civil cases—terminate through settlement²⁰ to the point where

14. See generally Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531 (2016).

15. Miller, *supra* note 13, at 309.

16. Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 762 (2010).

17. See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

18. See, e.g., Patricia Lee Refo, *The Vanishing Trial*, LITIGATION, Winter 2004, at 1 (“[O]ur federal courts actually tried fewer cases in 2002 than they did in 1962, despite a fivefold increase in the number of civil filings . . .” (emphasis omitted)).

19. See *id.*; see also THOMAS, *supra* note 1, at 2 (citing different statistics, but reaching the same general conclusion); John Barkai, Elizabeth Kent & Pamela Martin, *A Profile of Settlement*, COURT REV., Fall–Winter 2006, at 34 (noting that less than 3 percent of civil cases terminate in a trial verdict).

20. See, e.g., Robert B. McKay, *Rule 16 and Alternate Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 820 (1988). But see Barkai, Kent & Martin, *supra* note 19, at 35 (“Although ‘most cases settle,’ the percentage of cases that settle varies dramatically by the type of case. . . . Contrary to the popular saying, nowhere near 90% or more of cases settle (although torts come close).”).

commentators describe a “judicial ‘settlement culture’” that “has become pervasive in the federal courts.”²¹

Concurrently, there is a well-recognized reality that financial considerations play a larger role in driving the legal profession than they did when trials were more frequent. In fact, “the prevailing trend within the legal community has been to associate the decline of professionalism in the practice of law with the emergence of increasing commercialism, indicating that law has become more a business than a profession.”²² This dynamic plays itself out in two competing ways. On the one hand, lawyers who charge their clients by the hour or project have an incentive to increase the volume of billable work.²³ On the other hand, lawyers compete for client business based at least in part on the cost-effectiveness of their services.²⁴

One of the ways lawyers sometimes reconcile the competing business incentives is to drive up their adversaries’ litigation costs. Litigation costs sometimes matter more in pricing settlements than the merits of the underlying claims.²⁵ Thus, the more pain lawyers can inflict, the better the settlement deal they can ostensibly extract for their clients.²⁶ The pain can be in the form of the direct monetary costs of litigation, or it can be in the form of business disruption, negative publicity, and risk (even small risk or just the *perception* of small risk) of catastrophic liability. So, if the clients have the resources and the will to endorse the pain-infliction philosophy, lawyers achieve their objective of maximizing firm revenue while simultaneously furthering their clients’ ostensible interests. As a result, pretrial activities serve not to prepare the best case for a trial (which will almost never happen) but instead serve to win a pretrial victory. Lawyers exploit the pretrial tools not only for a victory through motion practice but also for fee generation and settlement leverage. These latter ends, though

21. Freer, *supra* note 3, at 1509.

22. Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217, 218 (2002).

23. See, e.g., Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 956 (2000) (“[I]t is not at all evident that practitioners, even highly ethical professionals, resist market incentives in any systematic way.”).

24. See, e.g., Jay Fitzgerald, *Corporate Clients Shift Priorities for Law Firms*, BOS. GLOBE (Mar. 2, 2014), <https://www.bostonglobe.com/business/2014/03/02/white-shoe-law-firms-scuffed-lower-cost-competition-and-growing-clout-corporate-clients/R7E5m4U4njUjRzBtVFJGKL/story.html> [<https://perma.cc/P23C-LPL7>].

25. See Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437, 437 (1988); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases”); Nagareda, *supra* note 2, at 655 (“As [the probability of success on the merits] approaches zero, the settlement zone for a given lawsuit will tend to be defined primarily by the sum of the two sides’ litigation costs.”).

26. See Brian T. Fitzpatrick & Cameron T. Norris, *One-Way Fee Shifting After Summary Judgment* 5–17 (Vanderbilt Pub. Law & Legal Theory, Research Paper No. 16-47, 2016), <https://ssrn.com/abstract=2845627> (describing costs of discovery and incentives for lawyers to abuse it for purposes of exacting settlement leverage) [<https://perma.cc/7SVD-EYPP>].

divorced from the stated objectives of the civil rules,²⁷ are the incentives that ultimately drive the abuses rampant in the pretrial industry.

The paradigm applies most logically to large-firm practice, where clients pay by the hour or the project. Liberal discovery rules are “chiefly responsible for the increased cost of legal services and for increased lawyer wealth in the last part of the twentieth century.”²⁸ In turn, “[l]arge firms vie for reputations that lead to rankings such as most ‘fearsome’—a category describing firms that ‘threaten to disrupt business as usual’ and ‘have the ability to impact operations, rack up costly bills and potentially ruin reputations.’”²⁹ The paradigm also applies to lawyers who charge contingent fees and who exploit pretrial devices to extract what Judge Richard A. Posner, channeling Judge Henry Friendly, has characterized as “blackmail settlements.”³⁰ Lawyers who do not charge by the hour or by the project certainly have a financial incentive to procure the highest possible settlement with the least amount of work,³¹ but they also know that their successful exploitation of the pretrial tools will bear directly on the size of the settlements they can extract from their adversaries.

From an ethical standpoint, we should certainly find these incentives troubling, as we would in any commercial industry that permits a service provider to exploit her customer. But the legal profession is no ordinary service provider; we are governed by ethical rules requiring us to expend “reasonable efforts to expedite litigation consistent with the interests of the client”³² and proscribe frivolous discovery conduct.³³ Certainly most lawyers honor their ethical obligations, but they do so in spite of, not in keeping with, economic incentives. And the self-regulated nature of the legal profession fails adequately to curb the behavior of lawyers unable to resist the economic rewards of the unethical litigation conduct that can infect the pretrial industry.³⁴

27. See FED. R. CIV. P. 1 (“These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

28. Freer, *supra* note 3, at 1514.

29. Andrew S. Pollis, *Trying the Trial*, 84 GEO. WASH. L. REV. 55, 71 (2016) (quoting Janet H. Cho, *Jones Day Again Makes the “Fearsome Foursome,” the Top 4 Law Firms Clients Most Dread Facing*, CLEVELAND.COM (Oct. 1, 2014, 10:29 AM), http://www.cleveland.com/business/index.ssf/2014/10/jones_day_again_makes_the_fearsome_foursome_the_top_4_law_firms_clients_most_dread_facing.html [https://perma.cc/MS98-WK KZ]).

30. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995); see also Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1674 (2011).

31. See Kessler et al., *supra* note 5, at 246 (noting that economically, “the contingent fee lawyer has an incentive to settle a case very early in the litigation, even for an amount much lower than the client would receive after trial, because the attorney bears all the litigation expenses and can earn a high hourly fee by an early settlement”); see also Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evolution*, 45 EMORY L.J. 523, 546 (1996).

32. MODEL RULES OF PROF’L CONDUCT r. 3.2 (AM. BAR ASS’N 2016).

33. See *id.* r. 3.4(d).

34. See Pollis, *supra* note 29, at 107–08.

II. LITIGATION TACTICS THAT ANIMATE THE PRETRIAL INDUSTRY

If the rise of the pretrial industry is contrary to the purpose of the civil rules, it certainly finds ammunition—even implicit endorsement—in the procedural tactics the rules themselves authorize. Chris Guthrie has suggested that “the labyrinthine structure created by the rules virtually guarantees” that litigants will “traverse pretrial and trial processes that are almost invariably lengthy and costly.”³⁵ Because lawyers inclined to use the civil rules as weapons tend to exploit the various methods of pretrial discovery (and methods of avoiding it), Part II.A addresses those discovery tactics first. Part II.B then addresses the other major weapons that constitute the arsenal of the pretrial industry: motions to dismiss (based on now-heightened pleading standards) and motions for summary judgment.

A. Discovery Machinations as the Primary Currency of the Pretrial Industry

Civil litigants ostensibly enjoy the privilege of discovering relevant information³⁶ through several devices, including interrogatories,³⁷ requests for admissions,³⁸ document requests,³⁹ and depositions.⁴⁰ These devices impose a multitiered matrix of burdens that are ripe for attorneys to exploit, constituting “as much as 90 percent of litigation costs,”⁴¹ particularly in high-stakes litigation or litigation in which at least one of the parties can afford to pursue aggressive discovery as a way of wearing down its opponent.

At the most superficial level, the party requesting written discovery (or that party’s lawyer in contingent fee cases) bears the relatively manageable cost of preparing the discovery requests, while the responding party bears the sometimes “exorbitant” cost of responding.⁴² Depositions may require equal time for the lawyers (for preparation and attendance), but they impose

35. Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1121 (2003).

36. See FED. R. CIV. P. 26(b).

37. See *id.* 33.

38. See *id.* 36.

39. See *id.* 34.

40. See *id.* 30.

41. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000)); see also Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1656–57 (2016) (“Financially, discovery is unmatched among the major sources of litigation costs; it generates more legal fees and expenses than any other round of court proceedings. According to various estimates, discovery can consume from fifty to as much as ninety percent of total legal costs in some cases.”).

42. See Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31, 36–37 (1993). See generally Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773 (2011).

a far greater burden on the party being deposed or that party's employer (for time away from productivity and anxiety over the deposition process) than on the party taking the deposition. Thus, at the superficial level, the party requesting discovery has the capacity to create settlement leverage by pursuing an aggressive discovery plan that will impose significant burdens on its adversary.

But, as every litigator knows, there is much more to it. At the superficial level, pretrial discovery proceeds without court involvement; there is no need for a court order to initiate discovery.⁴³ Moreover, the responding party need not obtain a court order to resist written discovery; the rules permit a party to stand on objections in lieu of providing substantive information or producing documents responsive to written discovery requests.⁴⁴ And, of course, even a party who provides some substantive information or documents can also withhold some, often leaving the requesting party uncertain whether anything has been withheld (and, if so, what it is).⁴⁵ Thus, the incentives from both an attorney-fee and settlement-leverage standpoint encourage lawyers to serve onerous discovery requests on adversaries while holding back substantive responses to the extent possible and litigating their positions if challenged.

Depositions work slightly differently but in ways that actually foment the problem because they are easy to initiate and burdensome to oppose. A party may not avoid a deposition simply by objecting, as she may do (at least at first) in the case of written discovery requests. Instead, the would-be deponent must apply for a protective order ahead of the scheduled deposition to avoid having to appear at the time and place designated by the requestor.⁴⁶ Thus, the mere serving of a one-paragraph deposition notice⁴⁷ triggers a duty on the deponent either to attend or to seek a protective order.⁴⁸ Both options are far more burdensome than the requesting party's simple task of drafting and serving the notice.

The burdens are even greater if the deposition notice is directed to an entity and designates specific topics on which the deponent must be knowledgeable. In that event, the "named organization must then

43. The only predicate to initiating discovery is a pre-discovery meeting with opposing counsel, designed ostensibly to avoid discovery disputes. *See* FED. R. CIV. P. 26(d)(1), (f); *see also id.* 26(d)(2) (authorizing service of document requests twenty-one days after service of the summons but deeming those requests served as of the date of the first Rule 26(f) conference). To be sure, the rules authorize trial courts to "modify the extent of discovery" at an initial pretrial conference. FED. R. CIV. P. 16(b)(3)(B)(ii). But the decision whether even to schedule such a conference lies in the "sound discretion of the trial court." *Hayden v. Chalfant Press, Inc.*, 281 F.2d 543, 545 (9th Cir. 1960); *see also* FED. R. CIV. P. 16(a) (stating that the court "may" hold pretrial conference).

44. *See, e.g.*, *Badalamenti v. Dunham's, Inc.*, 896 F.2d 1359, 1362 (Fed. Cir. 1990) (listing various options in responding to document requests, including merely "objecting").

45. The 2015 amendment to FED. R. CIV. P. 34(b)(2)(C) now requires objections to "state whether any responsive materials are being withheld on the basis of that objection." It is too early to assess the effect of that new requirement.

46. *See, e.g.*, *Kamps v. Fried, Frank, Harris, Shriver & Jacobson L.L.P.*, 274 F.R.D. 115, 118 (S.D.N.Y. 2011).

47. *See* FED. R. CIV. P. 30(b)(1).

48. *See id.* 26(c).

designate” a representative “to testify on its behalf.”⁴⁹ The preparation of such a representative for deposition can be “onerous.”⁵⁰ And the failure to prepare the witness adequately is “tantamount to a failure to appear” for the deposition at all.⁵¹ The service of such a deposition notice therefore automatically imposes significant costs on an adversary.

The burdens increase demonstrably when court intervention is required. A party that wishes to challenge objections to written discovery may move the court to compel it,⁵² just as a party seeking to avoid a deposition may seek a protective order. But in both cases, the movant must certify to the court that she has attempted to resolve the matter with opposing counsel before bringing her motion,⁵³ so the parties must go through the process of detailing their respective positions and seeking to come to common ground. While this “meet-and-confer” requirement has, theoretically at least, the salutary benefit of eliminating or streamlining the disputes that require judicial involvement,⁵⁴ it can delay the ultimate resolution of the discovery dispute.⁵⁵ And the meet-and-confer requirement actually provides additional incentives not to provide discovery in the first instance because the responding party knows that its adversary cannot move to compel discovery without having first attempted these pre-motion negotiations; the withholding party can thus eventually retreat from unreasonable positions with impunity, depriving the requesting party an opportunity to expose the recalcitrance to the court.

Even when the process moves to the point of motion practice (a costly exercise in itself),⁵⁶ the very nature of discovery disputes renders them vulnerable to poor judicial oversight.⁵⁷ The fact-intensive nature of the

49. *Id.* 30(b)(6); see also James C. Winton, *Corporate Representative Depositions Revisited*, 65 BAYLOR L. REV. 938, 971 (2013) (“[T]he burden is on the corporation to gather and present testimony on the subjects designated.”). Commentators have suggested that the burden thus imposed on the entity can be draconian. See, e.g., Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 ALA. L. REV. 651, 728–29 (1999).

50. *Calzaturificio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 37 (D. Mass. 2001); *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 639 (D. Minn. 2000).

51. *Black Horse Lane Assocs., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000).

52. See FED. R. CIV. P. 37(a).

53. See *id.* 37(a)(1) (“The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”); *id.* 26(c)(1) (same).

54. See, e.g., *Alexander v. FBI*, 186 F.R.D. 197, 199 (D.D.C. 1999) (“The entire purpose of the meet-and-confer rule is to force litigants to attempt to resolve, or a [sic] least narrow, the disputed issues to prevent the unnecessary waste of time and effort on any given motion.”).

55. See, e.g., *Sprint Commc’ns Co. v. Big River Tel. Co.*, No. 08-2046-JWL, 2009 WL 1580307, at *1 (D. Kan. June 4, 2009) (questioning “whether the letter and the spirit of the meet-and-confer rules were actually satisfied,” but resolving the discovery dispute “in the interest of avoiding further delay”).

56. See, e.g., Curtis E.A. Karnow, *Complexity in Litigation: A Differential Diagnosis*, 18 U. PA. J. BUS. L. 1, 52 (2015) (describing “formal discovery motion” as “cumbersome” and “expensive”).

57. Indeed, “judicial reluctance to deal with discovery disputes is due in part to the courts’ lack of the time and resources necessary to engage in the fact-intensive review and in

disputes is often a serious impediment to timely judicial attention, particularly because of other, ostensibly more pressing, obligations judges must fulfill.⁵⁸ So discovery disputes can linger, usually to the advantage of one side. When judges do rule on discovery disputes, they often lack the factual background to appreciate important nuances or the extent to which either side may have engaged in questionable discovery tactics, and they lack the time and inclination to dig into the finer points.⁵⁹ The U.S. Supreme Court has implicitly recognized as much, noting that “the success of judicial supervision in checking discovery abuse has been on the modest side.”⁶⁰

The 2015 amendments to the federal discovery rules⁶¹ were designed “ostensibly to make litigation faster and cheaper”⁶² and thus to curtail some of the currency of the pretrial industry.⁶³ But there are no substantive changes in the rules that will ensure significant change,⁶⁴ so it is questionable whether the changes will make progress toward that objective.

The most important change is to the language setting forth the standard for discovery. Until 2015, information was discoverable if it was “reasonably calculated to lead to the discovery of admissible evidence.”⁶⁵ Now, the standard expressed in the rule is that a party may request even relevant discovery only if it is “proportional to the needs of the case,” with several factors informing that proportionality test.⁶⁶ It is too soon to assess the practical effect of this language change,⁶⁷ and some have suggested that

part to the courts’ unwillingness to make fact-dependent calls as to lawyers’ professional behavior.” Lindsey D. Blanchard, *Rule 37(a)’s Loser-Pays “Mandate”: More Bark Than Bite*, 42 U. MEM. L. REV. 109, 132 n.88 (2011).

58. *See id.* at 126 (“[J]udges increasingly have little time to spare.”).

59. *See id.* at 127–28.

60. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

61. The Supreme Court submitted to Congress the 2015 amendments to the Federal Rules of Civil Procedure on April 29, 2015, *see* Letter from John G. Roberts, Chief Justice, U.S. Supreme Court, to John A. Boehner, Speaker, U.S. House of Representatives (Apr. 29, 2015), https://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf [<https://perma.cc/Z9LU-XC4V>], and they went into effect on December 1, 2015, *see* Order Amending the Federal Rules of Civil Procedure (2015), https://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf [<https://perma.cc/Z9LU-XC4V>].

62. Kenneth R. Berman, *Reinventing Discovery Under the New Federal Rules*, LITIGATION, Spring 2016, at 22.

63. FED. R. CIV. P. 1 advisory committee’s note to 2015 amendment (“[D]iscussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay.”).

64. *See infra* notes 133–34 and accompanying text. For an excellent summary of the rule changes and a summary of the courts’ early application of them, *see* John M. Barkett, *The First 100 Days (or So) of the 2015 Civil Rules Amendments*, 8 Digital Discovery & e-Evid. (BNA), 8 DDEE (Apr. 14, 2016).

65. FED. R. CIV. P. 26(b)(1) (2007) (amended 2015).

66. FED. R. CIV. P. 26(b)(1). The relevant factors informing proportionality are “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” *Id.*

67. *See* Barkett, *supra* note 64.

it is no substantive change at all.⁶⁸ But it stands to reason that the new standard will continue to engender discovery battles,⁶⁹ as will the very fact of its newness. Among other things, the factors that inform proportionality⁷⁰ are fact and case specific, so by definition the scope of discovery will differ in every case and will require significant attorney time to evaluate and advocate. Ultimately, permitting less discovery under the new standard will lower the aggregate costs of discovery, but the result in that scenario simply moves the settlement needle in favor of the party that benefits from the procedural change, divorced from the ultimate merits. The possibility of exploiting that shift (primarily of benefit to defendants) or bearing the burden of it (primarily absorbed by plaintiffs) creates all the more incentive for the parties to litigate over the scope of discovery.

Motion practice also raises the related question of cost shifting and sanctions. The rules ostensibly require the losing party to pay attorney's fees associated with discovery motions,⁷¹ but that rule has several exceptions, including if "circumstances make an award of expenses unjust."⁷² Other sanctions are available for parties who violate discovery orders.⁷³ Yet sanctions can be as effective a tool for the wrongdoer as they are for the wronged; discovery disputes often lead to "satellite litigation over sanctions," which "may work to the advantage of the guilty party."⁷⁴ And the available sanctions for lost or missing information—often electronically stored information—have also fueled the pretrial industry; "[t]he more that lawyers learned of these disputes and how they could alter the settlement landscape or secure a case-dispositive sanction, the more these disputes proliferated."⁷⁵

Finally, it is worth emphasizing that the costs inherently associated with discovery become exponentially more onerous when lawyers deliberately

68. See, e.g., *Vaigasi v. Solow Mgmt. Corp.*, No. 11 Civ. 5088(RMB)(HBP), 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016) ("[T]he 2015 Amendments constitute a reemphasis on the importance of proportionality in discovery but not a substantive change in the law."). Even before the amendment, the rule provided that "[t]he frequency or extent of . . . discovery . . . shall be limited by the court if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit . . ." FED. R. CIV. P. 26(b)(2)(C) (2007) (amended 2015).

69. Berman, *supra* note 62, at 29 ("Lawyers . . . still will have boundary disputes, though now over differently defined boundaries.").

70. See *supra* note 66 and accompanying text.

71. See FED. R. CIV. P. 37(a)(5)(A) ("If the motion is granted . . . the court *must*, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." (emphasis added)); see also *id.* 37(a)(5)(B) (requiring the movant to pay costs and attorney's fees if the motion is denied); *id.* 37(b)(2)(C).

72. *Id.* 37(a)(5)(A)–(B).

73. *Id.* 37(b).

74. Edward J. Imwinkelried, *A New Antidote for an Opponent's Pretrial Discovery Misconduct: Treating the Misconduct at Trial as an Admission by Conduct of the Weakness of the Opponent's Case*, 1993 BYU L. REV. 793, 817.

75. Berman, *supra* note 62, at 25.

exploit the rules to inflict pain on their adversaries.⁷⁶ “Some have analogized these lawyers to Sylvester Stallone’s movie character, the bellicose John Rambo,”⁷⁷ and the generally unsupervised nature of discovery lends itself to this sort of exploitation.⁷⁸ Indeed, “[d]iscovery bullies aggressively pursue production of embarrassing or burdensome information of questionable or no relevance to the underlying dispute,” while “discovery evaders hide the ball; they make the process ‘a game to be played by wordsmiths who will exploit every real and imagined ambiguity’ to avoid honest responses.”⁷⁹ Although it is difficult to quantify the extent of such abuse, “[t]he general sense of both practitioners and jurists is that [it] happens, and it happens a lot.”⁸⁰ And the costs associated with these abusive tactics are more than simply financial.⁸¹ Some lawyers and parties lack the fortitude and grit to litigate in this highly adversarial environment and retreat to mispriced settlement, regardless of the merits of their claims or defenses.⁸² Beyond the costs borne by the parties in individual litigation matters, discovery abuse imposes even greater systemic costs on our justice system, generating “considerable concern to . . . courts around the nation.”⁸³

B. Dispositive-Motion Practice as a Secondary Currency of the Pretrial Industry

The second major component of the pretrial industry is dispositive-motion practice, consisting primarily of motions to dismiss (which typically

76. See generally Pollis, *supra* note 29, at 68–70 (discussing the problem of lawyers who intentionally engage in abusive litigation tactics to bully their adversaries); G.M. Filisko, *You’re Out of Order!: Dealing with the Costs of Incivility in the Legal Profession*, A.B.A. J. (Jan. 1, 2013), http://www.abajournal.com/magazine/article/youre_out_of_order_dealing_with_the_costs_of_incivility_in_the_legal [<https://perma.cc/75SP-Q4DF>].

77. Pollis, *supra* note 29, at 68.

78. See *id.* at 70 (“Misbehavior in depositions has been a particular problem, perhaps because they proceed in person and without judicial supervision.”).

79. *Id.* at 69 (quoting Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 209, 229 (2006)).

80. Fitzpatrick & Norris, *supra* note 26, at 15.

81. See, e.g., Marrero, *supra* note 41, at 1656 (“When carried to extremes, [discovery] costs are not only bountiful attorneys’ fees, but also the inordinate time, expense, abuse, and frustration for all concerned.”).

82. Cf. Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 45–46 (describing “litigants not only as calculating creatures, but also as feeling creatures. . . . [L]itigants base at least some litigation decisions on ‘a desire to avoid the unpleasant psychological consequences’ of regret arising from ‘a decision that turns out poorly.’” (quoting Richard P. Larrick, *Motivational Factors in Decision Theories: The Role of Self-Protection*, 113 PSYCHOL. BULL. 440, 440 (1993))); see also Marrero, *supra* note 41, at 1658 (“The typical aim of excessive discovery tactics is to overwhelm an adversary with serial requests to disclose documents of massive proportions or questionable value, or to meet burdensome production schedules. In either event, the design of the demand, as one court observed in a commercial dispute, is to drive the inconvenience and costs of litigation so high as to force the opponent to abandon the fight.”).

83. *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 52 (Del. 1994). Despite the generalized concern, courts have failed to respond adequately to the pervasive problem of litigation misconduct. See Pollis, *supra* note 29, at 107–08.

attack the sufficiency of the pleaded allegations)⁸⁴ and motions for summary judgment (which challenge the need for a trial to resolve factual disputes).⁸⁵ Both types of motions, if successful, allow the movant to avoid trial. Their prevalence emphasizes the reality that litigation is focused on pretrial disposition. While these motions are ostensibly designed to curtail litigation costs, they (summary judgment motions in particular) have become a source of fee generation for lawyers and, relatedly, a settlement incentive for the parties because of the cost of opposing them. These incentives are separate from the underlying merits of the dispute.

1. Rule 12(b)(6) Motions

In 2007, the Supreme Court introduced heightened pleading with its decision in *Bell Atlantic Corp. v. Twombly*.⁸⁶ The scholarly literature is replete with responses and critiques of *Twombly* and the Court's 2009 follow-up decision *Ashcroft v. Iqbal*.⁸⁷ Some, like Judge Patrick E. Higginbotham, ascribe the rise of the heightened pleading standard to the exorbitant costs of discovery: "[u]nable to control discovery, the regulatory response has been to attempt to limit access to it" by dismissing cases before discovery begins.⁸⁸ The *Twombly* decision itself reflects this intention.⁸⁹

While litigators once assumed that dismissal was generally available only if the pleaded factual allegations were either insufficient to support a claim or not actionable at law,⁹⁰ that assumption has now faded. Today, the available inferences to be drawn from the factual allegations and their plausibility are subject to judicial scrutiny at the pleading stage.⁹¹ The very subjectivity of these criteria⁹² affords lawyers every incentive to exploit them, especially given the substantial possibility that "a tie goes to the defendant."⁹³ And, of course, the cost of drafting and opposing these motions aids in fee generation (although, admittedly, a successful motion would deprive the winning lawyer of the fees associated with the discovery

84. See FED. R. CIV. P. 12(b)(6).

85. See *id.* 56.

86. 550 U.S. 544 (2007).

87. 556 U.S. 662 (2009); see Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. REV. 435, 450 n.95 (2014) (discussing the body of literature on *Twombly* and *Iqbal*).

88. Higginbotham, *supra* note 16, at 750–51.

89. *Twombly*, 550 U.S. at 558 ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." (citation omitted)).

90. *E.g.*, *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) ("Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.").

91. See Pollis, *supra* note 87, at 451, 460.

92. Indeed, "*Iqbal* has been resoundingly criticized for, among other things, failing to articulate a cohesive measure by which lower courts can differentiate between unsubstantiated conclusory allegations (apparently implausible under *Iqbal*) and factually detailed assertions sufficient to overcome a motion to dismiss (apparently plausible)." *Id.* at 451.

93. See *McCauley v. City of Chicago*, 671 F.3d 611, 626 (7th Cir. 2011) (Hamilton, J., dissenting).

that dismissal would avoid). While commentators may debate the wisdom or significance of these decisions, “there seems to be no doubt that the cases have increased the number of Rule 12(b)(6) motions to dismiss.”⁹⁴ Thus, whether or not warranted or successful, the battle over pleading sufficiency has become a major tool of the pretrial industry.

2. Summary Judgment Motions

In 2010, Judge Higginbotham observed that motions for summary judgment have “displaced the trial as the destination point for litigation.”⁹⁵ Indeed, the summary judgment motion has become a staple of litigation since the Supreme Court’s 1986 trilogy of decisions clarifying the summary judgment standards⁹⁶ and tacitly encouraging trial judges to employ pretrial disposition more regularly.⁹⁷ Empirical evidence suggests that trial judges have done exactly that.⁹⁸ And, of course, summary judgment arguments depend heavily on evidentiary materials developed through discovery,⁹⁹ so those two components of the pretrial industry exacerbate each other.

Properly granted summary judgment motions obviously achieve efficiency goals because they spare all parties the cost of trial while disposing of cases on their merits. But the added efficiency is offset by improper grants of summary judgment (particularly when reversed on appeal, leading to additional trial court proceedings)¹⁰⁰ and by summary judgment denials, proper or improper, that provide no added value except to the attorneys who bill their time for working on them.¹⁰¹ They can easily become, as one commentator has noted, “a net drain on society.”¹⁰²

94. Freer, *supra* note 3, at 1515–16.

95. Higginbotham, *supra* note 16, at 746.

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

97. “[T]he 1986 Supreme Court trilogy is striking because of the strong pro-summary judgment language found throughout the Court’s three opinions.” Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1028 (2003).

98. Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 193 (“Empirical evidence suggests that the standard for summary judgment may have become more relaxed over time, in the sense that courts are more willing to grant motions for summary judgment today than in years past.”).

99. FED. R. CIV. P. 56(c)(1)(A) (listing available summary judgment evidence, which includes “depositions, documents, electronically stored information, . . . admissions, [and] interrogatory answers”); *see also* Langbein, *supra* note 9, at 570 (summary judgment motions are “routinely based on discovery product”).

100. More than 20 percent of summary judgments are reversed on appeal in federal courts, and the figures are even higher in the Federal Circuit. *See* Ted L. Field, “*Judicial Hyperactivity*” in the Federal Circuit: An Empirical Study, 46 U.S.F. L. REV. 721, 765 (2012).

101. I do not mean to ignore the value of clarity that a trial court can offer in denying summary judgment, either by narrowing the factual disputes that will define the trial or in resolving the parties’ disagreements over the applicable law. But “the summary judgment usually saves time only when it is granted and terminates a case or is sufficiently partially granted to streamline trial of a case.” Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication*

III. A TWO-PRONGED SOLUTION FOR DIFFUSING THE PRETRIAL INDUSTRY

Some scholars have called for the restoration of the civil trial as an antidote to the injustices of the pretrial industry¹⁰³ or as a prescription to reallocate to civil juries their constitutional power to resolve factual disputes.¹⁰⁴ It is unlikely that the judicial system will heed these calls, given the perceived costs of trial and the institutional inertia that has taken root over the decades. Indeed, the political antipathy toward the civil justice system¹⁰⁵ has prompted reforms that have made trial less likely, not more,¹⁰⁶ and there is no reason to believe that the trend will reverse course.

Nevertheless, there are reforms that would curtail some of the costs of the pretrial industry and restore emphasis on the merits of a case as the primary basis for evaluating settlement. I propose two such reforms here: (1) holding summary jury trials early in the litigation—before motion practice and discovery—to offer the parties a neutral evaluation of the merits by community members who would approximate the composition of a jury in a real trial, with consequences for parties who reject the results of the summary trial and then do worse at an actual trial and (2) routine appointment of special discovery masters to ensure that the costs of abusive discovery, financial and otherwise, do not play an outsized role in influencing outcomes.

A. Routinely Holding Summary Jury Trials

“The summary jury trial is a nonbinding . . . process presided over by a district or magistrate judge and designed to promote settlement in trial-ready cases.”¹⁰⁷ Its purpose is to “provide[] litigants and their counsel with

Process, 49 OHIO ST. L.J. 95, 172 (1988). As Arthur Miller has noted, “the expense and frequency of litigating summary judgment motions and the frequency of appeals from decisions granting them have undermined arguments espousing summary judgment as beneficial to judicial efficiency.” Pollis, *supra* note 87, at 490 (citing Miller, *supra* note 13, at 312 n.98).

102. D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 876 (2006).

103. See, e.g., Higginbotham, *supra* note 16, at 762. See generally Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011).

104. See Burbank & Subrin, *supra* note 103, at 402 (contending that “diminution of jury trials . . . is a tragedy”); Pollis, *supra* note 87, at 490 (“We must preserve the inference-drawing function that the Seventh Amendment clearly bestows on individual citizens who participate, through jury service, in the political process.”).

105. See generally Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285 (2002); Miller, *supra* note 13, at 302–03 (“Political candidates and office holders score cheap points with attacks on our justice system, cloaking themselves in the deceptive mantle of ‘tort reform.’”).

106. Professor Miller characterizes the impediments to trial as deliberately imposed “early-termination developments” designed “to suit the economic or political agendas of powerful interest groups at the expense of the original philosophical objectives of the Federal Rules of Civil Procedure.” Miller, *supra* note 13, at 310.

107. COMM. ON COURT ADMIN. & CASE MGMT., THE JUDICIAL CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 81 (2d ed. 2010) [hereinafter CIVIL LITIGATION

an advisory verdict after an abbreviated hearing in which counsel present summary evidence to a jury.”¹⁰⁸ It functions as a “sort of mock jury” in which “jurors are drawn from the actual jury pool and seated for an abbreviated trial.”¹⁰⁹ “Witnesses are generally not called,” but instead lawyers summarize the anticipated evidence as they attempt to persuade the mock jurors to reach an advisory verdict in their client’s favor.¹¹⁰ The whole process generally takes a day or less.¹¹¹

The concept of summary jury trials has been around for over thirty years.¹¹² But only about 25 percent of courts authorize it,¹¹³ and the procedure “has largely disappeared, in part because it was unavailable until too late in the litigation process.”¹¹⁴ Since summary jury trials are “thought to be most useful after discovery is complete,”¹¹⁵ there was no particular advantage in holding a summary jury trial rather than proceeding immediately to a full-blown trial.

But there is no reason that summary jury trials need to occur so late in the litigation process, after the pretrial industry has done its damage. To the contrary, in cases that involve factual disputes as to either liability or damages,¹¹⁶ permitting or requiring litigants to proceed to a summary jury trial *before* discovery begins would afford meaningful feedback to the parties about the relative strengths and weaknesses of their positions at an early stage of litigation.¹¹⁷ In effect, the parties could factor the results of the summary jury trial into their calculus of whether to proceed to discovery or whether to settle immediately. And, having not yet incurred the bulk of the litigation expenses, the parties may have an easier time reaching an agreement.¹¹⁸

MANAGEMENT MANUAL], <http://www2.fjc.gov/sites/default/files/2012/CivLit2D.pdf> [<https://perma.cc/C5W6-GK99>]. The *Civil Litigation Management Manual* “is for the guidance of judges. It is not intended to be relied upon as authority, and it creates no rights or duties.” *Id.* at i.

108. *Id.* at 81.

109. Bert I. Huang, *Trial by Preview*, 113 COLUM. L. REV. 1323, 1372 (2013).

110. CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 107, at 81.

111. Nancy A. Welsh, *I Could Have Been a Contender: Summary Jury Trial as a Means to Overcome Iqbal’s Negative Effects upon Pre-Litigation Communication, Negotiation and Early, Consensual Dispute Resolution*, 114 PENN ST. L. REV. 1149, 1186 (2010).

112. See Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984).

113. CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 107, at 82.

114. J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1740 (2012); see also CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 107, at 82 (“[F]ew cases are referred to this process.”).

115. CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 107, at 81.

116. Summary jury trials would not be particularly useful in cases that involve no contested issues or that turn only on issues of law.

117. See Welsh, *supra* note 111, at 1185–88.

118. See Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers’ Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 575–76 (2013) (“Late settlements appear to be a more common mistake than premature settlements because a significant percentage of cases settle after most or all discovery has been completed, on the eve of trial, or on the courthouse steps.”). *But see id.* at 573 (“Settlements consummated before the litigants possess adequate information, whether of factual or a legal nature, may be premature.”).

Summary jury trials, at least as they are traditionally set up, will not alone accomplish the goal of discouraging the pretrial industry, even if they occur earlier in the process. There are generally no consequences of disregarding the summary jury's verdict and proceeding to trial, other than the cost of the trial itself and the obvious risk that the trial result will be the same.¹¹⁹ An additional incentive is warranted to require the parties to make a rational choice about whether to proceed. For that reason, a party that is unwilling to honor the summary jury's verdict, and who instead forces her adversary to proceed to discovery, dispositive motions, and trial, must bear additional risk. I propose the risk of fee shifting: in the event the ultimate adjudicated result for the recalcitrant party is no better than the summary jury's verdict, the trial court should have the *discretion* to require that party to bear its adversary's attorney's fees. Imposing that risk will force the parties to think very carefully about the wisdom of proceeding.¹²⁰

In the context of summary jury trials, a fee-shifting proposal makes sense because the party potentially charged with its adversary's fees is responsible for the decision to begin the expensive discovery, dispositive motion, and trial process. A rational decision maker would accept the summary jury's verdict and cut off the pretrial industry at the legs unless she believes either that the summary jury's verdict was grossly aberrant or that proceeding to discovery would uncover additional evidence that would strengthen her case on summary judgment or at trial.

Of course, the proposal has its imperfections. The most obvious is information asymmetry; having not yet undertaken any discovery, the parties would not have access to the full panoply of evidence to exploit at the summary jury trial that they would hope to have by the time of a real trial, thus reducing the accuracy of the advisory verdict and the value the parties would place on it. The asymmetry arises because the problem would perhaps afflict plaintiffs more than defendants,¹²¹ and it would be particularly acute in cases where a party has concealed evidence or where as-yet-unprocured expert testimony is crucial to the outcome. But plaintiffs must have a good-faith factual basis for filing a lawsuit,¹²² and there is no

119. See CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 107, at 81 ("If no settlement is reached, the case returns to the trial track.")

120. My proposal mirrors a similar proposal I have made in another context: in claims that turn on an actor's state of mind, I have proposed that courts should restore to juries the power to resolve competing inferences, but in the event a jury reaches a defense verdict, it should also evaluate the strength of the plaintiff's evidence. See Pollis, *supra* note 87, at 484–85. If the evidence is extremely weak, the court should have the discretion to require the plaintiff to pay the defendant's attorney's fees, taking into account a number of mitigating or aggravating circumstances. See *id.* at 485–86. This proposal is aimed at reducing the number of state-of-mind cases dismissed at the pleading or summary judgment stage, while requiring plaintiffs to think carefully about whether their evidence is strong enough to run the risk of an adverse fee award.

121. See Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 159 (2011) (describing "large information asymmetries" in certain kinds of cases, "such as civil rights, constitutional, and employment discrimination cases," that can make it difficult for plaintiffs to plead adequately under heightened-pleading standards).

122. See FED. R. CIV. P. 11(b)(3) (stating that counsel's signature on a complaint constitutes representation that "the factual contentions have evidentiary support or, if

policy justification for shielding them from the scrutiny of a summary jury if their lawyers have met their ethical obligations before filing.¹²³ In some ways, then, the summary jury trial functions as another vehicle for scrutinizing the adequacy of the pleaded allegations,¹²⁴ but it does so through the lens of individuals who approximate actual jurors rather than the “members of an ‘elite class’” of judges (as motion practice does).¹²⁵ If the lack of information at the summary jury trial stage is the basis for a favorable defense verdict, then it is not unfair to allocate to the plaintiff the risk that she will not uncover sufficient information in discovery to succeed at later stages. In short, if the party with less access to relevant information makes the calculated decision to proceed with discovery instead of settling for the amount reflected in the summary jury trial result, that party would bear the risk that the information obtained through discovery will not support that choice. Moreover, the parties always have the option of revisiting settlement after discovery but before summary judgment or trial, thus giving them an opportunity to avoid fee shifting if discovery does not bear fruit.

A second imperfection is that parties would have an incentive to misstate the facts at the summary jury trial to increase the likelihood of a favorable result, thus distorting the settlement calculus and preventing a reasoned assessment of the fee-shifting risk. Judicial involvement would be useful here, both at the front end (in resolving disputes over the content of the presentations) and the back (in determining whether to award fees). A party who misrepresents the facts at the summary jury trial obviously should not be able to exploit the skewed result in later seeking a fee award. And, to the extent the misrepresentation is found to have been both deliberate and material, it could warrant the imposition of sanctions.¹²⁶

It is also true that summary jury trials would require the time and resources of both the parties and the presiding judge, so it has the potential to be costly. The extent of those resources will obviously depend on a number of factors, such as the extent to which the court will entertain objections to legitimacy of the factual representations in the parties’ presentations or will deliver substantive jury instructions on the applicable substantive law. The absence of the judge’s involvement on these kinds of

specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery”).

123. See MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 2016) (“A lawyer shall not bring . . . a proceeding, or assert . . . an issue therein, unless there is a basis in . . . fact for doing so that is not frivolous”); see also *id.* r. 3.3(a)(1) (stating that a lawyer shall not knowingly “make a false statement of fact or law to a tribunal”).

124. See Welsh, *supra* note 111, at 1186 (proposing “the use of summary jury trial to aid courts as they determine whether to allow plaintiffs to proceed into discovery”).

125. See Pollis, *supra* note 87, at 473 (quoting *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting)).

126. One colleague at the colloquium objected to the fee-shifting proposal because of the disproportionate risk it would create for the party, typically the plaintiff, with less pre-discovery access to information. That concern is well taken. Vesting the court with the discretion to impose sanctions for misrepresentations made during the summary jury trial is one way to mitigate it.

matters would likely distort the result, thus reducing the utility of the verdict as a settlement tool. Although the court's involvement would obviously be burdensome, there are ways of mitigating that burden, such as requiring the parties to work to reach agreement and shifting fees to any party who deviates from a fair representation of the facts or the law. Even if the legal system must absorb these costs, the corollary benefit from the earlier settlement would go a long way toward mitigating them and perhaps result in a net savings. Judge Posner has called for "'hesitation' in the use of summary jury trials" because they "enlarge jury service,"¹²⁷ but that concern also seems misguided if the process ultimately ends up reducing the need for judicial resources down the road.

At bottom, requiring parties to engage in a summary jury trial at the outset of litigation would give them an opportunity to hear an objective reaction to their claims and defenses before the pretrial industry takes its toll. It would empower them to make better-informed decisions about proceeding with the lawsuit at a point in time when they have not yet borne the exorbitant costs of litigation. And it would also afford "a marginalized plaintiff with the opportunity to tell her story to a judge, jury and decision-makers for the defendant," thus "approximat[ing] the experience of procedural justice provided by a 'day in court.'"¹²⁸

B. Greater Reliance on Special Discovery Masters

The second proposal I offer to curtail the costs of the pretrial industry is the more frequent appointment of special discovery masters. We need a judicial system that is more responsive to the actual experiences of civil litigation. It is thus imperative that we elevate the role of discovery supervision to a position commensurate with the burdens discovery imposes.

The need for greater supervision over discovery was one of the primary drivers of the 2015 amendments to the civil rules. The position papers submitted in advance of the 2010 Conference on Civil Litigation¹²⁹ (often referenced as the "Duke Conference") lamented that judges were not active enough in supervising discovery.¹³⁰ Seventy-two percent of attorneys

127. See Glover, *supra* note 114, at 1740 n.106 (quoting Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 386 (1986)).

128. See Welsh, *supra* note 111, at 1187.

129. See *2010 Civil Litigation Conference*, U.S. CTS., <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil> (last visited Mar. 25, 2017) [<https://perma.cc/2254-PL5W>].

130. See ADVISORY COMM. ON CIVIL RULES AND THE COMM. ON RULES OF PRACTICE AND PROCEDURE, THE JUDICIAL CONFERENCE OF THE U.S., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 4 (2010) [hereinafter ADVISORY COMM. REPORT], www.uscourts.gov/file/reporttothechiefjusticepdf ("One area of consensus in the various surveys, however, was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of that case.") [<https://perma.cc/C5X5-48VC>]; AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN

surveyed by the American Bar Association Section of Litigation “believe that early intervention helps to limit discovery,” but 60 percent also “believe that judges do not enforce [the existing] mechanisms to limit discovery.”¹³¹ This concern is not new.¹³²

Unfortunately, the amendments did very little to fix that problem. The drafters articulated the conflict in the competing objectives they sought to balance:

The challenge is to achieve [adequate judicial supervision] on a consistent, institutional basis without interfering with the independence and creativity of each judge and district responding to the specific mix of cases and docket conditions, and without interfering with the effective handling of many cases under existing rules and practices.¹³³

In the end, they opted for anemic precatory language that ultimately leaves the supervision of discovery to the discretion of individual judges, just as it always has been, and practitioners have bemoaned this missed opportunity.¹³⁴

Left to their own devices, judges are not likely to become more active in the resolution of discovery disputes under the new rules. Indeed, “[t]here are very few parts of the job that judges dislike more.”¹³⁵ Judges face many competing demands on their dockets—criminal cases, dispositive motions, requests for accelerated injunctive relief, settlement conferences, and (when it occurs) trial—so they must allocate their time and resources, and discovery disputes tend to fall to the bottom of the list.¹³⁶ And, while

COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009), http://www.uscourts.gov/sites/default/files/final_report_on_the_joint_project_of_the_actl_task_force_on_discovery_and_the_iaals_1.pdf (“Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial. Where abuses occur, judges are perceived not to enforce the rules effectively.”) [<https://perma.cc/BC38-FUJK>].

131. AM. BAR ASS’N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 3 (2009), http://www.uscourts.gov/sites/default/files/aba_section_of_litigation_survey_on_civil_practice_0.pdf [<https://perma.cc/H68Q-3MCH>].

132. See FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment (“[I]nvolvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center.”).

133. ADVISORY COMM. REPORT, *supra* note 130, at 4.

134. See, e.g., Ellen Ross Belfer, *Judicial Oversight of Discovery in the Amended Federal Rules of Civil Procedure*, LEON COSGROVE (Apr. 20, 2016), <http://www.leoncosgrove.com/blog/judicial-oversight-discovery-amended-federal-rules-civil-procedure/#sthash.byL3Ps vZ.dpuf> (The “amendments do nothing to require hold-out judges to become involved earlier or more consistently. . . . [T]here is no reason to expect that the desired judicial behavior will come about until the Federal Rules of Civil Procedure are amended to require it.”) [<https://perma.cc/W9A7-GRZL>].

135. Steven Weiss, *Seven Tips on How to Behave in Court*, LITIGATION, Spring 2016, at 4–5.

136. See *supra* notes 129–31 and accompanying text.

judges often delegate the discovery-management task to magistrates,¹³⁷ magistrates cannot dedicate themselves sufficiently to discovery matters given the range of their responsibilities and the increased frequency with which judges refer other types of case-management responsibilities to them.¹³⁸

Nevertheless, discovery disputes have an outsized impact on the cost of civil litigation and demand more compulsory supervision from the courts. To that end, courts should make more frequent use of their authority to appoint special masters to supervise discovery, as the civil rules authorize.¹³⁹ The use of special masters is growing, but “the number of reported appointments is still relatively small.”¹⁴⁰ Courts should embrace their authority to appoint special masters on a more regular basis to supervise discovery disputes. Special masters dedicated to that task, free of the other responsibilities that judges and magistrates must fulfill, will be in a better position to achieve the goal of ensuring that parties do not abuse the discovery process.

Moreover, the cost of routinely appointing special masters should not be an impediment. As a threshold matter, there will be no need for a special master’s time if the parties settle their dispute after the summary jury trial. In any event, courts are already authorized to allocate the special master’s payment “among the parties after considering the nature and amount of the controversy, the parties’ means, and the extent to which any party is more responsible than other parties for the reference to a master.”¹⁴¹ In ordinary circumstances, parties whose discovery conduct necessitates the services of the special master should pay her fees, an allocation the discovery rules already contemplate.¹⁴² Allocating the payment according to these equitable factors will deter parties from discovery abuse.

One colloquium colleague suggested that special masters may be more appropriate for some cases (presumably complex or high-stakes cases in which discovery disputes tend to arise more frequently and contentiously) than for others. The comment is reasonable, but practitioners will also confirm that discovery can get unnecessarily contentious even in the most unlikely of cases. So we should not establish fixed criteria to guide judicial discretion in deciding to appoint a special master. We should instead rely on its utility in streamlining discovery disputes, as well as the influence that

137. See 28 U.S.C. § 636(b)(1)(A) (2012); Landyn Wm. Rookard, Note, *A Referee Without a Whistle: Magistrate Judges and Discovery Sanctions in the Seventh Circuit*, 91 IND. L.J. 569, 571 (2016).

138. See Douglas A. Lee & Thomas E. Davis, “Nothing Less Than Indispensable”: *The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 NEV. L.J. 845, 925–47 (2016) (analyzing statistical data from 1990 to 2014 on the expansion of the magistrate’s role in federal court); see also Blanchard, *supra* note 57, at 127 (noting that magistrate judges “are equally busy”).

139. See FED. R. CIV. P. 53.

140. Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 369 (2008).

141. FED. R. CIV. P. 53(g)(3).

142. See *supra* note 71.

potentially paying for the special master's services will have on the parties' willingness to engage in improper discovery conduct.

In short, relying more routinely on special masters to supervise discovery will bring much-needed control to the cost-intensive discovery process that fuels the pretrial industry. The cost of discovery will decrease, at least to the extent abusive behavior drives it, or it will be borne by the party who deserves to bear it.

CONCLUSION

Like most endemic problems, the pretrial industry is rooted in human nature. We behave in ways that are most likely to reward us. As the civil trial disappeared, the pretrial industry evolved because it enriches lawyers and often extracts favorable settlements. But the costs to our system are enormous, and the settlements are often mispriced.

Judges are also human. No matter how much we cajole them or promulgate aspirational rules, they will never have the time or adequate incentives to curtail the pretrial industry. Indeed, nondiscretionary systemic change is the only way out of the money pit that the legal profession has dug for itself. By requiring civil litigants to participate in summary jury trials and imposing fee shifting on those who ignore the results, we can offer litigants a day in court that will arm them with important information about the strengths and weaknesses of their case, which, coupled with risk of proceeding to trial, should foster more frequent settlement. And by regularly appointing special discovery masters, we can provide supervision over the discovery process that its enormous influence on the cost of litigation warrants.

In sum, we can put an end to the pretrial industry, or at least reduce its magnitude. The question remains whether we truly have the determination to do it.