

2017

## Restraining Lawyers: From “Cases” to “Tasks”

Morris A. Ratner

*UC Hastings College of Law*

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### Recommended Citation

Morris A. Ratner, *Restraining Lawyers: From “Cases” to “Tasks”*, 85 Fordham L. Rev. 2151 (2017).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol85/iss5/34>

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# RESTRAINING LAWYERS: FROM “CASES” TO “TASKS”

Morris A. Ratner\*

## INTRODUCTION

Recent developments in the domains of procedure and private contract highlight a continuing shift of authority away from lawyers and toward courts and clients eager to control litigation costs. The shift has been accomplished in part via an unbundling of “cases” into “tasks,” by virtue of which courts and clients have greater opportunities to demand that each task adds sufficient value to justify its cost.<sup>1</sup>

In the sphere of procedure, the December 2015 amendments to the Federal Rules of Civil Procedure (“the Rules”) reinforce and expand court involvement in active case management and at the same time require parties and courts to more squarely consider proportionality when defining the scope of discovery allowed in a particular case. These changes build on a decades-long trend of “managerial judging,”<sup>2</sup> which inserts the judge as a kind of regulatory authority into areas where lawyers seeking to achieve clients’ broadly stated goals traditionally acted with less oversight. That judicial management involves unbundling “cases” and converting them into “tasks,” from motion practice to discovery, where the judge prioritizes and sequences each task to find the most efficient route to a resolution, e.g., by dispositive motion or settlement.

The market has moved in a similar direction supported by changes in information, project management technologies, and competition among law

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\* Associate Professor of Law, UC Hastings College of the Law. The author thanks the *Fordham Law Review*, the Stein Center for Law and Ethics at Fordham University School of Law, Bruce Green, Sherri Levine, and fellow participants in this year’s colloquium entitled *Civil Litigation Ethics at a Time of Vanishing Trials* held at Fordham University School of Law. 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. The observation and this Article’s title riff on a classic 1991 article by Professor Judith Resnik that observed a shift in perspective and practice from individual cases to broad categories of litigation that could be resolved in the aggregate. See Judith Resnik, *From “Cases” to “Litigation,”* 54 *LAW & CONTEMP. PROBS.* 5 (1991).

2. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 *U. CHI. L. REV.* 494, 534 (1986) (“Managerial judging employs the trial judge as a case manager, moving a lawsuit from filing to disposition.”); Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374, 380–81 (1982) (distinguishing “adversarial” and “inquisitorial” systems in large part on the basis of the relative authority between client and judge).

firms.<sup>3</sup> Clients looking to control legal spending are unbundling legal work to assign tasks, rather than cases, to individual lawyers or firms, applying procurement principles to source legal projects to the most cost-efficient providers. These same forces have increased the prevalence and commitment to litigation budgets and have pushed flat and other “value-based” pricing into a variety of litigation settings. Both mechanisms better align the financial interests of lawyers and clients while facilitating client input into the tasks undertaken to achieve litigation aims. The result is an erosion of the traditional division of authority between lawyer and client along the means-ends continuum.

Implicit in these procedural and market developments is a recognition that the key to conserving the courts’ and parties’ resources is restraining lawyer discretion with regard to litigation tasks, either directly, by shifting decision-making authority, or indirectly, by manipulating lawyers’ financial incentives. The economic theory behind this perception is presumably that, either as a result of their financial incentives (such as those produced by an hourly fee) or as a result of the perceived benefits of strategic gamesmanship (such as the desire to impose litigation costs on an adversary), unrestrained lawyers will not make litigation choices that achieve the cost-containment aims of a court or client.

These regulatory and market mechanisms for restraining lawyers share a common thread but differ in their purposes, efficacy, and fairness. Despite these differences, the growing intensity of their focus, and their possible amplification of each other, suggest the possibility of the emergence of new professional norms that call on litigators to think more deeply and inclusively about value from the perspective of court and client when making litigation choices.

#### I. SCARCITY, CONTROL, AND VALUATION OF TASKS IN THE SPHERE OF PROCEDURE: THE DECEMBER 2015 RULE AMENDMENTS

The managerial judging movement that gained traction<sup>4</sup> in the 1980s was propelled by the perceived need to more efficiently manage dockets in light of concerns regarding scarcity.<sup>5</sup> The movement has converted the trial

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3. Technological developments include new data storage, communication, budget, and timekeeping software both for tracking and projecting future project timelines and costs. *See, e.g.*, William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 383 (2011) (describing by way of example Cisco Systems, Inc.’s legal department’s use of an information management platform to “capture the full context of prior work, facilitate information sharing, develop internal expertise, save time, and obtain better legal outcomes”). *See generally* Drew Hendricks, *How Technology Has Revitalized Project Management*, TECH.CO (Mar. 25, 2015), <http://tech.co/technology-revitalized-project-management-2015-03> [<https://perma.cc/HVZ5-NS79>].

4. The 1983 rewrite of Rule 16 was a watershed moment for the movement. *See* FED. R. CIV. P. 16 advisory committee’s note to 1983 amendment (“Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and expanded to meet the challenges of modern litigation.”).

5. *See* FABIEN GELINAS ET AL., FOUNDATIONS OF CIVIL JUSTICE: TOWARD A VALUE-BASED FRAMEWORK FOR REFORM 93 (2015) (“The search for efficiency in the face of a

court judge from a relatively passive arbiter of pretrial disputes<sup>6</sup> to an active architect of the litigation process whose aim is to achieve a proper allocation of scarce procedural resources.<sup>7</sup>

The December 2015 amendments to the Federal Rules of Civil Procedure reinforce this trend. Amended Rule 1 advances that goal by adjusting the normative interpretive framework<sup>8</sup> for the Rules, operating at the level of the attorney's role as advocate. The amendment adds the following language to the familiar value statement that the Rules should be construed and administered to achieve the just, speedy, and inexpensive determination of the action: "and employed by the court and the parties."<sup>9</sup> Writing in his 2015 annual report, Justice Roberts noted that these additional words are a "big deal" and "make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow."<sup>10</sup>

The amendments to Rule 16 reduce the time to enter scheduling orders from 120 to 90 days, encourage in-person case management conferences,<sup>11</sup> and facilitate greater interaction with the court before the filing of discovery motions by giving the trial court discretion to direct that movants request court conferences before filing motions.<sup>12</sup> In short, it puts the trial court judge in the position of carving up cases and disputes earlier and more often.<sup>13</sup> In general, Rule 16 confers that ability by allowing the judge to sequence pretrial activity, including motion practice and discovery.<sup>14</sup> In the

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growing crisis due to scarce judicial resources seems to be the primary value expounded by the proponents of managerial judging." *But see* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences of Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994) (questioning the scarcity narrative).

6. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 405 (1906) (describing the historical image of the trial court judge as a "mere umpire").

7. *See* E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 311 (1986) ("The prototypical 'managerial' decision is one that allocates limited resources.").

8. Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 287–88 (2010) (describing Rule 1 as the "master rule" that determines how all other Rules are interpreted and applied).

9. FED. R. CIV. P. 1.

10. JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5–6 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [<https://perma.cc/BW5S-QP8H>].

11. FED. R. CIV. P. 16 advisory committee's note to 2015 amendment ("The provision for consulting at a scheduling conference by 'telephone, mail, or other means' is deleted.").

12. FED. R. CIV. P. 16(b)(3)(B)(v).

13. "Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation." ROBERTS, *supra* note 10, at 10.

14. *See, e.g.*, JOHN G. HEYBURN II & BARBARA JACOBS ROTHSTEIN, TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES 4 (2009) ("Sequencing the discovery and briefing necessary to resolve class certification and summary judgment motions is one of your most vital initial tasks."); Robert G. Bone, *Who Decides?: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1968 (2007) ("Discretionary case management extends to the appointment of litigation committees in complex cases, sequencing of issues, scheduling of discovery, timing of summary

most extreme incarnation, the managerial judge not only cabins party and attorney discretion to make litigation choices but eclipses party and lawyer altogether.<sup>15</sup> For example, in the World Trade Center litigation, a frustrated<sup>16</sup> Judge Alvin K. Hellerstein entered a case management order under Rule 16 and used his inherent authority to appoint his own experts to help him impose a discovery agenda, schedule, and process.<sup>17</sup>

Amended Rule 26 operates to limit party and attorney discretion by mandating a consideration of the value of discovery at the time lawyers frame discovery requests and by encouraging judges to more energetically insert themselves into that valuation as to each disputed request.<sup>18</sup> It does so by moving the proportionality requirement into the scope of the discovery subsection of Rule 26(b).<sup>19</sup> The amendment thus serves as a kind of exclamation point after the proportionality requirement.<sup>20</sup> Though the Advisory Committee notes to the most recent amendment emphasize the importance of various proportionality factors, in practice it is the consideration of whether the burden of discovery outweighs its likely benefit that is at the heart of the proportionality inquiry.<sup>21</sup>

These amendments operate as top-down pressure from Rule drafters on judges, parties, and lawyers to move even further away from the lawyer-

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judgment and trial, and much more.”). *See generally* WILLIAM W. SCHWARZER & ALAN HIRSCH, *THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE FOR JUDGES* (2d ed. 2006).

15. For a discussion of the history of Rule 16 and the degree to which it was designed to give judges discretion, see David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989).

16. *See generally* Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 CORNELL L. REV. 127 (2012).

17. *See In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 501, 523–24 (S.D.N.Y. 2009).

18. This change “may, as a practical matter, require ‘judges to be more aggressive in identifying and discouraging discovery overuse by emphasizing the need to analyze proportionality before ordering production of relevant information.’” *XTO Energy, Inc. v. ATD, LLC*, No. CIV 14-1021, 2016 U.S. Dist. LEXIS 57050, at \*58 (D.N.M. Apr. 1, 2016) (quoting *State Farm Mut. Auto. Ins. v. Fayda*, 14 Civ. 9792 (WHP) (JCF), 2015 U.S. Dist. LEXIS 162164, at \*2 (S.D.N.Y. Dec. 3, 2015)).

19. *See* FED. R. CIV. P. 26(b) advisory committee’s note to 2015 amendment. *See generally* Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. (forthcoming 2017) (manuscript at 3).

20. The amended Rule provides:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering 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.

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

21. *See* Gelbach & Kobayashi, *supra* note 19, at 16 (“Factor 6 is where the proportionality standard’s rubber meets the road: it asks judges to conduct a cost-benefit analysis . . . . The first five factors can be viewed as the ‘inputs’ in this determination . . .”).

driven, organically evolving, free-flowing adversarialism of a bygone era.<sup>22</sup> In its place, parties, through counsel, work with managerial—sometimes autocratic—trial court judges who intentionally arrange the constituent elements of litigation with a focus on value and conservation of resources. In a technical sense, the 2015 amendments are merely a nudge in that direction, but they are an important one. As Justice Roberts put it, they seek to accomplish a wholesale “change in our legal culture.”<sup>23</sup>

## II. SCARCITY AND CONTROL IN THE PRIVATE SPHERE: UNBUNDLING, SOURCING, BUDGETING, AND VALUE-BASED PRICING IN LITIGATION

Market forces are having a similar effect as sophisticated clients shift their focus from cases to tasks and thus to the means by which litigation aims are achieved.

### A. *The Traditional Lawyer-Client Relationship*

Traditionally, the client has chosen the goals of litigation and the lawyer has exercised broad discretion regarding the means.<sup>24</sup> This is so both as a formal and a practical matter.<sup>25</sup> The ABA Model Rules of Professional Conduct (“the Model Rules”) provide that “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued” but may “take such action on behalf of the client as is impliedly authorized to carry out the representation.”<sup>26</sup> Furthermore,

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22. See PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 10* (1978) (“[C]hanges in the federal discovery rules have gradually given the attorneys virtually unlimited discretion over the initiation of discovery and the enforcement of discovery rights. . . . The rules now allow the attorneys to decide whether and when to file requests and to determine the sequence and frequency of filing. . . . Today’s rules confer no express authority on judges either to control the initiation of discovery or to require compliance with the time limits set by the rules.” (footnotes omitted)).

23. ROBERTS, *supra* note 10, at 11.

24. See generally Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990).

25. Unsophisticated clients rarely attempt to participate in choices regarding the means by which litigation aims will be achieved. See Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92–97 (reviewing empirical literature demonstrating the lack of meaningful individual control by tort plaintiffs). This is especially true in group litigation. See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 530–31 (finding nonclass mass actions to often bear the “hallmarks of collective representation” with regard to “attenuated attorney-client relationships”).

26. MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2016); see also *id.* r. 1.4 (A lawyer shall “reasonably consult” with the client regarding the means by which the client’s objectives are to be accomplished.); *id.* r. 1.4 cmt. 3 (“In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial . . . the exigency of the situation may require the lawyer to act without prior consultation.”).

“[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.”<sup>27</sup> These rules construct a means-ends distinction but do not define either term with precision or explain the default amount of input lawyers should give clients into the tasks chosen. The rules merely require that clients be kept apprised of the status of the litigation and remain capable of making decisions regarding costs.<sup>28</sup> The Restatement (Third) of the Law Governing Lawyers sheds little additional light, other than confirming that lawyers have discretion with regard to the means in general,<sup>29</sup> subject to a poorly defined obligation to reasonably consult with clients,<sup>30</sup> and without the need even for that when circumstances warrant.<sup>31</sup> Indeed, the rules leave open the possibility of a lawyer taking on a litigation matter on an hourly basis, with limited input by the client as to means, subject only to the limits on what constitutes an “unreasonable” fee.<sup>32</sup>

While, over the years, commentators have urged a less divided and more collaborative and thoroughly negotiated lawyer-client relationship,<sup>33</sup> it has not been the norm outside of relatively limited settings. Increasingly, however, sophisticated<sup>34</sup> consumers of legal services are bridging the means-ends divide.

### B. A Changing Legal Services Market

The allocation of authority between lawyers and some clients has shifted because sophisticated consumers now have not only the motive but also effective means of controlling legal spending. The impetus for this shifting

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27. *Id.* r. 1.2 cmt. 2 (“[L]awyers usually defer to the client regarding such questions as the expense to be incurred . . .”).

28. *See id.* r. 1.4(a)(3).

29. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. b (AM. LAW INST. 2000) (“The lawyer begins with broad authority to make choices advancing the client’s interests. But the client may limit the lawyer’s authority by contract or instructions.”); *see id.* § 21 cmt. e (“A lawyer has authority to take any lawful measure within the scope of representation that is reasonably calculated to advance a client’s objectives as defined by the client unless there is a contrary agreement or instruction and unless a decision is reserved to the client. A lawyer, for example, may decide whether to move to dismiss a complaint and what discovery to pursue or resist.” (citations omitted)).

30. *See id.* § 20 cmt. c (“A lawyer must keep a client reasonably informed about the status of a matter entrusted to the lawyer, including the progress, prospects, problems, and costs of the representation.”).

31. *See id.* § 23 cmt. d (stating that lawyers need not consult with clients when time pressures preclude them from doing so, such as during court hearings or trials).

32. *See infra* Part IV.B.

33. Monroe H. Freedman, *Client-Centered Lawyering—What It Isn’t*, 40 HOFSTRA L. REV. 349, 353 (2011) (“Lawyers therefore act both professionally and morally in assisting clients to maximize their autonomy.”); Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71, 79 (1996) (“An approach favoring equality and collaboration would require that all decisions about the terms of the lawyer-client relationship be made jointly by the lawyer and client.”).

34. For a review of the different ways in which consumers of legal services can be “sophisticated,” see Fred C. Zacharias, *The Preemployment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?*, 49 WM. & MARY L. REV. 569, 577 (2007).

allocation is a belief that the law department can be managed on a budget, similar to any other division within a company, and a corresponding desire for predictability and value in the legal services used.<sup>35</sup> The means include increased market power of corporate consumers of legal services as a result of better-staffed in-house legal departments,<sup>36</sup> soft demand and entry of new players,<sup>37</sup> and innovation in the pricing of legal services enabled by advances in project and information management.<sup>38</sup> The upshot is that empowered consumers are able to accomplish cost savings by shifting their focus from cases to tasks, sourcing projects to the most cost-efficient providers, and demanding litigation budgets and value-based pricing that prompt greater collaboration between lawyer and client regarding the means deployed to achieve litigation ends.

### 1. Procuring Litigation Services: Unbundling and Sourcing

Unbundled<sup>39</sup> legal services are offered at the level of specific tasks that make up a subset of all work necessary to achieve a given aim.<sup>40</sup>

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35. SILVIA HODGES SILVERSTEIN, *LEGAL PROCUREMENT HANDBOOK* 15 (2015) (“Even as the economy improves, CEOs and CFOs see legal departments as cost centers that need efficient and effective management.”); Henderson, *supra* note 3, at 373 (“In response to harsh economic conditions, the nation’s corporate clients have tightened their legal budgets and altered their spending habits.”).

36. See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 761 (stating that expanded in-house counsel departments have allowed corporate general counsels to “surmount information asymmetry problems in legal representation”); Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers’ Ethics*, 80 FORDHAM L. REV. 2577, 2583 (2012) (“Corporate counsel often ‘micro-manage’ outside counsel. Their once-inferior status has been elevated and they now allocate, guide, control, and supervise the work of outside counsel.”); David B. Wilkins, *Team of Rivals?: Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2084 (2010) (“By the turn of the new century, this ‘inside counsel movement,’ as Robert Rosen has accurately labeled the push for authority and professional recognition by general counsel, appeared to have carried the day.”).

37. HILDEBRANDT CONSULTING LLC & CITI PRIVATE BANK, 2016 CLIENT ADVISORY 2 (2016), <https://www.privatebank.citibank.com/pdf/2016CitiHildebrandtClientAdvisory.pdf> (“While the demand for traditional law firm services has remained relatively soft, the supply of legal service providers has increased, creating a hyper-competitive market and forcing law firms to rethink how they deliver legal services.” (footnote omitted)) [<https://perma.cc/Y9BC-UWJP>].

38. See PATRICK J. LAMB, *ALTERNATIVE FEE ARRANGEMENTS: VALUE FEES AND THE CHANGING LEGAL MARKET* 52–53 (2010) (“For those who decide to utilize value-fee arrangements, project-management skills are critical to the pricing process and to the equally important management process that will ensure that lawyers operate within the cost structure required once a price is quoted. . . . There is an intersection between project management and knowledge management. One of the goals of both is the performance of work efficiently.”).

39. “Legal services traditionally have been regarded as relatively ‘bundled,’ in the sense that they consist of tightly linked elements that cannot be easily separated.” Milton C. Regan & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2148 (2010).

40. See generally MODEL RULES OF PROF’L CONDUCT r. 1.2(c) (AM. BAR ASS’N 2016) (authorizing unbundled services if the limited scope representation is “reasonable under the circumstances and the client gives informed consent”); ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 07-447 (2007) (blessing “collaborative practice” models



Unbundled services have traditionally been offered with regard to either routine transactional tasks<sup>41</sup> or, in litigation settings, to low-income clients by legal services entities that aid them in self-representation, e.g., in landlord-tenant or family law settings.<sup>42</sup>

However, especially since the Great Recession,<sup>43</sup> sophisticated clients in relatively less routinized categories of litigation have increasingly applied procurement principles to disaggregate and source<sup>44</sup> litigation work. Procurement is a term for a department commonly found in large corporations and government offices, but it is also a label for an approach to sourcing and negotiating the terms for the provision of services.<sup>45</sup> In

involving a limited scope of representation); ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007) (addressing ethical propriety of limited scope representations of pro se litigants); MODEST MEANS TASK FORCE, ABA, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE (2003), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_handbook\\_on\\_limited\\_scope\\_legal\\_assistance.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_handbook_on_limited_scope_legal_assistance.authcheckdam.pdf) [<https://perma.cc/9QCW-Q9VM>]; Kathleen Bird & Melissa Posey, Incorporating Limited Scope Representation into Your Law Practice Model (Sept. 12, 2014) (unpublished paper presented at the Missouri Bar 2014 Annual Meeting) (on file with the *Fordham Law Review*) (“The client and lawyer negotiate an appropriate delegation of tasks between the lawyer and client according to the difficulty and complexity of the issues and the skills required.”).

41. Such services may be fully commodified, in that they are offered via automated services such as LegalZoom, or may be offered by lawyers performing somewhat more tailored but still high-volume routine services, e.g., via online marketplaces where lawyers bid for the chance to work on legal tasks. *See, e.g.*, AVVO, <https://www.avvo.com/legal-services> (last visited Mar. 25, 2017) [<https://perma.cc/VC9R-548M>]; LEGAL HERO, <https://www.legalhero.com> (last visited Mar. 25, 2017) [<https://perma.cc/KYT3-8DQ3>].

42. Courts sometimes help litigants understand and find attorneys willing to provide such unbundled services. *See, e.g.*, *Limited Scope Representation*, CAL. CTS., <http://www.courts.ca.gov/1085.htm> (last visited Mar. 25, 2017) [<https://perma.cc/TH7H-YVZ7>].

43. *See* Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 92 (“The recession, with its widespread law-department budget cuts and thousands of large-firm layoffs, seems to have awakened everyone involved to the forces that had been building for years, and brought those forces more fully into play. Clients triaged their legal work and, as to what was indispensable, began to scrutinize which constituent tasks truly needed high-end staffing and which required not the ‘best,’ but just those good enough to accomplish the task cost-effectively.”).

44. *See, e.g.*, RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES, at xxxii (2008) (describing the example of Rio Tinto’s efforts to source legal work to low cost providers); *id.* at 45–52 (describing different types of sourcing of legal work); William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 462–63 (2013) (“Lawyers have a so-called monopoly on advocacy work before a tribunal and client counseling on legal matters, but that is of little consolation. Virtually every other aspect of a legal problem can be broken down into its component parts, reengineered, streamlined, and turned into a legal input or legal product that is better, cheaper, and delivered much faster.”).

45. *See, e.g.*, Silvia Hodges Silverstein, *Research Report: The State of Legal Procurement*, in LEGAL PROCUREMENT HANDBOOK 126, 126 (Silvia Hodges Silverstein ed., 2015) (“Procurement’s role in buying legal services keeps evolving. The three studies on the state of legal procurement that I conducted in 2011, 2012, and 2014 clearly demonstrate that procurement practices gain more and more influence on the category.”); Silvia Hodges, *Legal Procurement: Sourcing Is a Team Sport*, BLOOMBERG BNA (Aug. 29, 2012), <http://www.bna.com/legalprocurement-sourcing-is-a-team-sport/> [<https://perma.cc/6KK9-YAQN>].

litigation, it takes a variety of forms, including disaggregating and sourcing matters in-house,<sup>46</sup> to a captive center, to nonlawyer third parties,<sup>47</sup> or to one or more law firms.<sup>48</sup> While much of the work is routinized, a growing percentage of it includes such “higher-level” tasks as analyzing case law and evidence.<sup>49</sup>

Though anecdotal evidence suggests a trend, the degree to which this kind of unbundling and sourcing is happening in the U.S. legal services market, especially in relatively complex, high value litigation, is unclear. One 2011 study suggested that this unbundling was rare and that in-house counsel still choose to give a good portion of their business to a stable roster of firms.<sup>50</sup> But the study relied on pre-Great Recession data. The measurement problem is compounded by the fact that some law firms are sourcing in-house, via self-branded divisions, or are partnering with legal process outsourcing firms (LPOs).<sup>51</sup> Evidence of the growth of sourcing can be seen in the number of corporate litigants that now report using LPOs<sup>52</sup> and in the contrast between the rate of law firm growth, which is generally flat, and the rate of growth of nonlawyer legal services companies that provide much of the substitute legal services, which has been high. It can also be seen in the “stickiness” of relationships between firms and LPOs.<sup>53</sup>

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46. BTI Consulting reported, based on research conducted between February and August of 2016, that corporate clients moved in-house \$4 billion of legal work that would have gone to law firms in the prior year, including commercial and IP litigation. *See Clients Bring \$4 Billion In-House: For All the Wrong Reasons*, BTI CONSULTING GROUP (Sept. 7, 2016), <http://www.bticonsulting.com/themadclientist/2016/9/7/clients-bring-4-billion-in-house-for-all-the-wrong-reasons> [<https://perma.cc/5SU2-8P77>].

47. *See, e.g.*, Regan & Heenan, *supra* note 39, at 2150 (“Consider, for instance, the range of different activities in which [legal process outsourcing firm] CPA Global engages. It includes preparing summonses and complaints, interrogatories and requests for production of documents, motions, witness kits, timelines of events and exhibits, deposition summaries in various formats, memoranda of law, legal briefs, letters to third parties . . . .” (citation omitted)).

48. *See* John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 *FORDHAM L. REV.* 2995, 2998 (2014) (“[C]orporate clients at one time used one law firm for all or most of their outside legal work. Today, corporations often rely upon teams of lawyers from different law firms . . . .” (citation omitted)).

49. Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 *ARIZ. ST. L.J.* 125, 133 (2011).

50. *See* John C. Coates et al., *Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market*, 36 *LAW & SOC. INQUIRY* 999 (2011).

51. For example, Valorem Law Group, one of the leaders in flat-fee pricing of litigation services, partners with Novus Law, a document review LPO. *See Valorem’s Strategic Alliance with Novus Law*, VALOREM L. GROUP, <http://www.valoremlaw.com/novus-law> (last visited Mar. 25, 2017) [<https://perma.cc/JK3T-MF42>].

52. *See, e.g.*, NORTON ROSE FULBRIGHT, 2015 LITIGATION TRENDS ANNUAL SURVEY 31 (2015), [http://www.nortonrosefulbright.com/files/20150514-2015-litigation-trends-survey\\_v24-128746.pdf](http://www.nortonrosefulbright.com/files/20150514-2015-litigation-trends-survey_v24-128746.pdf) (reporting that a plurality of respondents had worked with a law firm that used a legal process outsourcing provider for elements of work, worked directly with an LPO, or used their own captive center) [<https://perma.cc/2J8N-N9NW>].

53. Robertson, *supra* note 49, at 127 (citing as evidence of the “mainstreaming” of legal process outsourcing that clients who experiment “tend to continue their contracts and institutionalize the practice”).

Client-driven sourcing erodes the means-end divide that traditionally characterized the attorney-client relationship by shifting the client's focus from cases to tasks and giving clients control over how those tasks are performed and by whom. Litigation budgets and alternative fee arrangements (AFAs), discussed below, are less direct but still potent market developments having a similar effect.

## 2. Pricing Litigation Services: Budgeting and AFAs

Increasingly, sophisticated clients insist on detailed litigation budgets building off worksheets that disaggregate litigation into constituent tasks,<sup>54</sup> assigning values to each. The preparation and discussion of budgets brings clients into the decision-making process regarding litigation means in a conversation that is typically about value and priorities. As one attorney recently put it:

Do not underestimate the power of a well-designed litigation budget to clarify thinking about a case and set client expectations about how it will be handled. A well-designed budget is more than a financial estimate; it sets priorities, reflects strategy and projects staffing. Increasingly, buyers of legal services expect well-designed budgets, and how firms create and use budgets is a factor in deciding which firms to hire.<sup>55</sup>

AFAs broadly include all nonhourly fee arrangements, including hybrid arrangements such as discounted billing with caps or success fees.<sup>56</sup> Some commentators see arrangements that merely repackage or moderately shift some of the risks to be hourly billing in disguise and view only fee arrangements that do not depend on hours spent to be “true” AFAs, such as “fixed” or “flat” fees for a defined service or legal product. Fixed fees can be set for each stage of a single civil action, for the entirety of the action, or for a group of actions or a category of litigation, and they can include modifications such as holdbacks or collars.<sup>57</sup> In general, AFAs, excluding

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54. See GEORGETOWN LAW CTR. FOR THE STUDY OF THE LEGAL PROFESSION, REPORT ON THE STATE OF THE LEGAL MARKET 10 (2017) (identifying as a “major shift that has occurred over the past decade” the “widespread client insistence on budgets (with caps) for both transactional and litigation matters”); Gary L. Sasso, *Budgets*, CARLTON FIELDS, <https://www.carltonfields.com/budgets-business-solutions/> (last visited Mar. 25, 2017) (providing guidance on legal expense budgeting, including a sample budget worksheet) [<https://perma.cc/BW7Z-F6NR>].

55. Richard A. De Palma & William T. Garcia, *Proper Litigation Budgeting Delivers True Value to Clients*, N.Y. L.J. (Apr. 13, 2015), <http://www.newyorklawjournal.com/id=1202723070676/Proper-Litigation-Budgeting-Delivers-True-Value-to-Clients> [<https://perma.cc/7QSS-PSJD>].

56. See, e.g., ASS'N OF CORP. COUNSEL, HANDBOOK FOR VALUE-BASED BILLING ENGAGEMENTS 1 (2014), <http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=security/getfile&pageid=1309263&page=/legalresources/resource.cfm&qstring=show=1309263&title=Guide%20to%20Value%20Based%20Billing&recorded=1> (noting that value-based billing includes fixed or flat fees, fixed fees with collars, reverse contingent fees, success fees, and performance-based holdbacks, among other mechanisms) [<https://perma.cc/N7KL-RPYU>].

57. On its website, under the heading “Phased Fixed Fee with Collar,” Paul Hastings describes its collar arrangement:

discounting, constituted about 16 percent of surveyed firms' revenues in 2015, flat from the prior year, though law firm managers expected that number to rise over time.<sup>58</sup>

Much of the move to value-based pricing is client driven and tangled with the unbundling and sourcing described in the preceding section. By way of example, Pfizer created the Pfizer Legal Alliance (PLA) in 2009, a group of law firms that handled the majority of the firm's work on a flat-fee basis, using a common set of project and information management tools and subject to Pfizer's directions regarding the outsourcing of certain types of legal work to nonlawyer third parties.<sup>59</sup>

Law firms offering alternative pricing arrangements range from big firms, such as Kirkland & Ellis<sup>60</sup> and Morgan Lewis,<sup>61</sup> to smaller, nimbler firms that litigate predominantly or exclusively on this basis and make it a centerpiece of their online marketing.<sup>62</sup> Like budgeting, value pricing has the potential to erode the means-end distinction to the extent it inspires a

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Based on hourly fees subject to a case budget and a collar (a range above and below the budget). If the fees are less than the lower collar, outside counsel receives a bonus. If the fees are higher than the upper collar, the client receives a discount from the regular hourly rate.

See *Alternative Fee Arrangements*, PAUL HASTINGS, <http://www.paulhastings.com/area/litigation/alternative-fee-arrangements> (last visited Mar. 25, 2017) [<https://perma.cc/RP9K-P78U>].

58. See HILDEBRANDT CONSULTING LLC & CITI PRIVATE BANK, *supra* note 37, at 7 (surveying mostly large firms, and noting that "the use of AFAs has not increased at the rate many observers had predicted, although according to the Citi 2015 Law Firm Leaders Survey, a majority are still expecting growth in the years ahead"); NORTON ROSE FULBRIGHT, *supra* note 52, at 25 (reporting a majority of corporate clients using AFAs, with larger companies being the most active users, but typically for only a fraction of their litigation spending); *id.* at 28–29 (reporting a majority of respondents holding the view that use of AFAs will remain flat but with 41 percent of larger companies expecting use of AFAs to rise).

59. Ellen Rosenthal & Justin McCarthy, *Pfizer Inc.'s Legal Alliance Program: Collaboration and Focus on Relationships Produce Better Legal Outcomes and Cost-Savings*, ASS'N CORP. COUNS. (2011), <http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=security/getfile&pageid=1279390&page=/valuechallenge/resources/index.cfm&qstring=&title=Pfizer%20Inc.%26%2339%3Bs%20Legal%20Alliance%20Program3A%20Collaborationand%20Focus%20on%20Relationships%20Produce%20Better%20Outcomes%20and%20Cost-savings&recorded=1> [<https://perma.cc/P27W-VQG2>].

60. See *Alternative Fee Arrangements*, KIRKLAND & ELLIS LLP, <https://www.kirkland.com/sitecontent.cfm?contentID=341> (last visited Mar. 25, 2017) [<https://perma.cc/BMH7-BA6H>].

61. See Press Release, Morgan Lewis, Morgan Lewis Named Among the Best by Clients for Alternative Fee Arrangements (Apr. 28, 2016), <https://www.morganlewis.com/news/morgan-lewis-named-among-the-best-by-clients-for-alternative-fee-arrangements> [<https://perma.cc/3PDX-7T5K>].

62. Those firms include Bartlit, Beck, Herman, Palenchar & Scott, LLP; Seyfarth Shaw, LLP; and Valorem Law Group. See *Seyfarth Lean*, SEYFARTH SHAW LLP, <http://www.seyfarth.com/SeyfarthLean-Overview> (last visited Mar. 25, 2017) [<https://perma.cc/T3BJ-9F3L>]; *Success Based Fees*, BARTLIT, BECK, HERMAN, PALENCHAR & SCOTT, LLP, <http://www.bartlit-beck.com/about-success.html> (last visited Mar. 25, 2017) [<https://perma.cc/J4AB-JZZ6>]; *What's So Revolutionary?*, VALOREM L. GROUP, <http://www.valoremllaw.com/what-is-revolutionary> (last visited Mar. 25, 2017) [<https://perma.cc/YR83-N2AD>].

higher degree of collaboration between lawyer and client.<sup>63</sup> That collaboration typically occurs at the front end as lawyer and client build assumptions regarding the scope of representation and work to be done for a fixed fee into the representation agreement itself.<sup>64</sup>

Value pricing has the potential to restrain litigators and lawyer-driven adversarialism not only via direct client input but also by better aligning the incentives of lawyers and cost-conscious clients. AFAs such as fixed fees reward and thus inspire efficiency. One attorney for a firm that has been at the leading edge of flat-fee litigation in high-stakes, complex cases described its effects on discovery and motion practice:

The substantial majority of time and money spent in big case litigation is spent in discovery: e-discovery and production of irrelevant data and documents by the millions, seven-hour depositions of insignificant witnesses by the dozens, motion after motion on such matters as where to conduct depositions or which proposed pretrial schedule is more reasonable. . . .

These practices are the progeny of the billable hour. Lawyers on flat fees (or contingent fees) abhor inefficiency and avoid the discovery morass.<sup>65</sup>

Sourcing, budgeting, and risk-sharing pricing arrangements are not new. For example, insurance companies have for many years aggressively used litigation budgets and pricing controls to cabin attorney discretion regarding litigation tasks.<sup>66</sup> What is new is the pervasiveness of these mechanisms. The Association of Corporate Counsel, a professional association for in-house attorneys, now identifies as favored practices by general counsels a cluster of value-based mechanisms, including “[v]alue-based fee structures,” “[o]utsourcing contract work to legal process outsourcing vendors,” and “[p]ractices for managing outside counsel performance.”<sup>67</sup>

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63. See, e.g., Ed Poll, *Clients Define Value Billing—But Will They Accept It?*, LAW PRAC. TODAY (June 2013), [http://www.americanbar.org/content/newsletter/publications/law\\_practice\\_today\\_home/lpt-archives/june13/clients-define-value-billing-but-will-they-accept-it.html](http://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/june13/clients-define-value-billing-but-will-they-accept-it.html) (“Value billing can only work through the kind of interaction that is best described as true lawyer-client collaboration. In such a relationship, client and lawyer work together to assess needs and develop a proactive, interactive law approach, making recommendations to each other about actions and decisions that are mutually beneficial.”) [<https://perma.cc/2MH6-AVDT>].

64. See PATRICK LAMB, *ALTERNATIVE FEES FOR LITIGATORS AND THEIR CLIENTS* 48 (2014) (“There are general assumptions built into every fee agreement, including the likely volume of documents, the issues (broadly defined, such as ‘no counterclaim’), the likely number of depositions, the time frame of events, number of witnesses, time to trial, and so forth. All assumptions underlying the fee structure should be specified.”).

65. Kathryn Kirmayer, *From the Experts: In Support of Flat Fee Pricing for Complex Litigation Matters*, CORP. COUNS. (May 16, 2012), <https://www.crowell.com/files/In-Support-of-Flat-Fee-Pricing-for-Complex-Litigation-Matters.pdf> [<https://perma.cc/ES2T-S5YJ>].

66. See Susan Randall, *Managed Litigation and the Professional Obligations of Insurance Defense Lawyers*, 51 SYRACUSE L. REV. 1, 7–9 (2001) (describing insurance litigation practices).

67. See ASS’N OF CORP. COUNSEL, *GC VALUE INSIGHTS: WHAT MULTINATIONAL GENERAL COUNSEL VALUE MOST* 4 (2012), <http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=security/getfile&pageid=1316714&page=/valuechallenge/reso>

### III. CONVERGENCE AND DIVERGENCE OF REGULATORY AND MARKET MECHANISMS FOR RESTRAINING LAWYERS

The regulatory and market developments described in the preceding part differ along a number of dimensions summarized in table 1 below. First and foremost, their scope varies. The changes in procedural doctrine that have enabled managerial judging formally apply to all civil actions, even if courts are likely to be relatively more interventionist in complex cases. Moreover, the particular focus on proportionality in discovery, which requires the judge to assess the value of each disputed request, applies across the board. In contrast, client intervention in the means by which litigation aims are achieved, for example, by sourcing, budgeting, or manipulating counsel's incentives via fee arrangements, typically occurs in those cases where clients are sufficiently sophisticated, have sufficient leverage, and are more interested in controlling legal spending than outspending an opponent.<sup>68</sup>

The purposes of the amendments to the Rules and developments in the private sphere also differ. Whereas the procedural amendments are designed to achieve the "just, speedy, and inexpensive determination of every action,"<sup>69</sup> private contract serves client aims, which may or may not point in the same direction.

Even when client and court aims align, the obstacles to controlling litigation costs vary in each sphere. Information asymmetries plague clients and courts when they seek to participate in litigation. But, in the public domain, the court can rely on the adversarial process to present some of the necessary information. For example, a party with a winning and dispositive motion can be relied upon to identify and help chart a direct path to that motion in the course of a Rule 16 conference, even if the other party hopes to delay or complicate it. No comparable adversarial process serves a similar monitoring function in the private sphere, where agency costs persist despite the attempts to cabin attorney discretion described in Part II.<sup>70</sup> Moreover, in the private domain, even an interventionist client who aggressively seeks to control legal spending, can find it difficult to monitor counsel, especially if counsel's fees are not tied to efficient outcomes. For example, a lawyer working on an hourly basis pursuant to an agreed

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urces/index.cfm&qstring=&title=GC%20Value%20Insights&recorded=1 [https://perma.cc/4AFX-LTDN].

68. See JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 100 (2013) ("The legal framework is *supposed* to make our economy more efficient by providing incentives for individuals and firms not to behave badly. But we have designed a legal system that is an arms race: the two protagonists work hard to out-lawyer each other, which is to say outspend each other.").

69. FED. R. CIV. P. 1.

70. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (defining agency costs); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1709 (1998) ("Agency costs are potentially significant in legal representation because the client delegates significant discretion to the lawyer but incurs high monitoring costs because of the specialized and idiosyncratic nature of professional work.").

litigation budget carefully mapped with a client could nevertheless subtly inspire opposing counsel's distrust and ire to the point where disputes and fees proliferate, all the while proclaiming that the extra costs are beyond the agent's control.

Finally, the limits on lawyer discretion achieved via procedure and private contract vary with regard to their equity. Procedure offers the possibility, at least, of being evenly applied; whereas, as a practical matter, private contract as a means of controlling attorney decision making is mostly available to sophisticated clients.

**Table 1: Comparison Chart (Regulatory v. Market)**

	<b>Regulatory (Procedure)</b>	<b>Market (Unbundling, Sourcing, and AFAs)</b>
<b>Scope</b>	All federal court cases	Matters in which lawyers and clients include relevant terms in their representation agreements
<b>Purposes</b>	“The just, speedy, and inexpensive determination of every action,” per Federal Rule of Civil Procedure 1	Client aims, typically including controlling legal spending
<b>Vehicle</b>	Judicial involvement in identification and assessment of the value and sequencing of litigation tasks	Client involvement in identification and assessment of the sourcing, value, and sequencing of litigation tasks
<b>Obstacles to Efficacy</b>	Variation among judges and cases, information asymmetries, and limits of Rule 16 and inability to fully control parties	Agency problems, including information asymmetries and inability to control court or other parties
<b>Fairness (Equality of Application)</b>	Available in all cases but typically applied more aggressively in “large” cases (e.g., MDLs)	Available to sophisticated clients who demand it or when lawyers choose to offer these options

Despite their differences, the cabining of lawyer discretion and lawyer-driven adversarialism accomplished via managerial judging and private contract have the potential to reinforce each other. For example, a court seeking to sequence litigation tasks depends in part on the parties to cooperate, such as by providing information and participating in a case management conference to advance the aims of Rule 1. A lawyer’s incentive to assist depends in part on the degree to which clients are effectively controlling legal spending. A lawyer hired on an hourly basis



without an active and involved client focused on the value of litigation tasks may find himself motivated by the self-interested desire to maximize his fee, thus frustrating Rule 16's cost-saving function.<sup>71</sup> Conversely, a lawyer whose client is promoting value-based decision making by paying attention to the means, sourcing to the lowest cost providers, or insisting on pricing mechanisms that privilege efficiency is likelier to find his own self-interest more fully aligned with the aims of Rule 1. Similarly, a client focused on controlling legal spending may find an ally in a particularly active managerial judge who sequences tasks in a manner designed to most efficiently resolve the litigation. Conversely, the client may be frustrated by a judge who gives parties and their counsel greater free reign.

#### IV. PRACTICES AND DUTIES

As a practical matter, due to the pincer-like effect of changes in both the public and private domains, lawyer-driven adversarialism may be housed in a smaller space, as discretion is limited by court and clients who have increasing opportunities and means to unpack cases into tasks and to dictate which tasks lawyers will pursue and how. With the right judge or client, a lawyer may experience a substantial shift in control and, to the extent court and client are driven by the desire to contain costs, will be forced to think deeply and inclusively about the value of tasks.

But what about the lawyer whose judge is not particularly managerial or whose client pays an hourly fee and asks few questions about the means? Do the trends described in Part II suggest that all lawyers have a duty to engage with court or client in litigation choices that have traditionally been left to the lawyer's discretion? Specifically, do all lawyers have an obligation to sequence case activity, source work, or otherwise map litigation tasks onto a budget that permits value-based discussions regarding the means to be pursued to achieve litigation aims?<sup>72</sup>

In the procedural sphere, the formal duties baked into Rule 1 have already changed as a result of the December 2015 amendment; the open question is the extent to which that amendment will change behavior of court and counsel. In the private sphere, behaviors are changing in some sectors of the legal services market. An obstacle to formal reform is a conceptualization of the role of the negotiation associated with the retention of an attorney and structuring of the lawyer-client relationship as

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71. See, e.g., Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2200 (1989) (noting that the "significant shift in recent decades from fixed-fee to hourly-fee charging by lawyers" was altering the "dynamics of the process" of litigation).

72. The market developments sketched in Part II are occurring in the corporate "hemisphere" of the legal services market. Disruption may come from below, but norm change often occurs at the top end of the legal services market, which continues to garner outsized attention and to influence common perceptions of professional roles. Vincent R. Johnson & Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 NOTRE DAME L. REV. 359, 364 (1990) ("[E]vents which affect larger firms have a 'trickle-down' effect.").

contractual rather than fiduciary.<sup>73</sup> That is, the discussion of the scope of the representation, the manner in which fees and costs will be handled, the sharing of risk, and the sourcing of work are all seen as taking place as part of an arm's-length negotiation, a characterization that provides infertile soil for the development of duties.

#### A. Duties to Court

The recent amendments to the Rules make clear that, at least as far as the court is concerned, the litigator's duties have indeed changed or have at least been sharpened. The extent to which the December 2015 amendments truly represent a cultural shift depends on the eagerness of trial court judges to push the boundaries of their inherent authority and on counsel's and parties' willingness to prioritize the aims of Rule 1.

There is anecdotal evidence that the Rule 1 amendment is beginning to have its intended effects. Courts are citing both the amendment and Justice Roberts's explanation of it when issuing case management orders and deciding discovery disputes regarding proportionality in a way that suggests they acknowledge a shift toward greater judicial control of litigation choices. For example, Judge Edward G. Smith of the Eastern District of Pennsylvania has posted a "Policies and Procedures" document citing and quoting the Rule 1 amendment and Justice Roberts as framing the court's expectations regarding Rule 16 case management conferences and the discovery process.<sup>74</sup> Also, by way of example, Magistrate Judge Elizabeth Laporte recently cited and quoted both the amendments and Justice Roberts's annual report when applying the relocated proportionality requirement in a discovery dispute.<sup>75</sup> The court found, ultimately, that the parties had not sufficiently addressed the value of the specific discovery request and that, in Magistrate Judge Laporte's view, the discovery sought did not appear to be proportional to the amount at stake in the litigation.<sup>76</sup> These are mostly matters of tone, with courts using the amendments to underscore their responsibility to manage litigation tasks.

It is possible that we will even see Rule 16 aggressively applied to the point where courts adopt lawyer-restraining mechanisms deployed in the private domain. In a provocative and thoughtful article, Professor Jay

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73. See Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 *FORDHAM L. REV.* 1833, 1837–38 (2011) (describing the negotiations around the formation of the attorney-client relationship as a contractual rather than a fiduciary moment); Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 *UCLA L. REV.* 29, 55 (1989) (“[F]ee contracts entered into prior to or contemporaneously with the commencement of the attorney-client relationship are irrebuttably presumed to be arm's length transactions, governed by contract and not by fiduciary law.”). *But see* Zacharias, *supra* note 34, at 573 nn.4–5 (citing scholars and courts identifying lawyers' preemployment fiduciary duties).

74. See generally Memorandum on Policies and Procedures, Edward G. Smith, Judge, E.D. Pa., <https://www.paed.uscourts.gov/documents/procedures/smtpol.pdf> (last updated July 29, 2016) [<https://perma.cc/7EC9-983L>].

75. *Dao v. Liberty Life Assurance Co.*, No. 14-cv-04749-SI, 2016 U.S. Dist. LEXIS 28268, at \*5–7 (N.D. Cal. Feb. 23, 2016).

76. *Id.* at \*14.

Tidmarsh recently proposed that courts consider imposing litigation budgets.<sup>77</sup> The idea is to require litigants to submit, seek court approval of, and stay within budgets, something British courts have required since 2013.<sup>78</sup>

There is some precedent for an American federal court judge, acting as fiduciary for certain kinds of plaintiffs, to influence litigation budgets. For example, judges appointing class counsel are encouraged to consider “requesting that counsel submit ex parte or under seal a proposed budget for fees in the case.”<sup>79</sup> Similarly, trial courts, appointed by the Judicial Panel on Multidistrict Litigation to oversee MDLs<sup>80</sup> may address litigation expenses in case management orders, if only for the purpose of tracking and distinguishing common costs rather than cabining them.<sup>81</sup> MDL judges also impose back-end fee caps, both when awarding common benefit fees and when limiting fees that can be charged by individually retained counsel, relying not just on law particular to MDLs but on their inherent authority to regulate lawyers.<sup>82</sup> But, as Professor Tidmarsh acknowledges, the idea of court-imposed litigation budgets that impose ex ante limits on party expenditures is “radical”<sup>83</sup> and raises a number of concerns, including the judge’s competence to set budgets,<sup>84</sup> gamesmanship in the budget setting process,<sup>85</sup> and questions of authority.<sup>86</sup>

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77. Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855 (2015).

78. *Id.* at 859.

79. BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, *MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES* 8 (3d ed. 2010) (noting, however, that “[f]ew judges have unilaterally imposed strict limits on fees in the order of appointment”).

80. See Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985, 1986 (2011) (“An MDL is created when the Judicial Panel on Multidistrict Litigation (JPML) transfers related cases pending in diverse federal district courts to a designated forum for consolidated pretrial motions and discovery.”).

81. See generally DUKE LAW CTR. FOR JUDICIAL STUDIES, *STANDARDS AND BEST PRACTICES FOR LARGE AND MASS TORT MDLS* 46 (2014) (discussing mechanisms used by MDL judges to track fees and costs); *id.* at 66 (discussing creation of court-ordered common benefit funds in MDL proceedings); BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, *MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR TRANSFEREE JUDGES* 15 (2011) (“If lead counsel are to receive attorney fees, set guidelines in an early pretrial order after consultation with counsel. Establishing guidelines and ground rules—even establishing budgets or rates for payment—early in the litigation helps ease the judge’s burden and prevent later disputes.”); Leonard A. Davis & Philip A. Garrett, *Case Time and Cost Management for Plaintiffs in Multidistrict Litigation*, 74 LA. L. REV. 483, 498–505 (2014) (describing typical procedures).

82. See Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 380 (2014) (“With regard to a court’s inherent authority to exercise ethical supervision over the parties in MDL matters, courts have relied on the broad equitable powers of a federal court over an attorney’s contingent fee contract.”); Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 73–76 (2013) (exploring inherent authority doctrine as applied to regulate fees in MDLs).

83. Tidmarsh, *supra* note 77, at 859.

84. *Id.* at 895.

85. *Id.* at 910.

86. *Id.* at 912 (“[I]t is doubtful that litigation budgets fall within the Supreme Court’s power . . . under the Rules Enabling Act.”).

### B. Duties of Lawyer to Client

As between lawyer and client, the trends described in Part II have not yet evolved into professional duties and, as noted, instead appear to be treated as instances of private contract reshaping the lawyer-client relationship rather than as a template for a new default<sup>87</sup> relationship between all lawyers and clients. An inquiry into whether change is afoot invites us to map the space between emerging “best practices” and duties. To the extent duties derive from norms,<sup>88</sup> and to the extent norms emerge in part from professional discourse and practices,<sup>89</sup> the amplification of interest and concern regarding scarcity and control with regard to the selection, sequencing, and sourcing of litigation tasks suggests that we could be at a tipping point where changing client needs and best practices designed to meet those needs impact duties.<sup>90</sup> If so, we know where to look, including in the rules that allocate authority between court and party and between lawyer and client and those that define competence and reasonable fees. These duties will be defined and enforced by the usual array of regulatory vehicles, including disciplinary bodies (for example, self-regulation), courts regulating counsel via orders on fees and costs, and private litigation (for example, malpractice or breach of fiduciary duty).

#### 1. Allocating Authority

The Model Rules discussed at the outset of Part II.A build on a traditional means-ends distinction with the lawyer, under the default rule, having substantial discretion to choose the means deployed to accomplish the client’s aims. What would change look like? Model Rule 1.4 could be interpreted to require more fulsome and value-oriented discussion of litigation tasks, including methods for reducing costs such as sourcing to lowest-cost providers. The connection between the current text of Model Rule 1.4 and emerging best practices is the requirement that lawyers

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87. See Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 667 (2001) (defining “default” rules as those that can be changed contractually).

88. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241 (1991) (“[O]ver the last twenty-five years or so the traditional norms have undergone important changes. One important development is that those norms have become ‘legalized.’ The rules of ethics have ceased to be internal to the profession; they have instead become a code of public law enforced by formal adjudicative disciplinary process.”).

89. This is especially so with regard to duties that turn on objective standards of reasonableness, such as the duty of care or the conception of a “reasonable” fee. For an example of a competing account of the process by which norms are enshrined as duties in the ethics rules, see Lynn A. Baker, *The Politics of Legal Ethics: Case Study of a Rule Change*, 53 ARIZ. L. REV. 425 (2011) (reviewing the politics of an amendment of a Texas ethics rule regarding fee sharing).

90. See David B. Wilkins, *Redefining the “Professional” in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, 58 LAW & CONTEMP. PROBS. 241, 249 (1995) (“Whatever may be said of ethics in general, professional ethics must be designed to serve specific societal needs. As such, it cannot be separated from the social, economic, and political contexts in which these needs arise and through which they must be met.”); cf. Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Firm Practice*, 70 GEO. WASH. L. REV. 931, 941 (2002) (assessing the impact of the way corporations use law firms on legal norms and lawyers’ exercise of discretion).

“reasonably consult”<sup>91</sup> with clients regarding means. To the extent practices and thus expectations are changing, there is space in the current text for regulatory authorities to catch up. Without linking the duty to this particular provision of the Model Rules, Professor Fred Zacharias made a similar suggestion: “In some situations, a client is well advised to use a particular lawyer for limited purposes, leaving other aspects of the potential representation to another lawyer, a non-lawyer service provider, or pro se representation.”<sup>92</sup>

## 2. The Duty of Competence

In litigation, disputes regarding attorney competence typically flow from a loss on the merits, which calls the lawyer’s skill, knowledge, or preparation into question. That focus flows naturally from the economics of malpractice litigation, where parties may be particularly inspired by unwanted case outcomes to sue their former attorneys for professional negligence. But the duty of competence also extends to law office management issues that impact the lawyer-client relationship. Recent and swift changes in expectations regarding lawyer knowledge of data security provide a case in point, where technological change inspired a formal expansion of the duty of competence.<sup>93</sup>

Along those lines, the practices described in Part II suggest that lawyers may need to acquire new skills, including the ability to disaggregate and properly source production of legal services, manage information sufficiently to reasonably estimate project costs, and bring project-management principles to bear in litigation.<sup>94</sup> With regard to sourcing, the duty of competence thus far has been applied only to ensure that the lawyer who outsources maintains responsibility for the quality of the work product and should normally consult with the client before outsourcing.<sup>95</sup> It has not been extended to require expertise with the decomposition, management, and sourcing of legal work.

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91. MODEL RULES OF PROF’L CONDUCT r. 1.4 cmt. 3 (AM. BAR ASS’N 2016).

92. Zacharias, *supra* note 34, at 578. As services like Jurbid and Upcounsel that require lawyers to bid on matters become more widespread and regularly used, the market may force what the rules currently do not. *See, e.g.*, JURBID, <http://www.jurbid.com> (last visited Mar. 25, 2017) [<https://perma.cc/9XAE-NHAL>]; UPCOUNSEL, <https://www.upcounsel.com> (last visited Mar. 25, 2017) [<https://perma.cc/8EQL-TPKW>].

93. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 8 (requiring lawyers to keep abreast of changes in technology); Cal. State Bar Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 2010-179 (2010) (recognizing a duty of competence and care when lawyers transmit client data); *Cloud Ethics Opinions Around the U.S.*, A.B.A., [http://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/resources/charts\\_fyis/cloud-ethics-chart.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html) (last visited Mar. 25, 2017) [<https://perma.cc/29W9-PSZQ>].

94. *See* LAMB, *supra* note 64, at 144 (“If there is no disaggregation strategy, the firm hasn’t eliminated the fat.”); Regan & Heenan, *supra* note 39, at 2163 (“Even on the more modest scale of individual projects, law firms may need to develop better project management skills than many currently possess.”).

95. *See generally* Geoffrey C. Hazard, Jr. et al., THE LAW OF LAWYERING § 4.02 (4th ed. 2015).

Again, to look for the emergence of such duties, we might look first to spaces where sophisticated repeat players (judges or lead plaintiffs under the Private Securities Litigation Reform Act) act on behalf of unsophisticated, one-shot clients (MDL plaintiffs or absent class members) when selecting counsel. Rule 23(g) provides the touchstone for the inquiry into proposed class counsel's adequacy, providing a nonexhaustive list that includes items such as class counsel's "experience" and "knowledge," but does not touch on the kinds of items sophisticated clients consider when hiring counsel as described in Part II.<sup>96</sup> Courts appointing counsel sometimes mention efficiency and cost consciousness as a factor but usually without describing the competencies necessary to achieve such efficiency. The order appointing counsel in *In re J.P. Morgan Chase Cash Balance Litigation*<sup>97</sup> is typical. There, the court indicated it was appointing counsel after being assured they would "work together efficiently" and, toward that end, "fairly, adequately, and economically represent the interests of the class" without specifying exactly how they would do so, other than by implying the three appointed firms would avoid duplication of labor.<sup>98</sup> While the Private Securities Litigation Reform Act was designed to give sophisticated institutional investors a major role in the selection and monitoring of class counsel, there is little either in case law or commentary suggesting they have done so by vetting attorneys for project and information management skills or the ability to budget or source tasks.<sup>99</sup>

### 3. Reasonable Fees and Costs

If the developments sketched in Part II are to impact conceptions of the reasonableness of fees, we are likely to see them do so in at least two spaces: a lowering of the ceiling on reasonable fees, especially for routine legal tasks, and a change in the labeling of some tasks in terms of whether they can support fees or are costs which are to be merely reimbursed.

Model Rule 1.5 defines the ethical prohibition on charging unreasonable fees, one echoed in the Restatement (Third) of the Law Governing Lawyers. The reasonableness requirement that governs fee disputes and disciplinary proceedings focuses on identifying those fee agreements that are beyond the pale<sup>100</sup> and does not attempt to memorialize best practices, in terms of

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96. FED. R. CIV. P. 23(g).

97. 242 F.R.D. 265 (S.D.N.Y. 2007).

98. *Id.* at 277.

99. *See, e.g.,* Lynn A. Baker et al., *Is the Price Right?: An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1424 (2015) ("Our data suggest that some lead plaintiffs do take seriously the responsibility Congress bestowed on them, carefully choosing their lawyers, aggressively negotiating fees with them upfront, and actively monitoring them throughout. But such plaintiffs are in the minority."); Stephen J. Choi et al., *Do Institutions Matter?: The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L.Q. 869, 900 (2005) ("Private institutions are clearly not keeping fees in check.")

100. *See, e.g.,* *Bushman v. State Bar of Cal.*, 522 P.2d 312, 314 (Cal. 1974) ("It is settled that gross overcharge of a fee by an attorney may warrant discipline."); *In re Dorothy*, 605 N.W.2d 493, 501 (S.D. 2000) (finding fees charged in a divorce and custody case excessive

tethering lawyer and client interests, encouraging risk sharing, prompting client input on litigation choices, and the like. But as lawyers continue to compete for business using project management techniques, sourcing, and alternative fees, the ceiling on what lawyers can charge for equivalent work should lower as a result of Model Rule 1.5(a)(3), which looks to, among other factors bearing on the reasonableness of a fee, “the fee customarily charged in the locality for similar legal services.”<sup>101</sup>

Similarly, as sophisticated clients insist that lawyers source some litigation tasks to lowest-cost providers, including nonlawyer service companies, some tasks, like document review, which were once routinely performed by lawyers at their usual rates, should, over time, come to be seen as lower-rate work<sup>102</sup> or even as bases for expenses rather than fees, the way copying costs are treated. While lawyers and clients may be increasingly negotiating such arrangements, a failure to do so does not yet appear to amount to an unreasonable fee. On the contrary, authority suggests that even routine legal work may be charged at regular rates.<sup>103</sup> That said, because reasonableness is still assessed by reference to what others charge for similar work, this should be a continuing pressure point with regard to lawyers’ duties going forward.

#### CONCLUSION

Courts and some clients are responding to scarcity by shifting their attention from “cases” to “tasks” and attempting to ensure that the value of each litigation task is justified. Part IV maps the spaces to search for evidence of changing legal norms and duties flowing from these developments. Rule 1 accomplishes that norm change directly as a formal matter. The ethics rules and other laws governing lawyers do not yet appear to have converted emerging practices in the corporate hemisphere into broadly applicable duties; but the process of identifying the places to look for such change also reveals the leverage points where change can be

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on the facts of that case, and noting that “[c]ourts have noted the importance of efficiency in determining an appropriate amount of attorney’s fees”).

101. MODEL RULES OF PROF’L CONDUCT r. 1.5(a)(3) (AM. BAR ASS’N 2016).

102. See LAMB, *supra* note 64, at 144–45 (“For cases with a sufficient number of documents, the best answer, in my view, is that document review (not just first-level review, but all review right up until partners lay hands on the documents) should be outsourced. There are professional reviewers who do more, offering higher quality and more useful work product, than any law firm could consider, for a fraction of the cost.”); NICHOLAS M. PACE & LAURA ZAKARAS, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 45 (2012) (“It is not likely, however, that clients will continue to accept the notion that paralegals or newly hired associates assigned to routine discovery tasks should bill their services at the same rates used for their trial appearances or appellate-brief writing.”).

103. See, e.g., ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 00-420 (2000) (“When costs associated with legal services of a contract lawyer are billed to the client as fees for legal services, the amount that may be charged for such services is governed by the requirement of Model Rule 1.5(a) that a lawyer’s fee shall be reasonable. A surcharge to the costs may be added by the billing lawyer if the total charge represents a reasonable fee for services provided to the client.”).

effectuated. Examples include litigation settings where courts act as fiduciaries and disputes regarding fees and the lawyer's duty of care.