

Restraining Lawyers: From “Cases” to “Tasks”

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

In the sphere of procedure, the December 2015 amendments to the Federal Rules of Civil Procedure 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”² 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 to find the most efficient route to a resolution, e.g., by dispositive motion or settlement.

The market has moved in a similar direction. Clients looking to control legal spend, supported by changes in information and project management technologies and competition among law firms, 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 and facilitate client input into the tasks undertaken to achieve litigation aims.

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¹ The observation and Article 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 L. & CONTEMP. PROB. 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. 376, 380-81 (1982) (distinguishing “adversarial” and “inquisitorial” systems in large part on the basis of the relative authority between client and judge).

The result is an erosion of the traditional division of authority between lawyer and client along the means/ends continuum.

Implicit 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 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 court or client.

These regulatory (judicial case management) and market (unbundling and sourcing, budgeting, and value-based fees) 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 traction³ in the 1980s was propelled by the perceived need to more efficiently manage dockets in light of concerns with scarcity.⁴ The movement has converted the trial court judge from a relatively passive arbiter of pretrial disputes presented by the

³ The 1983 rewrite of Rule 16 was a watershed moment for the movement. Fed. R. Civ. P. 16, Notes of Advisory Committee on Rules – 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.”).

⁴ See Fabien Gelin, Clement Camion, Karine Bates, Siena Anstis, Catherine Piche, Mariko Khan & Emily Grant, FOUNDATIONS OF CIVIL JUSTICE: TOWARD A VALUE-BASED FRAMEWORK FOR REFORM (2015), at 93 (“The search for efficiency in the face of a growing crisis due to scarce judicial resources seems to be the primary value expounded by the proponents of managerial judging”). *But see* Linda Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences of Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (questioning the scarcity narrative).

parties⁵ to an active architect of the litigation process whose aim is to achieve a proper allocation of scarce procedural resources.⁶

The December 2015 amendments to the Federal Rules of Civil Procedure reinforce this decades-old trend. Amended Rule 1 advances that goal by adjusting the normative interpretive framework⁷ for the rules, operating at the level of the attorney's role as advocate. The amendment adds to the familiar value statement that the Rules should be construed and administered to achieve the just, speedy, and inexpensive determination of the action the following language: "and employed by the court and parties."⁸ Writing in his 2015 annual report, Justice Roberts noted that these additional words are a "big deal" and "make express the obligation of lawyers and judges to work cooperatively in controlling the expense and time demands of litigation – an obligation given effect in the amendments that follow."⁹

The amendments to Rule 16 reduce the time to enter scheduling orders from 120 to 90 days, encourage in-person case management conferences,¹⁰ 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. In short, it puts the trial court judge in the position of carving up cases and disputes earlier and more often.¹¹ Rule 16 in general confers that ability by allowing the judge to sequence pretrial activity, including motion practice and discovery.¹² In the

⁵ See Jay Tidmarsh & Roger Trangsrud, *MODERN COMPLEX LITIGATION* (2d ed. 2010) (describing historical image of the trial court judge as a "mere umpire," quoting Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906), reprinted in 35 F.R.D. 273 (1964)).

⁶ 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.").

⁷ Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENVER U. L. REV. 287, 287-88 (2010) (Rule 1 is the "master rule" determining how all other rules are interpreted and applied).

⁸ Fed. R. Civ. P. 1.

⁹ Justice John Roberts, *2015 Year-End Report on the Federal Judiciary* (2015), at 5-6 (available at <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>).

¹⁰ Fed. R. Civ. P. 16 Advisory Committee Notes on Rules – 2015 Amendment ("The provision for consulting at a scheduling conference by 'telephone, mail, or other means' is deleted.").

¹¹ "Judges must be willing to take on a stewardship role, managing cases from the outset rather than allowing parties alone to dictate the discovery and the pace of litigation." Roberts, *supra* note 10, at 10.

¹² See, e.g., JOHN G. HEYBRUN, II & BARBARA JACOBS ROTHSTEIN, *TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES* (JPMDL and Federal Judicial Center 2009), at 4 ("Sequencing the discovery and briefing necessary to resolve class certification and summary judgment motions is one of your most vital 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

most extreme incarnation, the managerial judge not only cabins party and attorney discretion to make litigation choices, but eclipses party and lawyer altogether.¹³ For example, in the World Trade Center litigation, a frustrated¹⁴ Judge Hellerstein entered a case management order under Rule 16 and his inherent authority to appoint his own experts to help him impose a discovery agenda, schedule, and process.¹⁵

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 prodding judges to more energetically insert themselves into that valuation as to each disputed request.¹⁶ It does so by moving the proportionality requirement into the scope of discovery subsection of Rule 26(b).¹⁷ The amendment thus serves as a kind of exclamation point after the proportionality requirement.¹⁸ 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.¹⁹

discovery, timing of summary judgment and trial, and much more.”). *See generally* William W. Schwarzer & Alan Hirsch, *THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE OF JUDGES* (2d ed. 2006).

¹³ 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. PENN. L. REV. 1969 (1989).

¹⁴ *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).

¹⁵ *See In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 501, 523–24 (S.D.N.Y. 2009); Clarifying Order Regulating Discovery at 2-4, *In re World Trade Ctr. Disaster Site Litig.*, Case No. 1:21-mc-00100 (S.D.N.Y. November 27, 2007), ECF No. 619.

¹⁶ 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*, 2016 U.S. Dist. LEXIS 57050, *58 (D. NM April 1, 2016) (*quoting* *State Farm Mut. Auto. Ins. Co. v. Fayda*, 2015 U.S. Dist. LEXIS 162164, 2015 WL 7871037, ag *2 (S.D.N.Y. Dec. 3, 2015)).

¹⁷ *See* Committee Notes on Rules – 2015 Amendment. *See generally* Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. ___, 3 (forthcoming)

¹⁸ The amended rule provides that parties may obtain discovery regarding any nonprivileged matter 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).

¹⁹ *See* Gelbach & Kobayashi, *supra* note 18, 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”).

These amendments operate as top-down pressure from rule-drafters on judges, parties, and lawyers to move yet further away from the lawyer-driven, organically evolving, free-flowing adversarialism of a bygone era.²⁰ 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 rule 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.”²¹

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.²² This is so both as a formal and a practical matter.²³ The ABA 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

²⁰ Compare PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY* (Federal Judicial Center 1978), at 10 (“[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.”).

²¹ Roberts, *supra* note 10, at 11.

²² 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).

²³ 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 ILL. L. REV. 89, 92-97 (reviewing empirical literature demonstrating 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 (2003) (non-class mass actions often bear the “hallmarks of collective representation” with regard to “attenuated attorney-client relationships”).

representation.”²⁴ Furthermore, “[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.”²⁵ 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, other than the requirement that clients be kept apprised and remain capable of making decisions regarding costs. The RESTATEMENT sheds little additional light, other than confirming that lawyers have discretion with regard to the means in general,²⁶ subject to a poorly defined obligation to reasonably consult with clients,²⁷ and without the need even for that when circumstances warrant.²⁸ 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, discussed in Section IV.B., below.

While, over the years, commentators have urged a less divided and more collaborative and thoroughly negotiated lawyer-client relationship,²⁹ it has not been the norm outside of relatively limited settings. Increasingly,

²⁴ ABA MODEL RULES OF PROF’L CONDUCT R. 1.2 (2016) [hereinafter “ABA MODEL RULES”]. See also ABA MODEL RULES R. 1.4 (A lawyer shall “reasonably consult” with the client regarding the means by which the client’s objectives are to be accomplished); ABA MODEL RULES 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 before 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”).

²⁵ ABA MODEL RULES R. 1.2, Cmt. [2] (“[L]awyers usually defer to the client regarding such questions as the expense to be incurred”).

²⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, §21, Cmt. b (“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.”) and 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.”).

²⁷ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, §20, Cmt. c (“A lawyer must keep the client reasonably informed about the status of a matter entrusted to the lawyer, including the progress, prospects, problems, and costs of the representation....”).

²⁸ *Id.*, §23 (lawyers need not consult with clients when time pressures preclude them from doing so, such as during court hearings or trials).

²⁹ 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.”).

however, sophisticated³⁰ 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 effective means to control legal spend. The impetus is a belief that the law department can be managed on a budget as is any other division within a company, and a corresponding desire for predictability and value in the legal services used.³¹ The means include increased market power of corporate consumers of legal services as a result of better-staffed in-house legal departments,³² soft demand and entry of new players³³ and innovation in the pricing of legal services enabled by advances in project and information management.³⁴ The upshot is that empowered consumers are able to accomplish cost savings by shifting their focus from “cases” to

³⁰ 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).

³¹ Silvia Hodges Silverstein, LEGAL PROCUREMENT HANDBOOK (2015), at 15 (“Even as the economy improves, CEOs and CFOs see legal departments as cost centers that need efficient and effective management.”); William D. Henderson, *Three Generations of U.S. Lawyers, Generalists, Legal Specialists, Project Managers*, 70 MD. L. REV. 373 (2011) (“In response to harsh economic conditions, the nation’s corporate clients have tightened legal budgets and altered their spending habits.”).

³² See 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.”); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 761 (2010) (expanded in-house counsel departments have allowed corporate GCs to “surmount information symmetry problems in legal representation”).

³³ Hildebrandt Consulting, LLC, *Citi Private Bank 2016 Client Advisory* (2016), at 3 (“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,” available at <https://www.privatebank.citibank.com/pdf/2016CitiHildebrandtClientAdvisory.pdf>, last visited August 26, 2016).

³⁴ See Patrick J. Lamb, ALTERNATIVE FEE ARRANGEMENTS: VALUE FEES AND THE CHANGING LEGAL MARKET (2015), at 52-53 (“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.”).

“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

Unbundled³⁵ legal services are offered at the level of specific tasks that comprise a subset of all work necessary to achieve a given aim.³⁶ Unbundled services have traditionally been offered with regard to either routine transactional tasks³⁷ 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.³⁸

However, especially since the Great Recession³⁹ sophisticated clients in relatively less routinized categories of litigation have increasingly

³⁵ “Legal services traditionally have been regarded as relatively ‘bundled,’ in the sense that they consist of tightly linked elements that cannot easily be separated.” Milton C. Regan & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 *FORDHAM L. REV.* 2137, 2148 (2010).

³⁶ See generally Mark H. Tuohey, III *et al.*, *HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE* (ABA 2003) (available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendant/sls_sclaid_handbook_on_limited_scope_legal_assistance.authcheckdam.pdf); Betsy Lynch, Kathleen Bird & Melissa Posey, *Incorporating Limited Scope Representation into Your Law Practice Model*, Missouri Bar 2014 Annual Meeting (2014) (“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,” available at [http://www.mobar.org/course-materials/am2014/pages/new-Lawyer/Incorporating%20LRS%20into%20Practice.pdf](http://www.mobar.org/course-materials/am2014/pages/new-lawyer/Incorporating%20LRS%20into%20Practice.pdf)). See also ABA MODEL RULES R 1.2 (c) (authoring unbundled services if the limited scope representation is “reasonable under the circumstances and the client gives informed consent”); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-447 (August 9, 2007) (blessing “collaborative practice” models involving a limited scope of representation); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-446 (May 5, 2007) (addressing ethical propriety of limited scope representations of pro se litigants).

³⁷ 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 and routinized services, e.g., via online marketplaces where lawyers bid for the chance to work on legal tasks. See, e.g., <https://www.avvo.com/legal-services> (last visited August 15, 2016); <https://www.legalhero.com> (last visited August 15, 2016).

³⁸ Courts sometimes help litigants understand and find attorneys willing to provide such unbundled services. See, e.g., <http://www.courts.ca.gov/1085.htm> (last visited August 27, 2016).

³⁹ 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 (2011) (“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

applied procurement principles to disaggregate and source⁴⁰ litigation work. Procurement is a term for a department commonly found in large corporations and government offices, but also a label for an approach to sourcing and negotiating the terms for the provision of services.⁴¹ In litigation, it takes a variety of forms, including disaggregating and sourcing matters in-house,⁴² to a captive center, to non-lawyer third parties,⁴³ or to one or more law firms.⁴⁴ While much of the work is routinized, a growing percentage of it includes such “higher-level” tasks as analyzing case law and evidence.⁴⁵

Though anecdotal evidence suggests a trend, the degree to which this kind of unbundling and sourcing is happening in the United States legal services market, especially in relatively complex, high value litigation, is unclear. One 2011 study suggested it is rare, and that in-house counsel still

needed high-end staffing and which required not the ‘best,’ but just those good enough to accomplish the task cost-effectively.”).

⁴⁰ See, e.g., See RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2008), at xxxi (describing the example of Rio Tinto’s efforts to source legal work to low cost providers) and 45-52 (describing different types of sourcing of legal work); William D. Henderson, *A Blueprint for Change*, 40 PEPPERDINE 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 in a legal input or legal product that is better, cheaper, and delivered much faster.”).

⁴¹ See, e.g., Silvia Hodges Silverstein, *Research Report: The State of Legal Procurement*, LEGAL PROCUREMENT HANDBOOK (Ed. Silvia Hodges Silverstein 2015), at 126 (“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*, BNA (August 29, 2012) (available at <http://www.bna.com/legalprocurement-sourcing-is-a-team-sport/>).

⁴² 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 previously have gone to law firms in the prior year, including commercial and IP litigation. See BTI Consulting, *Clients Bring \$4 Billion In-House: For All the Wrong Reasons* (September 7, 2016) (available at [file:///Users/morrisratner/Desktop/Clients%20Bring%20\\$4%20Billion%20In-House:%20For%20All%20the%20Wrong%20Reasons%20-%20BTI%20Consulting%20Group.webarchive](file:///Users/morrisratner/Desktop/Clients%20Bring%20$4%20Billion%20In-House:%20For%20All%20the%20Wrong%20Reasons%20-%20BTI%20Consulting%20Group.webarchive), last visited September 18, 2016).

⁴³ See, e.g., Regan & Heenan, *supra* note 36, at 2150 (“Consider, for instance, the range of different activities in which [LPO] 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.”).

⁴⁴ 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”).

⁴⁵ Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L. J. 125, 133 (2011)

choose to give a good portion of their business to a stable roster of firms.⁴⁶ 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 LPOs.⁴⁷ Evidence of the growth of sourcing can be seen in the number of corporate litigants that now report using LPOs,⁴⁸ and in the contrast between the rate of law firm growth, which is generally flat, and the rate of growth of non-lawyer legal services companies that provide much of the substitute legal services, which has been high. It can also be seen in the stickiness of firms' relationships with LPOs.⁴⁹

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 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,⁵⁰ 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 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,

⁴⁶ See John C. Coates, Michele M. DeStefano, Ashish Nanda & David P. Wilkins, *Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market*, 36 LAW & SOC. INQUIRY 999 (2011).

⁴⁷ 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 <http://www.valoremlaw.com/novus-law> (last visited August 21, 2016).

⁴⁸ See, e.g., Norton Rose Fulbright, LLP, 2015 LITIGATION TRENDS ANNUAL SURVEY (2015), at 31 (reporting a majority 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, available at http://www.nortonrosefulbright.com/files/20150514-2015-litigation-trends-survey_v24-128746.pdf).

⁴⁹ Robertson, *supra* note 46 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").

⁵⁰ See, e.g., Carlton Fields sample Litigation Budget Estimate, available at [https://www.carltonfields.com/files/Uploads/Documents/Business%20Solutions/Sample_Litigation_Budget\[1\].pdf](https://www.carltonfields.com/files/Uploads/Documents/Business%20Solutions/Sample_Litigation_Budget[1].pdf), last visited August 31, 2016.

buyers of legal services expect well-designed budgets, and how firms create and use budgets is a factor in deciding which firms to hire.⁵¹

AFA's broadly include all non-hourly fee arrangements, including hybrid arrangements such as discounted billing with caps or success fees.⁵² 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" AFA's, 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 can include modifications such as holdbacks or collars.⁵³ In general, AFA's excluding discounting constituted about 16% of surveyed firms' revenues in 2015, flat from the prior year, though law firm managers expected that number to rise over time.⁵⁴

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

⁵¹Richard A. De Palma, *Proper Litigation Budgeting Delivers True Value to Clients*, NEW YORK LAW JOURNAL (April 13, 2015) (available at http://www.thomsonhine.com/uploads/1137/doc/Proper_Litigation_Budgeting_-_Garcia_Depalma.pdf, last visited August 31, 2016).

⁵²See, e.g., ASSOCIATION OF CORPORATE COUNSEL, HANDBOOK FOR VALUE-BASED BILLING ENGAGEMENTS (2014), at 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, available at <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>, last visited August 26, 2016).

⁵³Paul Hastings describes the collar arrangement on its website under the heading "Phased Fixed Fee with Collar": "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 <http://www.paulhastings.com/area/litigation/alternative-fee-arrangements>, last visited September 18, 2016.

⁵⁴See Hildebrandt Consulting, LLC, *Client Advisory*, *supra* note 34, at 2016 (surveying mostly large firms, and noting: "the use of AFA's 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, LLP, 2015 LITIGATION TRENDS, *supra* note 49, at 25 (reporting a majority of corporate clients using AFA's, with larger companies being the most active users, but typically for only a fraction of their litigation spend) and 28-29 (reporting a majority of respondents holding the view that use of AFA's will remain flat, but with 48% of larger companies expecting use of AFA's to rise).

management tools, and subject to Pfizer's directions regarding the outsourcing of certain types of legal work to non-lawyer third parties.⁵⁵

Law firms offering alternative pricing arrangements range from big firms such as Kirkland & Ellis⁵⁶ and Morgan Lewis⁵⁷ to smaller, nimbler firms that litigate predominantly or exclusively on this basis and make it a centerpiece of their online marketing.⁵⁸ Like budgeting, value pricing has the potential to erode the means/end distinction to the extent it inspires a higher degree of collaboration between lawyer and client.⁵⁹ 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, say, a fixed fee, into the representation agreement itself.⁶⁰

Value pricing has the potential to restrain litigators and lawyer-driven adversarialism not only via direct client input, but 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

⁵⁵ Ellen Rosenthal & Justin McCarthy, *Pfizer Inc.'s Legal Alliance Program: Collaboration and Focus on Relationships Produce Better Legal Outcomes and Cost-Savings*, ACC Value Challenge Toolkit Document (2011) (at <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>, last visited August 27, 2016).

⁵⁶ See <https://www.kirkland.com/sitecontent.cfm?contentID=341>, last visited September 23, 2016.

⁵⁷ See <https://www.morganlewis.com/news/morgan-lewis-named-among-the-best-by-clients-for-alternative-fee-arrangements>, last visited September 23, 2016.

⁵⁸ Those firms include Bartlit, Beck, Herman, Palenchar & Scott, LLP, Seyfarth Shaw, LLP, and Valorem Law Group. See <http://www.bartlit-beck.com/about-success.html>; <http://www.seyfarth.com/SeyfarthLean-Overview>; and <http://www.valorem.com/what-is-revolutionary>.

⁵⁹ See, e.g., Ed Poll, *Clients Define Value Billing – But Will They Accept it?*, LAW PRACTICE TODAY (June 2013) (“Value billing can only work through the kind of interaction that is best described as a 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.”).

⁶⁰ See Patrick Lamb, *ALTERNATIVE FEES FOR LITIGATORS AND THEIR CLIENTS* (2014), at 48 (“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.”).

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.⁶¹

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.⁶² What's 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 GCs, a cluster of value-based mechanisms, including "value-based fee structures," "outsourcing contract work to legal process outsourcing vendors," and "practices for managing outside counsel performance."⁶³

III. Convergence and Divergence of Regulatory and Market Mechanisms for Restraining Lawyers

The regulatory and market developments described in the preceding section differ along a number of dimensions summarized in Table 1, below. For starters, 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, e.g., by sourcing, budgeting, and/or manipulating counsel's incentives via fee arrangements, typically occurs in those cases where clients are sufficiently sophisticated and have sufficient leverage, and, moreover, where clients are interested in controlling legal spend rather than outspending an opponent.⁶⁴

⁶¹ Kathryn Kirmayer, *From the Experts: In Support of Flat Fee Pricing for Complex Litigation Matters*, CORPORATE COUNSEL (May 16, 2012) (available at <https://www.crowell.com/files/In-Support-of-Flat-Fee-Pricing-for-Complex-Litigation-Matters.pdf>, last visited September 23, 2016).

⁶² See generally Susan Randall, *Managed Litigation and the Professional Obligations of Insurance Defense Lawyers*, 51 SYRACUSE L. REV. 1, 7 (2001) (describing insurance litigation practices).

⁶³ See ACC, *GC Value Insights: What Multinational Corporate Counsel Value Most* (2012) (<http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=security/getfile&pageid=1316714&page=/valuechallenge/resources/index.cfm&qstring=&title=GC%20Value%20Insights&recorded=1>, last visited September 18, 2016).

⁶⁴ See Joseph E. Stiglitz, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2013), at 125 ("The legal framework is supposed to make our economy more efficient by providing incentives for individuals and firms not to behave

The purposes of the rule amendments and developments in the private sphere also differ. Whereas the procedural rule amendments are designed to achieve the “just, speedy, and inexpensive determination of every action,” 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 courts and clients when they seek to participate in decision-making regarding litigation tasks. But, in the public domain, the court can rely on the adversarial process to surface necessary information to a degree; for example, a party with a winning and dispositive motion can be relied upon to identify and help chart a path to it in the course of a Rule 16 conference, even if the other party hopes to delay or complicate it. No similar adversarial process serves a similar monitoring function in the private sphere, where agency costs persist despite the attempts to cabin attorney discretion described in Section II, above.⁶⁵ Moreover, in the private domain, even an interventionist client who aggressively seeks to control legal spend can find it difficult to monitor counsel, especially if counsel’s fees aren’t tied to efficient outcomes. For example, a lawyer working on an hourly basis pursuant to an agreed litigation budget carefully mapped with a client could nevertheless subtly inspire opposing counsel’s distrust and ire to the point where disputes, and, depending on the representation agreement, 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 varies 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

Characteristics	Regulatory (Procedure)	Market (Unbundling, Sourcing, and AFAs)
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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.”).

⁶⁵ 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.”); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (defining agency costs).

Scope	All federal court cases	Matters in which lawyers and clients include relevant terms in their representation agreements
Purposes	“The just, speedy, and inexpensive determination of every action,” per Fed. R. Civ. P. 1	Client aims, typically including controlling legal spend
Vehicle	Judicial involvement in identification, assessment of the value of, and sequencing of litigation tasks	Client involvement in identification, assessment of the value of, sourcing, and sequencing of litigation tasks
Obstacles to efficacy	Variation among judges and cases; information asymmetries; limits of Rule 16 and inability to fully control parties	Agency problems, including information asymmetries; inability to control court or other parties
Fairness (Equality of Application)	Available in all cases, but typically applied more aggressively in “large” cases (e.g., MDLs)	Available to sophisticated clients who demand it, or where lawyers in their discretion 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, e.g., by providing information and participating in 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 spend. 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 self-interest – i.e., the desire to maximize his fee – to frustrate Rule 16’s cost-saving function.⁶⁶ Conversely, a lawyer

⁶⁶ See, e.g., Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PENN. L. REV. 2197, 2200 (1998) (noting that the “significant shift in

whose client is promoting value-based decision-making by paying attention to the means, sourcing to lowest cost providers, and/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 spend may find an ally in a particularly active managerial judge who sequences tasks in a manner designed to most efficiently resolve the litigation, and, conversely, 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 and/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 regulatory and market trends described in Section II, above, suggest that lawyers in such circumstances have a duty to engage with court or client in litigation choices that have traditionally been in the lawyer’s discretion to make subject to a loose requirement of a consultation, and more specifically to sequence case activity, source work, or otherwise map litigation tasks onto a budget in a way that permits value-based discussions regarding the means to be pursued to achieve litigation aims?⁶⁷

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 retention of an attorney and structuring of the lawyer client relationship as a contractual

recent decades from fixed-fee to hourly-fee charging by lawyers” was altering the “dynamics of the process” of litigation).

⁶⁷ The market developments sketched in Section II, above, 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 role. Vincent R. Johnson & Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 NOTRE DAME L. REV. 359, 364-65 (1990) (“[E]vents which affect larger firms have a ‘trickle-down’ effect.”).

rather than a predominantly fiduciary moment.⁶⁸ 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 rule amendments make clear that at least as the court is concerned, the litigator's duties have indeed changed, or 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 amendment is beginning to have the intended effects. Courts are citing both the amendment of Rule 1 and Justice Roberts' 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 United States District Court for 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.⁶⁹ Also by way of example, Magistrate Judge Elizabeth Laporte recently cited and quoted both the rule amendments and Justice Roberts annual report when applying the relocated proportionality requirement in a discovery dispute,⁷⁰ finding, ultimately, that the parties had not sufficiently addressed the value of the specific discovery request, and that in her view, the discovery sought did not appear to be proportional to the amount at stake in the litigation.⁷¹ These are mostly matters of tone, with courts using

⁶⁸ 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 31, at 573-74, n. 4-5 (citing scholars and courts identifying lawyers' pre-employment fiduciary duties).

⁶⁹ See <https://www.paed.uscourts.gov/documents/procedures/smtpol.pdf>, last visited September 24, 2016.

⁷⁰ *Dao v. Liberty Life Assur. Co.*, 2016 U.S. Dist. LEXIS 28268, *5-7 (N.D. Cal. February 23, 2016).

⁷¹ *Id.*, at *14.

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 Tidmarsh recently proposed that courts consider imposing litigation budgets. The idea is to require litigants to submit, seek court approval of, and stay within budgets, something British courts have required since 2013.⁷²

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.”⁷³ Similarly, trial courts appointed by the Judicial Panel on Multidistrict Litigation to oversee MDLs⁷⁴ may address litigation expenses in case management orders, even if normally just for the purpose of tracking and distinguishing common costs, rather than for the purpose of cabining them.⁷⁵ 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, instead, on their inherent authority to regulate lawyers.⁷⁶ But, as Professor Tidmarsh acknowledges, the idea of court-imposed litigation

⁷² Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 859 (2015).

⁷³ Barbara J. Rothstein & Thomas E. Willging, *MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES* (Federal Judicial Center 2005), at 5 (noting, however, that “[f]ew judges have unilaterally imposed strict limits on fees in the order of appointment.”).

⁷⁴ See Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation*, 79 FORDHAM L. REV. 1985, 1986 (2011) (“An MDL is created when the Judicial Panel on Multidistrict Litigation (JPML) transfers related cases pending in the diverse federal district courts to a designated forum for consolidated pretrial motions and discovery.”).

⁷⁵ See generally, *STANDARDS AND BEST PRACTICES FOR LARGE AND MASS TORT MDLS* xi (Duke Law Center for Judicial Studies 2014), at 46 (discussing mechanisms used by MDL judges to track fees and costs) and at 50 (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* (2011), at 15 (“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 for payment – early in the litigation helps ease the judges 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, 499-505 (2014) (describing typical procedures).

⁷⁶ 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).

budgets that impose ex ante limits party expenditures is “radical,”⁷⁷ and raises a number of concerns, e.g., the judge’s competence to set budgets,⁷⁸ gamesmanship in the budget setting process,⁷⁹ and questions of authority.⁸⁰

B. Duties of Lawyer to Client

As between lawyer and client, the trends described in Section II, above, have not evolved into professional duties, yet, 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 default⁸¹ 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,⁸² and to the extent norms emerge in part from the bottom up, from professional discourse and practices,⁸³ then the amplification of interest and concern regarding scarcity and control with regard to the selection, sequencing, and sourcing of litigation tasks caused by parallel developments in both the regulatory and market domains suggests that we could be at a tipping point, where changing client needs and best practices designed to meet those needs impact duties.⁸⁴ If so, we know where to look, including in the rules that allocate authority between court and party and between lawyer and client, and that define competence

⁷⁷ Tidmarsh, *supra* note 74, at 859.

⁷⁸ *Id.*, at 895.

⁷⁹ *Id.*, at 910.

⁸⁰ *Id.*, at 912 “[I]t is doubtful that litigation budgets fall within the Supreme Court’s power” under the Rules Enabling Act).

⁸¹ 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).

⁸² 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.”).

⁸³ 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 a competing account of the process by which norms are enshrined as duties in the ethics rules, see, e.g., Lynn A. Baker, *The Politics of Legal Ethics: Case Study of a Rule Change*, 53 ARIZ.L.REV. 425 (2011) (reviewing politics of amendment of a Texas ethics rule regarding fee sharing).

⁸⁴ See generally David B. Wilkins, *Redefining the “Professional” in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, 58 L. & CONTEMP.PROBS. 241 (1996) (“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, *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).

and reasonable fees. These duties will be defined and enforced by the usual array of regulatory vehicles, including disciplinary bodies (self-regulation), courts regulating counsel via orders on fees and costs, and private litigation (e.g., malpractice or breach of fiduciary duty).

1. Allocating Authority

The Model Rules discussed at the outset of Section II.A. build on a traditional means/ends distinction with the lawyer as a 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 rule text and emerging best practices is the requirement that lawyers "reasonably consult"⁸⁵ 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. Though not hooking the duty to this particular provision of the Model Rules, Professor 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."⁸⁶

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.⁸⁷

⁸⁵ ABA MODEL RULES R. 1.4, Cmt. [3].

⁸⁶ Zacharias, *supra* note 31, 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.*, <http://www.jurbid.com> and <https://www.upcounsel.com>.

⁸⁷ *See, e.g.*, ABA MODEL RULES R. 1.1, Cmt. [6] (requiring lawyers to keep abreast of changes in technology); The State Bar of California Standing Comm. On Prof'l Resp. & Conduct, Formal Op. No. 2010-179 (recognizing a duty of competence and care when lawyers transmit client data, available at <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=wmqECiHp7h4%3D&tabid=836>);

Along those lines, the practices described in Section II, above, 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.⁸⁸ 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.⁸⁹ It has not been extended to require expertise with decomposition, management, and sourcing of legal work.

Again, to look for the emergence of such duties, we might look first to spaces where sophisticated repeat players (e.g., judges or lead plaintiffs under the PSLRA) act on behalf of unsophisticated one-shot clients (e.g., 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 non-exhaustive 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 Section II.⁹⁰ 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 Morgan Chase Cash Balance Litigation*⁹¹ 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.⁹² While the Private Securities Litigation Reform Act⁹³ 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

American Bar Association Law Practice Division, *Cloud Ethics Opinions Around the U.S.* (available at http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html).

⁸⁸ See Lamb, *ALTERNATIVE FEES FOR LITIGATORS*, *supra* note 61, at 144 ("If there is no disaggregation strategy, the firm hasn't eliminated the fat."); Regan & Heenan, *supra* note 36, 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.").

⁸⁹ See generally Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *THE LAW OF LAWYERING* (4th ed. 2015) §4.02, at 4-5.

⁹⁰ Fed. R. Civ. P. 23(g).

⁹¹ *In re Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265 (S.D.N.Y. 2007).

⁹² *Id.*, at 277.

⁹³ Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77-1 to 78j-1 (2000).

vetting attorneys for project and information management skills, the ability to budget or source tasks.⁹⁴

3. Reasonable Fees and Costs

If the developments sketched in Section 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 routinized legal tasks, and a change in the labeling of some tasks in terms of whether they can support fees or, instead, 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. The reasonableness requirement that governs fee disputes and disciplinary proceedings focuses on identifying those fee agreements that are beyond the pale⁹⁵ and does not attempt to memorialize best practices, in terms of 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 ABA 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.”⁹⁶

Similarly, as sophisticated clients insist that lawyers source some litigation tasks to lowest cost providers, including non-lawyer service companies, some tasks, like document review that were once routinely performed by lawyers at their usual rates should over time come to be seen as lower-rate work⁹⁷ or, even, as bases for expenses rather than fees, e.g.,

⁹⁴ See, e.g., Lynn A. Baker, Michael A. Perino & Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM.L.REV. 1371, 1423-24 (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, Jill E. Fisch & A.C. Pritchard, *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.”).

⁹⁵ See, e.g., *In re Dorothy*, 605 N.W.2d 493, 501-02 (2000) (finding fees charged in a divorce and custody case excessive on the facts of that case, and noting “Courts have noted the importance of efficiency in determining the appropriate amount of attorney’s fees.”); *Bushman v. State Bar of Cal.*, 11 Cal. 3d 558, 563 (1974) (“It is settled that gross overcharge of a fee by an attorney may warrant discipline.”).

⁹⁶ ABA MODEL RULES R. 1.5(a)(3).

⁹⁷ See Lamb, ALTERNATIVE FEES FOR LITIGATORS, *supra* note 61, 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

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 routinized legal work may be charged as fees at regular rates.⁹⁸ 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.

V. 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. The preceding Section 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 law governing lawyers do not yet appear yet 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 effectuated, e.g., in litigation settings where courts act as fiduciaries and in disputes regarding fees and the lawyer's duty of care.

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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* (RAND 2012), at 45 ("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 appearance or appellate-brief-writing.").

⁹⁸ See, e.g., ABA Formal Ethics Op. 2000-420 ("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 ABA Model Rule 1.5 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 the services provided to the client.").